

THE
PRIVY COUNCIL DIGEST
(1836—1930)

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FOREWORD

No words are really necessary to justify the bringing out of a complete collection of the decisions of the highest Judicial Tribunal so far as India is concerned. The number of High Courts and other Courts of final authority in India has increased of late, and with it the number of Judges who have to deal here with the law and procedure in India. Further, the number of reports wherein decisions of such Courts and Judges are reported has also largely increased. The result is that there is an enormous increase in the number of judgments of such Indian Courts that are reported. Every such judgment is, in one sense, authoritative, but it could not be really gainsaid that it would be in public interests in the long run if only judgments laying something really worth preserving be reported. But one has after all largely to take things as they are, and it is here that the necessity of having a final judicial authority whose decisions constitute the last word on the subject becomes apparent. Without such a final authority, it is easy to see that not only will there be difference between the views of the different Benches of different Courts in India but also between the decisions of different Full Benches of different Courts. Though India is said to be really a continent in the sense that it is occupied by different nationalities with essentially different systems of personal laws and customs, it is clear that each province in India generally contains a large portion of such different nationalities; so that practically the systems of law that have to be administered to the peoples inhabiting the different provinces are very generally really the same. It is therefore necessary and expedient that the laws governing such people should be the same as far as possible. Such a result could in practice be best obtained by having one final judicial authority to whose decisions all provinces in India are subordinate. In the Privy Council we have such an authority. The decisions of the Privy Council in these circumstances constitute the law governing the whole of India. The Legislature could not, in the exist-

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PREFACE

The usefulness, and even the absolute necessity, of a *Privy Council Digest* have been very fully dealt with by the Honourable Mr. Justice C. V. Anantakrishna Aiyar in the Foreword with which he has so generously commended this volume to the acceptance of the legal profession and the public. Compilations like the present may, however, owing to a variety of reasons, be easily open to the reproach of being superfluous to the knowing and practically useless to the unknowing. The digested matter may be imperfect or even misleading. Decisions relating to the same topic may be collected under different heads, with the result of driving the busy Judge or practitioner who has to pick up a reference at short notice from one head to another and of thus rendering it difficult for him to get what he wants. What may be called the subsidiary points dealt with in a judgment, and the *obiter dicta* found in it, may not be noted at all, or may not be noted separately. The judgment in a case relating to the construction of a deed or of a will, for instance, may contain quite a complicated statement of facts bearing upon a number of points dealt with in the judgment, the whole of which statement may be unnecessary, and even embarrassing, to one who desires to be enlightened upon one of such points only, and wishes to know only such facts as bear upon it. In such a case the entire statement of facts and all the points dealt with in the judgment may be noted under a single head. Again, in the case of a judgment running over a number of pages, dealing with a number of points, and containing many observations, the particular page of the report at which a point is dealt with, or an observation occurs, may not be given, and the point or observation may thus not be made readily available.

My object in compiling this Digest has been to free it from the reproach above-mentioned and to make it as useful as the reports themselves. I have endeavoured to achieve this object by taking care

to see that the digested matter is complete and self-sufficient, and is, as far as possible, in the very words of the judgment; by collecting under the same head decisions relating to the same branch of law, and by collecting in one place decisions bearing upon the same point and arranging them in chronological order except where topical order has necessitated a deviation from chronological order; by noting under a separate head each of the points dealt with in a judgment, with, wherever necessary, a separate statement of the facts of the case bearing upon that point only; by noting *obiter dicta*, and even observations on legal maxims, matters relating to Practice and Procedure, Appreciation of Evidence, and the Interpretation of Deeds, Wills and Statutes; and by noting the particular page or pages of the reports at which the digested matter is to be found. The topics dealt with have also been carefully analysed and arranged and a carefully prepared table of sub-heads has been given in regard to each topic. Copious cross-references have, of course, been given, as also references to all the reports in which the digested matter is to be found. To enhance the usefulness of this Digest and to fully justify its claim to be as good as the reports themselves, I have also extracted material passages in the judgments representing the *ratio decidendi*.

Decisions reported up to the end of July 1930 have been included in this volume, those which could not be included in what may be called the original volume being included in the supplement printed at the end.

It is needless to say that in the case of a compilation of such magnitude as the present, there must needs be faults of commission and of omission and scope for improvement. Suggestions calculated to remove the former and to contribute to the latter will be gladly welcomed.

I cannot conclude this preface without offering my sincere thanks to Mr. R. Narayanaswami Aiyar, Proprietor of the Madras Law Journal Press, for his kindness in undertaking the publication of this volume and for the care he has bestowed on its execution.

Mylapore.

A. S. VISWANATHA AIYAR.

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THE PRIVY COUNCIL DIGEST

ABWABS.

—*Huq—Nature of—Origin.*

It has been from ancient times customary almost throughout India for the superior holder of the soil, whether he was a feudal "baron", or principal fiscal officer appointed by Government, to levy certain dues. In Bengal, these dues or cesses were called abwabs; in the Central Provinces and the Bombay Presidency, "huq," an Arabic word meaning "dues" or "right". Akbar appears to have reduced the capricious levy of these "dues," and regulated the system. These dues were made part of the emolument attached to the office, and as the office became hereditary the representative of the family who took up the office took it with the obligation of using the perquisites for the maintenance of the family. The old zemindars were placed in the same position. (*Mr. Ameer Ali.*) **MAHATABSINGH v. BADAN-SINGH.** (1921) 48 I. A. 446 (460-1) =

48 C. 997 (1013) = 26 C. W. N. 226 = 20 A. L. J. 443 =
64 I. C. 194 = 1922 P. C. 146.

—*Regulation VIII of 1793, Ss. 54, 55, 61—Abwabs—Payments over and above rent whether or not—Landlord's right to recover—Payments made for a long time—Effect.*

The question was whether certain payments, over and above rent, which were described in the plaint as "old usual abwabs," and which were also described in the appellants' zemindary accounts as abwabs, were, properly so called, abwabs within the meaning of the word as used in Regulation VIII of 1793. They had admittedly been paid for a long period.

Held, that the H. C. was perfectly right in treating them as abwabs, and not as part of the rent.

If the sums were payable at the time of the permanent settlement they ought to have been consolidated with the rent under S. 54 of Regulation VIII of 1793. Not being so consolidated they cannot now be recovered under S. 61 of that regulation. If they were not payable at the time of the permanent settlement they would come under the description of new abwabs in S. 55; and they would be in that case illegal. (*Lord Macnaghten.*) **TILUCKDARI SINGH v. CHULHAN MAHTON.** (1889) 16 I. A. 152 =

17 C. 131 = 5 Sar. 408.

ACCOMPLICE.

—*Evidence of—Corroboration—Necessity—Uncorroborated testimony—Conviction based upon—Legality.*

It is no doubt the practice of Judges, where the testimony of an accomplice is not confirmed, to recommend the jury not to give credit to his testimony. At the same time it is to be observed, that if the jury, notwithstanding that recommendation, believe the testimony of the accomplice, the want of confirmation is not a legal objection to the verdict; though, when cases of that description have been submitted to the judges after trial, it has been usual to recommend a pardon (356-7). (*Mr. Justice Bosanquet.*) **POONEAKHOTY MOODELIAR v. THE KING.** (1835) 3 Knapp. 348 =

1 Sar. 76.

ACCORD AND SATISFACTION.

—*Substituted agreement—Accord and satisfaction by—What amounts to—Effect—Rights superseded by agreement—Suit to enforce—Maintainability.*

Disputes between the respondent and the appellants were referred to certain arbitrators, who, after the completion of the investigation, drew up what was termed "a receipt" which the appellants signed, the arbitrators witnessed, and the respondent accepted and acted upon. That document stated the amount to be paid by the appellants to the respondent and the mode in which it was to be paid.

Held, that the "receipt" proved conclusively that all the parties agreed to a settlement of all their existing disputes by the arrangement formulated in the "receipt," that it was a clear example of what used to be well known in common law pleading as "accord and satisfaction by a substituted agreement," and that thereafter the new agreement was the basis of all the rights of the parties (145-6).

No matter what were the respective rights of the parties *inter se* they are abandoned in consideration of the acceptance by all of a new agreement. The consequence is that when such an accord and satisfaction takes place the prior rights of the parties are extinguished. They have in fact been exchanged for the new rights; and the new agreement becomes a new departure, and the rights of all the parties are fully represented by it (145-6). (*Lord Moulton.*) **PAYANA RUNA SAMINATHAN v. PANA LANA PALANI-APPA.** (1913) 41 I. A. 142 = 18 C. W. N. 617 =
26 I. C. 228.

ACCOUNTS.

ADJUSTMENT OF.

APPEAL.

BALANCE DUE ON—SUIT FOR.

COMMISSIONER FOR TAKING.

DECREE FOR.

FORGERY OF.

FRAUD BY MANIPULATION OF.

HEIR AT LAW—WILL OF DECEASED.

INSPECTION OF, REFERRED TO OFFICER OF COURT.

ITEMS LATER OF LONG—SUIT FOR.

KEEPING OF.

LATER ITEMS OF LONG—SUIT FOR.

MORTGAGOR AND MORTGAGEE.

PARTNERSHIP.

PRINCIPAL AND AGENT.

PRODUCTION OF—TIME FOR.

SETTLED ACCOUNTS—RE-OPENING OF.

SETTLEMENT OF.

SUIT FOR.

Adjustment of.

—*Document by party to suit amounting to—Signature in—Proof of. See EVIDENCE—DOCUMENT—SIGNATURE IN—PROOF OF.*

(1875) 3 Suth. 132 (133-4) =
23 W. R. 390.

ACCOUNTS—(Contd.)

Appeal.

—Production of accounts—Time for—Extension of—Discretion of Court below—Interference with. *See* ACCOUNTS—PRODUCTION.

(1866) 10 M. I. A. 490 (508).

—Rejection in—Propriety—Conditions.

The Court of Appeal treated the accounts as of no value, but the only reason assigned is that the first payment of rent is entered for Srabun 1287, when Saadut could have received no rent and was attorning to Ali. Now the person who maintained the accounts and produced them was not asked about this matter, which may perhaps easily be explained. It is anyhow a very slight reason for rejecting accounts ranging over 5 years, having all the appearance of regularly kept accounts, sworn to as such, and supported by receipts to which their Lordships cannot find that any objection is taken (234). (*Lord Hobhouse.*) NIRMAL CHUNDER BONNERJEE *v.* MAHOMED SIDDICK.

(1898) 25 I. A. 225 = 26 C. 11 (22) = 7 Sar. 383.

—Re-opening of—Remand for—Investigation thereof fully by commissioners and their opinion concurred in by Court below.

The other items of account which the plaintiff disputes, and on which he asks to have the cause sent back for further trial, have all been investigated by the native assessors or commissioners. These were persons peculiarly conversant with native accounts; they appear to have been examined on their report in open Court; and the Judges of the Sudder Court expressly state that, after going over the several items with the commissioners, they entirely concurred in their opinion. To remit a cause to India, for the purpose of reopening accounts so taken is obviously a course which their Lordships would not be justified in adopting, unless they had a clear conviction that there had been a miscarriage of justice (508). (*Sir James W. Colvile.*) RAMPERSHAD TEWARY *v.* SHEOCHURN DOSS.

(1866) 10 M. I. A. 490 = 2 Sar. 177.

Balance due on—Suit for.

—Memorandum of accounts filed with plaintiff—Memorandum different filed in course of plaintiff's examination admittedly signed by defendant—Inconsistency between—If fatal to plaintiff's case.

In a suit for a sum of money on an unadjusted account, plaintiff filed a memorandum (A) with her plaint, from which the amount claimed in the plaint could not be made out. In her examination by the Court, the plaintiff put in another memorandum (C) to explain memorandum A. Defendant admitted that memorandum C was signed by him. It had reference to a period immediately preceding that for which the suit was brought.

Held, that memorandum C was rather evidence to support the originally stated cause of action, than an amendment of the claim or the substitution of one claim or cause of action for another. The case was one which should have been decided not merely on the discrepancy between the two statements made by the plaintiff, but on the whole of the evidence.

The claim as originally prepared was for what might prove to be due on adjustment of an account continuous in its nature, as connected with continuous receipts and disbursements in the plaintiff's service. The plaintiff, whilst her examination was being proceeded with, having produced in support of her claim the document C, which showed the defendant accountable to her and charged with certain sums by his own admission derivable from this document, it is difficult to conceive how the Court could have rejected it in that or any other stage of the cause, or have refused to give due weight to it as evidence on the trial of the issues of fact.

ACCOUNTS—(Contd.)

Balance due on—Suit for—(Contd.)

Had it been open to any just exception as an amendment of the plaint, this should have been proposed to the judge who allowed it to be filed; and if in any way inadmissible as evidence this should have been urged on the hearing of the issues if not at an earlier stage. *MULKA MUKHDRA BEGUM v. TEKATH ROY.* (1870) 14 W. R. 24 (P. C.) = 2 Suth. 355.

—Objections by defendant in—Decree to plaintiff subject to—Validity. *See* PARTNERSHIP—DISSOLUTION—ACCOUNTS—BALANCE DUE ON. (1834) 5 W. R. 76.

Commissioner for taking.

—Finding of, based on evidence improperly admitted—Procedure in case of—Dismissal of suit—Propriety—Further investigation—Sending of case back for—Necessity.

A suit for the recovery of the balance found due on taking accounts was referred to a Commissioner to take accounts. The Commissioner submitted a finding in favour of the plaintiff, based mainly on certain independent evidence, including the accounts of the defendants. He also admitted in evidence the account books of the plaintiff, without, however, calling the clerk who had made some of the entries therein, but his finding was not based on those account books.

When the case went to the recorder, he held that the account books of the plaintiff had, by reason of the non-calling of the said clerk, not been satisfactorily proved and made corroborative evidence. He rejected the independent evidence on which the Commissioner's finding was really based, held that the plaintiff had failed to substantiate his case, and dismissed the suit.

Held, that the dismissal of the suit was wrong, since even upon the accounts of the defendant, which were in evidence, something was due to the plaintiff (360-1).

Even if the recorder was right in holding that the Commissioner's finding was based upon evidence improperly received, he ought to have sent the case back for further investigation and not dismissed the suit altogether (360-1). (*Sir James W. Colvile.*) WATSON *v.* AGA MEHEDEE SHERAZEE. (1874) 1 I. A. 346 = 3 Sar. 384.

—Finding of fact of, on question of account—Interference with—Power of Court—Discretion.

In a suit for the balance due on accounts, a reference was made, by consent of parties, to a Commissioner for taking accounts, with full powers for the purposes of the investigation. The formal commission issued to the Commissioner by the Court stated that he was appointed commissioner for the purpose of taking accounts; that, in taking accounts, he was to decide upon all questions of fact with full powers for the purposes of investigation; and that, if questions of law arose and could not be settled or disposed of by him, they were to be submitted to the Court. On a construction of the terms of reference, it was found that the reference, though not in the form of a reference for the final determination of a cause by an arbitrator, according to the provisions of Article 312 and the following articles of the C.P.C. of 1859, was something higher than and different from the ordinary reference to a commissioner to investigate accounts under Art. 181 of that Code.

Seem, in the case of such a reference, it would be hardly competent to the Court to re-open a question of account against a clear finding of the Commissioner upon a question of fact relating to the account and made by the Commissioner upon evidence properly before him (362). (*Sir James W. Colvile.*) WATSON *v.* AGA MEHEDEE SHERAZEE. (1874) 1 I. A. 346 = 3 Sar. 384.

ACCOUNTS—(Contd.)**Commissioner for taking—(Contd.)**

—*Limitation—Plea of—Jurisdiction to entertain—Plea not raised in pleadings or issues—Appointment, by consent of parties.*

A suit brought by the appellant against the respondents to recover a sum alleged to be the balance of an account due from the respondents to the appellant was by consent of parties referred to a Commissioner to take accounts, who in taking them was to decide upon all questions of fact, whether as to the delivery of timber or the value of timber delivered, or otherwise, with full powers for the purposes of the investigation. It was further agreed that if questions of law should arise and could not be settled or disposed of before the Commissioner, they were to be submitted to the Court.

Nothing was said in the written statements about the claim being barred by limitation, and no issue on that point was settled.

Quere whether, in view of those facts and after the consent order referring the question to the investigation of the Commissioner, an objection on the ground of limitation taken before the Commissioner would not be taken too late (359). (*Sir James W. Colville.*) **WATSON v. AGA MEHEDEE SHERAZEE.** (1874) 1 I. A. 346 = 3 Sar. 384.

—*Reference to—Nature of—Commissioner under O. 26, R. 11 of C. P. C. of 1908—Arbitrator under C. P. C. of 1908—Test—Reference by consent.*

In a suit for the balance alleged to be due on accounts, the parties on 5—4—1872, agreed that the cause should be referred to a commissioner to take accounts, who in taking them was to decide upon all questions of fact, whether as to the delivery of timber or the value of timber delivered, or otherwise, with full powers for the purposes of the investigation; and that if questions of law should arise and could not be settled or disposed of before the Commissioner, they were to be submitted to the Court. And the formal commission issued on 19—4—1872 was in the same terms.

Held, that the reference, though not in the form of a reference for the final determination of a cause by an arbitrator, according to the provisions of Art. 312 and the following articles of C. P. C. of 1859, was something higher than and different from the ordinary reference to a commissioner to investigate accounts under Art. 181 (361-2).

The reference is made by consent. A consent to such a reference under Art. 181 does not appear to be made necessary by the Code. The terms of the orders of the 5th and 19th of April, 1872, do not import anything but the agreement of the parties (362). (*Sir James W. Colville.*) **WATSON v. AGA MEHEDEE SHERAZEE.** (1874) 1 I. A. 346 = 3 Sar. 384.

REPORT OF—OBJECTION TO.

—*Appeal to P. C.—Maintainability for first time in.*

In this case a question involving partnership accounts came before the First Court. That Court referred the investigation of the accounts to Commissioners, under S. 181 of C. P. C. of 1859. Upon that the Commissioners made a report. Objections were taken to that report by the defendant-appellant, and the Commissioners made a reply to those objections. The Court sent the matter again to the Commissioners for further investigation, and the Commissioners made a supplemental report. No objections were taken by the defendants to the supplemental report. In the appeal to the P. C., defendants raised an objection to the Commissioners' report, which had not been raised by the objections to the first report of the Commissioners or to their second report. It appeared also that the matter was never called to the attention of the first Court, orally, when the case came before it, and that no objection was taken by way of appeal to the appellate Court upon that point.

ACCOUNTS—(Contd.)**Commissioner for taking—(Contd.)****REPORT OF—OBJECTION TO—(Contd.)**

Held, affirming the Court below, that the point was not open for discussion before their Lordships. (*Sir Barnes Peacock.*) **SETHS GUJMULL JEITHMULL AND THANMULL v. MUSSUMAT CHAHEE KOWAR.**

(1874) 2 I. A. 34 = 3 Sar. 417.

—*Hearing of suit—Objection to Court at—Maintainability.*

Their Lordships do not think it necessary to lay it down as an absolute rule of law that no objection can be taken to the report (of a commissioner to whom the Court had referred the investigation of the accounts under S. 181 of C. P. C. of 1859) orally, unless the parties have taken formal exceptions in the way in which exceptions are now taken to a Judge's certificate in this country (36). (*Sir Barnes Peacock.*) **SETHS GUJMULL JEITHMULL AND THANMULL v. MUSSUMAT CHAHEE KOWAR.**

(1874) 2 I. A. 34 = 3 Sar. 417.

Decree for.

—*See DECREE—ACCOUNTS—SUIT FOR—DECREE IN.*

Forgery of.

—*Detailed forgery—Difficult to accomplish and easy to expose.* (*Lord Hobhouse.*) **NIRMAL CHUNDER BONNERJEE v. MAHOMED SIDDICK.** (1898) 25 I. A. 225 (235) = 26 C. 11 (23-4) = 7 Sar. 383.

—*Perjury supporting—Imputation of—Evidence to support, necessary.* (*Lord Hobhouse.*) **NIRMAL CHUNDER BONNERJEE v. MAHOMED SIDDICK.** (1898) 25 I. A. 225 (234-5) = 26 C. 11 (23) = 7 Sar. 383.

Fraud by manipulation of.

—*Proof of—Mode of.* *See EVIDENCE—EMBEZZLEMENT BY TREASURER—PROOF OF—MODE OF.* (1874) 14 M. I. A. 86 (92-3).

Heir-at-law—Will of deceased.

—*Invalidity of—Suit on foot of—Profits of estate in case of—Account of—Decree for—Form of.* *See DECREE—ACCOUNTS—SUIT FOR—DECREE IN—HEIR-AT-LAW.* (1885) 12 I. A. 103 (111) = 11 C. 684 (693-4).

—*Trustees under—Account from—Right of.*

An heir-at-law is entitled to so much of the inheritance in the real and personal property as is not exhausted by the valid provisions of the will, and he is entitled to the protection of the law to keep that inheritance intact until he comes into its enjoyment.

Where the heir-at-law averred upon information and belief that the trustees (under the will) "against the directions contained in the will" sold securities for money, consisting of Government paper, "out of the corpus of the estate of the said testator and have improperly applied the proceeds thereof," and the High Court (Appellate Jurisdiction) directed an account thinking that an averment upon "information and belief" was sufficient as to a fact within the defendant's knowledge and not within the plaintiff's, and that the statement as to the sale being "against the directions contained in the will," and of the proceeds being "improperly applied," was inconsistent with a due performance of the trust.

Their Lordships concurred in that view, and held that the plaintiff was entitled to the account decreed (83). (*Mr. Justice Willes.*) **JUTTENDROMOHUN TAGORE v. GANENDROMOHUN TAGORE.**

(1872) Sup. I. A. 47 = 9 B. L. R. 377 = 18 W. R. 359 = 3 Sar. 82 = 2 Suth. 692.

ACCOUNTS—(Contd.)**Inspection of, referred to officer of Court.**

—*Report of Inspector—Admissibility in evidence—Weight due to.*

In a suit brought by the appellant against the respondent to recover the alleged balance of an account, the account books produced and filed by the appellant were handed over to a person for the purpose of examination and inspection, according to the ordinary course of the Court. The order, addressed to the Inspector, directed him to appear in Court, and in the presence of both parties or their agents, to inspect or compare appellant's account books, and file a report of the correctness or incorrectness of the same.

Held, that the Inspector's report was evidence, but not conclusive evidence, and it was open to the parties to contradict, by evidence produced on the other side, the statements contained in the report (95). (*Mr. Pemberton Leigh.*) **DWARKA DOSS v. BABOO JANKEE DOSS.**

(1855) 6 M. I. A. 88.

Items later of long—Suit for.

—*Limitation—Earlier items barred—Effect. See LANDLORD AND TENANT—RENT—ARREARS—SUIT FOR—NATURE OF.* (1865) 10 M. I. A. 214 (218-9).

Keeping of.**INDIANS—HABIT OF.**

—*We have the means of knowing that the natives are particularly exact in keeping written accounts. (Mr. Baron Parke.) MEER USUD-OOLLAH v. MUSSUMAT BEEBY IMAMAN.* (1836) 1 M. I. A. 19 (46) =

5 W. R. 26 (P. C.) = 1 Suth. 46 = 1 Sar. 89.

—*The habits of the Indian people with regard to the keeping of accounts are well-known and have often been proved. (Lord Atkinson.) LAL KUNWAR v. CHIRANJI LAL.* (1909) 37 I. A. 1 (7) =

32 A. 104 (112) = 7 M. L. T. 57 = 11 C. L. J. 172 =

14 C. W. N. 285 = 12 Bom. L. R. 244 = 5 I. C. 249 = 20 M. L. J. 182.

MODE OF.

—*Debit balance at end of year—Promissory note executed for—Entry showing debit balance as paid off and promissory note as debit item—Practice.*

In a suit on a promissory note for the principal sum of Rs. 15,000, the plaintiff's case was that, on the Diwali day in 1907, the defendant was found indebted to the plaintiff in the principal sum of Rs. 14,000, and that the suit note was executed for that and other sums, amounting to Rs. 15,000. The defendant's case was that he had paid off the entire amount due to the plaintiff on that date, that nothing was due by him to the plaintiff then, and that the suit note was a forgery. An important question in the suit was therefore whether the defendant had paid as alleged by him, or whether the plaintiff merely closed the account for the year (the native financial year) by taking a fresh promissory note from the defendant for the balance carried into the new account. From the account books of the plaintiff it appeared that the Rs. 14,000 were credited as "in cash in full settlement of the account up to this day," i.e., the 5th November, 1907. An examination of the accounts made out in previous years showed, however, that the regular practice was to enter as sums of cash received and credited the amounts of new promissory notes given by the defendant to the plaintiff in liquidation of earlier notes, just as though actual cash had been received. *Held*, that the expression "in cash" in the account books was far from conclusive and that the practice must be taken to be to close each yearly account entirely by treating any debit balance as paid off when there was credited as liquidating the cash balance due, a new promissory note which then

ACCOUNTS—(Contd.)**Keeping of—(Contd.)****MODE OF—(Contd.)**

became a debit item in the account for the ensuing year. (446). (*Viscount Haldane.*) **HAJI UMAR ABDUL RAHIMAN v. MUNCHERJI COOPER.** 3 L. W. 308 =

20 C. W. N. 297 = (1916) 1 M. W. N. 137 =

34 I. C. 268 = 1915 P. C. 89 = (1915) 30 M. L. J. 444.

Later items of long—Suit for.

—*Limitation—Earlier items barred—Effect. See LANDLORD AND TENANT—RENT—ARREARS—SUIT FOR—NATURE OF.* (1865) 10 M. I. A. 214 (218-9).

Mortgagor and Mortgagee.

—*See MORTGAGE—MORTGAGOR AND MORTGAGEE—ACCOUNTS.*

Partnership.

—*See PARTNERSHIP—ACCOUNTS.*

Principal and Agent.

—*See PRINCIPAL AND AGENT.*

Production of—Time for.

—*Extension of—Discretion of Court below—Interference (in appeal) with.*

That it was right to call upon the plaintiff (in a suit for partition) to bring into the account the profits made by the joint family firm under his management appears to be too clear for argument. It is, however, insisted that the Court has improperly visited his failure to produce the accounts required, by charging him with interest on the principal sum for which he was accountable at the rate of 12 per cent.; that they ought to have given him further time to produce his accounts; and that the cause ought to be sent back to India, in order that the account of profits may now be taken. Their Lordships have to observe that the time to be allowed was a matter for the discretion of the Court; that the account was presumably one which the plaintiff, as a Merchant and Banker, ought to have been able to produce at short notice; that the time actually allowed was not unreasonably short; and that in the circumstances it was competent to the Court to charge the plaintiff with interest in lieu of the profits for which he had failed to account (507). (*Sir James W. Colville.*) **RAMPERSHAD TEWARRY v. SHEOCHURN DOSS.** (1866) 10 M. I. A. 490 =

2 Sar. 177.

Settled accounts—Re-opening of.

—*Bond executed for balance accepted as due on settlement—Suit against debtor's heirs on—Re-opening of accounts in.*

The suit was brought by the appellants against, *inter alia*, the infant son and heir of a deceased Nawab on two bonds alleged to have been executed by him in their favour on 15-5-1856.

The case of the appellants, which their Lordships accepted as substantially true, was that on 15-5-1856 there was a settlement of accounts between the Nawab and the servants of the appellants who had been pressing him for payment of what was due from him to the appellants' firm; that the result of that settlement was to strike a balance of Rs. 22,188, as the amount then due for principal and interest; and to agree that, in consideration of the forbearance by which the larger portion of that sum was made payable by instalments, the interest then due should be turned into principal; and further, that the two bonds were executed on the footing of that settled account.

Held, reversing the Court below, that, on the facts disclosed by the evidence, the respondents could not resist a decree for the full amount secured by the bonds, and that no case was made for re-opening the account which was settled on 15-5-1856 (125-6).

ACCOUNTS—(Contd.)**Settled accounts—Re-opening of—(Contd.)**

The evidence shows that the Nawab examined the accounts; that he objected to the interest; but that he nevertheless finally submitted to the account rendered, accepted the balance shown as the sum due, and, in consideration of his creditors' forbearance, executed the bonds by which payment of that balance was secured. He was no doubt very much at the mercy of his creditors; his case was the ordinary one of a needy landholder purchasing the forbearance of those who had ministered to his necessities by submitting to very usurious terms. But, with his eyes open, he entered into a contract which is not forbidden by any law. No fraud, in the proper sense of the word, has been established; and their Lordships cannot agree with the Court below in thinking that, upon the facts proved, the Nawab would in his lifetime have been entitled to re-open an account which he had advisedly settled. And if this could not have been done by him in his lifetime, it cannot now be done by his representatives. **SHAH KOONDUN LALL v. RAJAH AMEER HUSSUN KHAN.**

(1866) 11 M. I. A. 120 (126) = 2 Sar. 239 =
R. & J's No. 6 (Oudh).

—Settlement in nature of compromise—What amounts to—Re-opening of accounts in case of—Grounds.

Accounts of long standing and great complication of a mercantile firm at Calcutta, one of the partners of which afterwards acted as agent in England, involving charges for agency and partnership transactions, were mutually agreed to be investigated and closed. After long negotiations and discussion respecting some of the charges, an agreement was come to, the parties agreeing to strike the general balance at a given sum, reserving one item of the account, amounting to a considerable sum, for future investigation. That reserved item was subsequently settled by the acceptance of a Bill of Exchange for a lesser amount, as such reserved item, if opened, would have disarranged the settled general account. The Bill of Exchange was dishonoured, and an action brought to recover the amount. A bill was then filed for an injunction, for the cancelment of the Bill of Exchange, and that the account so settled might be opened. The Supreme Court at Calcutta held that the reserved item being left open was evidence that the account was not finally closed, and decreed the accounts to be opened, referring the cause to the Master.

Upon appeal, the Judicial Committee held, reversing such decree and dismissing the bill with costs, that the transaction amounted to an adjustment of the general accounts between the parties, subject to the reserved item which was ultimately settled, and that the account so settled and closed could not, in the absence of fraud, be re-opened (408).

It appears to us very clear that the settlement which took place here was in the nature of a compromise; an acceptance by one party, and a consent to pay by the other a gross sum in satisfaction of a disputed account (396). (*Mr. Pemberton Leigh.*) **MCKELLAR v. WALLACE.**

(1853) 5 M. I. A. 372 = 8 Moo. P. C. 378 =
1 Equity. Rep. 309 = 1 Sar. 453.

—Grounds—Fraud—Collusion of parties, etc.

If parties having accounts between them meet and agree, not to ascertain the exact balance, but agree to take a gross sum as the balance; a sum which one is willing to pay, and the other is content to receive as the result of those accounts, it is obvious, that the production of vouchers is entirely out of the question, and errors in the account are so also, for the very object of the parties is to avoid the necessity for producing those vouchers, upon the assumption that there are or may be errors in the account so settled, therefore, it is either an account stated and settled, in the formal sense of that expression, or, it is the case of a settlement by compromise. In either case it may be vitiated by fraud; in

ACCOUNTS—(Contd.)**Settled accounts—Re-opening of—(Contd.)**

either case it is good for nothing, if, either from the collusion of the parties, upon the circumstances under which the settlement takes place, it is proved in a Court of Equity, that the transaction was not so fairly and so fully understood between the parties, either from the confusion in which it was involved, or from misrepresentations made on the one side or the other, as it ought to have been, and that injustice has been done to either side (395-6). (*Mr. Pemberton Leigh.*) **MCKELLAR v. WALLACE.**

(1853) 5 M. I. A. 372 = 8 Moo. P. C. 378 =
1 Equity. Rep. 309 = 1 Sar. 453.

—Settlement by ascertaining exact balance—Production of vouchers—Necessity—Re-opening of account on ground of errors—Right of.

Parties having accounts between them may meet and agree to settle those accounts by the ascertainment of the exact balance; and if they mean to ascertain the exact balance, it may be necessary for that purpose, and probably is necessary in most cases, that vouchers should be produced, and that all the information which is possessed on one side and the other, should be furnished in the settlement of those accounts; and, if it afterwards turn out that there are errors in the account, it is a sufficient ground for opening the account and for setting it right in a Court of Equity (395). (*Mr. Pemberton Leigh.*) **MCKELLAR v. WALLACE.** (1853) 5 M. I. A. 372 = 8 Moo. P. C. 378 =
1 Equity. Rep. 309 = 1 Sar. 453.

—Suit for—Decree directing re-opening and referring cause to Master for inquiry into accounts—Defendant proceeding with inquiry before Master and appealing against decree before his report—Reversal of decree on appeal—Costs of proceedings before Master—Order as to.

Accounts of long standing and great complication of a mercantile firm at Calcutta, one of the partners of which afterwards acted as agent in England, involving charges for agency and partnership transactions, were mutually agreed to be investigated and closed. After long negotiations and discussion respecting some of the charges, an agreement was come to, the parties agreeing to strike the general balance at a given sum, reserving one item of the account, amounting to a considerable sum, for future investigation. That reserved item was subsequently settled by the acceptance of a Bill of Exchange for a lesser amount, as such reserved item, if opened, would have disarranged the settled general account. The Bill of Exchange was dishonoured, and an action brought to recover the amount. A bill was then filed for an injunction, for the cancelment of the Bill of Exchange, and that the account so settled might be opened. The Supreme Court at Calcutta held that the reserved item being left open was evidence that the account was not fully closed, and decreed the accounts to be opened, referring the cause to the Master.

The defendant did not appeal from that interlocutory decree, but proceeded in the Master's office in respect of the matters included in the accounts; but before the general report was made by the Master he appealed from such interlocutory decree to England. The Judicial Committee being of opinion that such decree ought to be reversed, the question arose as to the costs of the proceedings in the Master's office.

Held that, in the peculiar circumstances of the case, the defendant must pay the costs of the proceedings in the Master's office (409-10).

Their Lordships accordingly remitted the cause to the Court below with directions that the costs payable to the defendant, upon the dismissal of the bill, and the costs payable by him consequent upon his proceedings in the Master's office, should be set off, the one against the other, and the balance paid to the party entitled to the same

ACCOUNTS—(Concl'd.)**Settled accounts—Re-opening of—(Concl'd.)**

(410-1). (*Mr. Pemberton Leigh.*) MCKELLAR *v.* WALLACE. (1853) 5 M. I. A. 372 = 8 Moo. P. C. 378 = 1 Equity. Rep. 309 = 1 Sar. 453.

Settlement of.

—Arbitration and award—Distinction—Test. See PARTNERSHIP—PARTNERS—DISPUTES BETWEEN—TRANSACTION SETTLING. (1924) 27 Bom. L. R. 746.

Suit for.

BALANCE DUE ON ACCOUNTS—SUIT FOR.

—(1) Objections by defendant in—Decree to plaintiff subject to—Validity. See PARTNERSHIP—DISSOLUTION—ACCOUNTS—BALANCE DUE ON. (1834) 5 W. R. 76.

—(2) Statement of accounts filed with plaint—Statement filed in course of evidence—Contradiction between. See ACCOUNTS—BALANCE DUE ON—SUIT FOR—MEMORANDUM OF ACCOUNTS, ETC. (1870) 14 W. R. 24 (P. C.).

DECREE IN.

—See DECREE—ACCOUNTS—SUIT FOR—DECREE IN.

INQUIRY INTO ACCOUNTS.

—Costs of—Order as to. See ACCOUNTS—SETTLED ACCOUNTS—RE-OPENING OF—SUIT FOR.

(1853) 5 M. I. A. 372 (409-11).

LATER ITEMS OF LONG ACCOUNT.

—Suit for—Limitation—Earlier items barred. See LANDLORD AND TENANT—RENT—ARREARS—SUIT FOR—NATURE OF. (1865) 10 M. I. A. 214 (218-9).

—Limitation—Plea of—Order directing taking of accounts irrespective of—Propriety.

Where, in a suit for an account and payment of the balance, the defendant pleaded limitation and a denial of liability to account, and the High Court sent the case back to the Court below for a finding as to the state of the accounts, such finding to be irrespective of any plea of limitation to be raised by the defendant, *held*, that the order of the High Court was not a proper order to be pronounced.

It was irregular to take the account irrespective of the plea of limitation (236). (*Lord Robertson.*) ASHGAR ALI KHAN *v.* KURSHED ALI KHAN. (1901) 28 I. A. 227 = 24 A. 27 (41) = 3 Bom. L. R. 576 = 8 Sar. 142.

—Parties—Hindu deceased—Liability of—Suit against his divided sons to enforce—Will by deceased—Residuary legatee and executor under—If and when necessary parties.

R and *M* were two brothers, who were originally members of a joint Hindu family, but who admittedly became separate in 1795, as to all property, save two cottages, one at Nagpore, and the other at Cuttack. *R* managed the bank at Nagpore till his death. The suit, which was filed by *M*, was to obtain from the sons of *R*, an account of all *R*'s dealings with that bank, and to make them responsible.

R's sons denied that they were his representatives, and that they were liable for his debts. Their case was that they became divided from their father in 1823, under an arrangement by which he gave them a part of his property and they relinquished in his favour all right to the remainder. They alleged further that *R* had executed a will bequeathing all his property to one *H*, and that he, not they, were *R*'s representatives and liable for his debts.

Held, that *H* and the executor under *R*'s will were necessary parties to the suit (197).

The will might be a valid will, and *H*, the residuary legatee, or the executor, might be in possession of the assets of *R*, and in that case, they would be primarily responsible for the suit claim (197). (*Dr. Lushington.*) BABOO JANOEKEY DOSS *v.* BINDABUN DOSS.

(1843) 3 M. I. A. 175 = 1 Sar. 263.

ACCOUNT BOOKS.**BALANCE AGAINST A PARTY.**

CROSS-EXAMINATION OF PARTY WITH REFERENCE TO HIS OWN.

EVIDENTIARY VALUE OF FIGURES GIVEN.

FORGERY OF.

HINDU JOINT FAMILY.

PARTNER—BOOKS OF PARTNERSHIP.

P. C.—ACCEPTANCE OR REJECTION OF BOOKS BY COURTS BELOW.

PROFITS SHOWN IN.

PROOF OF.

REJECTION IN APPEAL OF, ON SUSPICION FORMED ON INSPECTION OF BOOKS.

WITNESS WHO KEPT.

Balance against a party.

—Omission by him to carry forward—No evidence in his favour.

The mere omission of an accountable party, framing his own account, to carry forward into a new account a balance against himself existing in a former one, can constitute no evidence in his favour. To prove the extinction of the balance, such omission must be considered in conjunction with other evidence in the cause. MULKA MUKHDRA BEGUM *v.* TEKAETH ROY. (1870) 14 W. R. 24 (P. C.) = 2 Suth. 355.

Cross-examination of party with reference to his own.

—Points therein relied upon against him—Examination with reference to—Necessity.

The respondent, having by his agents free access to the appellant's account-books, and having at the hearing such extracts as those agents thought it expedient to make, has examined the appellant, but has not called his attention to any of the difficulties now (that is, in the appeal to the Privy Council) pressed against him. It is obvious that great injustice may be done by treating a banker's accounts in such a fashion (198). (*Sir Arthur Hobhouse.*) BAIJNATH SAHAY *v.* RUGHONATH PERSHAD SINGH.

(1882) 12 C. L. R. 186 = 4 Sar. 372 = Bald. 437.

Evidentiary value of.

—Bogus entries—Proof of some—Effect.

Account books are sufficiently discredited if a certain number of entries therein are proved to be bogus entries by independent evidence which precludes the possibility of error or accident (218). (*Lord Sinha.*) SETH MAGAMMAL *v.* DARBARILAL CHOWDHRY.

5 O. W. N. 226 =

30 Bom. L. R. 296 = 107 I. C. 113 = 47 C. L. J. 222 =

27 L. W. 523 = 24 N. L. R. 40 = 1928 P. C. 39 =

(1927) 54 M. L. J. 208.

Figures given.

—Results as to profits and losses worked out in books on basis of—Dissociation of one from other—Propriety. See AGREEMENT—CONSTRUCTION—AGENT.

Forgery of.

—Probability of—Accounts extending over number of years and contained in different books—Forgery of.

It must be confessed that to forge elaborate accounts extending over 6 years, or even to insert new sheets in such accounts, would be a most dangerous undertaking, and to make the different books correspond exactly would be a task of almost insuperable difficulty (9). (*Lord Hobhouse.*) TEWARI JASWANT SINGH *v.* LALA SHEO NARAIN LAL.

(1893) 21 I. A. 6 = 16 A. 157 (162) = 6 Sar. 404.

Hindu joint family.

—Firm books of—Entries in—Binding character of, on member of family and partner of firm—Inaccuracy of entries—Onus of proof of, on him.

ACCOUNT BOOKS—(Contd.)**Hindu joint family—(Contd.)**

The plaintiff, as a member of the joint family and a partner in the several firms of the joint family, was *prima facie* bound by the entries in the account books of the firms. If he impeached them, it lay on him to falsify them (508). (*Sir James W. Colville.*) **RAMPERSHAD TEWARRY v SHEO-CHURN DOSS.** (1866) 10 M. I. A. 490 = 2 Sar. 177.

Partner—Books of partnership.

—Entries in—Binding character of, on him. *See* ACCOUNT BOOKS—HINDU JOINT FAMILY. (1866) 10 M. I. A. 490 (508).

P. C.—Acceptance or rejection of books by Courts below.

—Interference with. *See* EVIDENCE—WITNESS—ACCOUNT BOOKS. (1867) 11 M. I. A. 551 (587).

Profits shown in.

—Agreement to be bound by—Scope and effect of. *See* AGREEMENT—CONSTRUCTION—AGENT. (1927) 53 M. L. J. 278.

Proof of.**EVIDENCE.**

—Inspector to whom inspection of account referred—Report of—Admissibility of—Value of. *See* ACCOUNTS—INSPECTION OF, ETC. (1855) 6 M. I. A. 88 (95).

LAXITY OF, IN INDIA.

—Books not strictly proved but received in evidence without objection—Appellate Court—Consideration of books by, and drawing inferences from them—Propriety.

That these books (Account Books) were proved with the strictness which would be required in our Courts cannot be said; but they seem to have been received according to the course of the Indian Courts. No objection to their reception was made in the first instance; they were submitted by the Judge to the examination of Mahajuns appointed for the purpose, who were questioned by him upon them. Nor does it appear that their genuineness or correctness was ever formally or directly impugned, though some objection may have been taken to the proof of them. The course of the argument here induces their Lordships to regret that these material documents were not strictly proved, but they were sent up to the appellate court as part of the record; and in these circumstances their Lordships think that, according to the course of these events, the appellate Court was justified in considering them as part of the evidence in the cause (385). (*Sir James W. Colville.*) **MUSSUMAT CHUTHA v. BABOO MIHUN LALL.**

(1867) 11 M. I. A. 369 = 2 Sar. 303.

MODE OF.

—Evidence to be adduced.

The regular proof of books and accounts requires that the clerks who have kept those accounts, or some person competent to speak to the facts, should be called to prove that they have been regularly kept, and to prove their general accuracy (98). (*Mr. Pemberton Leigh.*) **DWARKA DOSS v. BABOO JANKI DOSS.** (1855) 6 M. I. A. 88.

STRICTNESS IN.

—Relaxation of—Inspection of accounts in presence of parties by Inspector appointed by Court for the purpose—Report by him as to their genuineness and accuracy—No challenge before him of their genuineness and accuracy.

In an action brought by the appellant against the respondent to recover the alleged balance of an account, the appellant produced and filed certain account books, and they were handed over to a person for the purpose of examination and inspection, according to the ordinary course of the Court.

ACCOUNT BOOKS—(Concl'd.)**Proof of—(Contd.)****STRICTNESS IN—(Contd.)**

The Inspector was requested to inspect or compare plaintiff's account books in the presence of both parties or their agents, and to file a report of the correctness or incorrectness of the same. The genuineness of those books was not disputed when they were offered to the Inspector, and their accuracy was not disputed by the respondent's agent, who attended to examine them, but, on the contrary, their general accuracy was admitted; the accounts contained in those books had been for several months open to the inspection of the respondent, with power to him to point out any inaccuracies, if any inaccuracies existed, and he had in his own possession means at any moment of disproving the accuracy of those books (if inaccurate they were) by the production of his own accounts, books and vouchers.

Held, that there was a *prima facie* case for the establishment of the accounts filed by the appellant (99).

Having regard to the issue joined between these parties, and the facts which must be taken to have been impliedly admitted between them, and to what took place before the Inspector when those books were produced to him, the necessity of the strict proof of the accounts was removed, and it was not possible for the Court to hold that any doubt could exist as to the genuineness of those accounts, or as to the accuracy of those accounts (98). (*Mr. Pemberton Leigh.*) **DWARKA DOSS v. BABOO JANKI DOSS.**

(1855) 6 M. I. A. 88.

Rejection in a peal of, on suspicion formed on inspection of books.

—Propriety—Objection not taken in Court below—Decision in Court below based on books.

In this case the oral evidence tendered by either party was conflicting and was considered to be unreliable by both the courts in India. They, however, regarded certain account books produced by one of the parties as tests of the truthfulness of the case of the one side or the other. But the High Court rejected the books on the ground that on a personal inspection thereof, one of the pages of an account book was found to be tampered with. The learned Judges of the High Court did so without hearing evidence, or calling upon the parties for an explanation, even though the other side never contended that the leaf in question had been interpolated and did no more than object to particular entries in it. On appeal, *held* by their Lordships, that it would be more satisfactory, before coming to a final decision on the appeal, that the true state of the books should be ascertained by a further enquiry, in which each party should be at liberty to adduce evidence with reference to the composition and state of the books, and of the entries in them, and with reference to the custody of the books, and the persons who could have had access to them. (*Sir Montague Smith.*) **BURRA LALL OPENDRONATH SAHEE DEO v. THE COURT OF WARDS.** (1877) 3 Suth. 414 = Bald. 125 = 1 I. T. 451

Witness who kept.

—Evidence of, after refreshing memory from books—Rejection of. *See* EVIDENCE ACT, S. 34—ACCOUNT BOOKS. (1899) 4 C. W. N. 18 (20).

ACCRETION.

—*See* ALLUVION AND DILUVION—ACCRETION.

ACKNOWLEDGMENT.

—Doing an act in presence of a person—Acknowledgment of having done it when he was not present—Distinction.

To do an act in the presence of a witness, and to acknowledge having done it when the witness was not present, are two entirely different things,—as different as the

ACKNOWLEDGMENT—(Contd.)

witnessing a fact or act, and the witnessing a confession of that fact or act (402). (*Lord Brougham.*) *CASEMENT v. FOULTON.* (1845) 3 M. I. A. 395 = 5 Moo. P. C. 130 = 1 Sar. 293.

—See also LIMITATION ACT OF 1908, S. 19.

ACQUIESCENCE.**Adverse claim—Acquiescence in.**

—*Acquiescence alleged in one place—Claim not abandoned contemporaneous—Effect.*

If a supposed acquiescence in one place be contemporaneous nearly with a claim not abandoned, it amounts to little or nothing (360). (*Lord Justice James.*) *RAMAMANI AMMAL v. KULANTHAI NATCHIAR.*

(1871) 14 M. I. A. 346 = 17 W. R. 1 = 2 Suth. 493 = 2 Sar. 736.

PRESUMPTION ADVERSE FROM—PROPRIETY OF.

—*Females and infants.*

In a case in which the question was whether plaintiff's mother and next friend was the wife of her alleged husband and plaintiff his legitimate son and issue and therefore entitled to inherit the property of his deceased father, the defendant, an admitted wife of the deceased, relied upon the grant to herself of a certificate of heirship to her deceased husband unopposed by the plaintiff as a tacit admission of absence of title in the plaintiff. With reference to this contention, their Lordships observed:—Considerable weight is due, *prima facie*, to such a submission to an adverse title as the objection supposes, but the weight depends upon the just belief that the parties whose interests are affected by acquiescence possess knowledge of their right, means to enforce it, and counsels how to set about resisting, a step injurious to it, which are ordinarily in the possession or reach of either of two rival claimants. One of the plaintiffs in this case is an infant; the other is a Hindu female. Against neither is it the practice of the Courts in India to press a presumption by acquiescence in a rival claim, from the mere non-contestation for a limited time of an adverse title, and especially not of such a title as this certificate evidences. The contrary doctrine has been constantly affirmed and acted upon, both in Indian Courts and before this Tribunal. (*Lord Justice James.*) *RAMAMANI AMMAL v. KULANTHAI NATCHIAR.*

(1871) 14 M. I. A. 346 (360) = 17 W. R. 1 = 2 Suth. 493 = 2 Sar. 736.

—*Females—Competent interested persons—Existence of—Effect.*

It has been very properly urged that the youth, ignorance, sex, and dependent state of the plaintiff must all be weighed, and have due importance given to them, when her supposed acquiescence in the title of *P* is urged against her. As respects herself, personally, the force of these arguments may be admitted so far as they regard acquiescence alone; but her ignorance of *P*'s proceedings and claim to the whole succession which she alleges, cannot so readily be conceded, and the weight of presumptive proof arising from the conduct both of herself and of other persons competent to the protection of her interests, cannot be excluded from the consideration of their Lordships when deciding whether such ignorance is established in any of them (93). Though the youth and dependent state of the plaintiff herself may be admitted to afford very cogent reasons for not pressing against her those presumptions of acquiescence which similar conduct in a competent adult would give rise to, yet presumptions from the conduct of others cannot be excluded from the consideration of this case, when the probabilities on either side are weighed (102). (*Sir James W. Colville.*) *SOORENDRONATH ROY v. MUSSUMAT HEERAMONEE*

ACQUIESCENCE—(Contd.)**Adverse claim—Acquiescence in—(Contd.)**

PRESUMPTION ADVERSE FROM — PROPRIETY OF—(Contd.)

BURMONEAH. (1868) 12 M. I. A. 81 (102-3) = 10 W. R. 35 = 1 B. L. R. (P. C.) 26 = 2 Suth. 147 = 2 Sar. 372.

Estoppel based upon.

—See EVIDENCE ACT, S. 115.

Hindu female—Adoption and will of deceased husband—Acquiescence in.

—*What amounts to—Effect—Acts of acquiescence applicable to legal or voidable adoption or will—Female acting without independent advice.*

In a case in which an adoption and a will by a deceased Hindu were set up, the question was whether the deceased was of sufficient capacity at the time to understand the nature and object of those acts, and voluntarily gave an intelligent consent to those acts. Both the adoption and the will were attacked by the appellant, the widow of the deceased. It was strongly pressed against the appellant in support of the validity of the adoption that she was a consenting party to it, performing her part in the ceremony, and afterwards showing by unequivocal acts her entire acquiescence in what had been done. These acts were—allowing the boy to perform the funeral rites as an adopted son, and the day after the adoption putting her mark to an *arzee* addressed to the Collector, stating the adoption and the performance of the funeral rites by the adopted son, and praying for the transfer into his name of her late husband's property.

Held, that so long as the appellant was acting without the guidance of a disinterested adviser her acquiescence in an alleged adoption or will ought not to prejudice her (433).

The appellant is a Hindu female. In such a case as the present it was hardly to be expected that she would be capable of distinguishing between an adoption in fact, and a legal adoption, or between a will in fact, and a valid will. The acts attributed to her are really no confirmation of the case of the adoption and the will, as every one of them upon which reliance is placed might equally have been done with respect to a legal or an avoidable adoption (433-4). (*Lord Chelmsford.*) *TAYAMMAUL v. SASHACHALLA NAIKER.* (1865) 10 M. I. A. 429 = 2 Sar. 139.

ACT.

—Doing of, in presence of a person—Acknowledgment of having done it in his absence—Distinction. See ACKNOWLEDGMENT—DOING AN ACT, ETC.

(1845) 3 M. I. A. 395 (402).

ACTIONS.**Assumpsit.**

—Cause of action—Breach of contract—Fraud on part of defendant—Effect. See LIMITATION—ASSUMPSIT.

(1849) 5 M. I. A. 43 (69).

Detinue.

—*Specific performance—Assignee of trusteeship of pagoda and of property belonging to it—Suit by, to recover portion of that property from third parties disputing his right under assignment.*

A suit brought by the assignee of the uraima right, or right of management, of a pagoda, and of all the rights of the existing trustees, including the right to the custody of certain jewels devoted to the service of an idol, for the recovery of those jewels from third parties, who resisted the plaintiff's attempt to remove them from their ordinary place of custody, is not one for specific performance. It is not brought against the other parties to the contract, the urallars, but against persons, strangers to the contract, who are disputing the right of the plaintiff under his assignment to

ACTIONS—(Contd.)**Detinue—(Contd.)**

take possession of a portion of the property belonging to the pagoda. The suit is in the nature of an action for detinue, brought to recover jewels, the right to the custody of which the plaintiff says has passed to him by virtue of the assignment, wherein the plaintiff has to make out his title to the goods (79-80). (*Sir James W. Colvile.*) **RAJAH VURMAH VALIA v. RAVI VURMAH MUTHA.** (1876) 4 I. A. 76 = 1 M. 235 (246) = 3 Sar. 687 = 3 Suth. 382.

—*Trover—Distinction—Timber logs sold according to usage of trade at once—Conversion of—Suit for damages for—Nature of.*

An action to recover damages for the conversion by the defendants of a large quantity of logs of timber belonging to the plaintiff is not either in form or in substance, an action of detinue, in which the plaintiff seeks to recover a specific chattel which the defendant detained from him, and in which the judgment would be that the defendant do deliver the chattel or pay the value of it. The action more resembles what used to be called an action of trover. The subject-matter of the action is timber, an ordinary article of commerce, which, according to the evidence of the usage of trade, is disposed of in the same year in which it arrives at Rangoon (the market for the timber), either by sale or by being cut up, or in various ways. The plaintiff could not claim four years afterwards the restitution of the particular logs. His claim is, and must be, to the damages which he has sustained by the conversion of the logs by the defendants at that date (133-4). (*Sir Robert P. Collier.*) **BOMBAY-BURMAH TRADING CORPORATION, LTD. v. MIRZA MAHOMED ALLY.** (1878) 5 I. A. 130 = 4 C. 116 (119-20) = 3 Sar. 622 = 3 Suth. 525.

Money had and received for plaintiff's use.

—Money paid for an existing consideration which afterwards failed—Suits for—Distinction—Test. See LIMITATION ACT OF 1908, ARTS. 62, 97—APPLICABILITY—BENGAL PATNI TALUQS REGULATION VIII OF 1819. (1918) 46 I. A. 52 (55-6) = 46 C. 670 (677-8).

Trover.

—Action of—Co-heirs—Transfer illegal by one of—Suit by other heir to recover property transferred—Parties—Onus on transferee—Defences open to him. See GOVERNMENT PROMISSORY NOTES—TRANSFER ILLEGAL OF, BY ONE OF CO-HEIRS. (1869) 12 M. I. A. 507.

—Detinue—Distinction. See ACTIONS—DETINUE—TROVER.

ACT OF STATE.

ACTS AMOUNTING OR NOT AMOUNTING TO.

LEGALITY OF—MUNICIPAL COURT'S JURISDICTION TO QUESTION.

PLEA OF.

QUESTION AS TO NATURE OF ACT—IMPRESSION OF PARTIES AS TO—EFFECT.

SUIT QUESTIONING VALIDITY OF—PARTIES.

Acts amounting to an, or not.

—*British Protectorate—Native subjects in—Rights of, created prior to cession of land to Crown—Orders in Council extinguishing—Legality—Jurisdiction of Courts to enquire into.*

Where the Crown by order in council limited the pre-existing rights of native subjects in Swaziland, a British Protectorate, held, that it was an act done under power conferred by the Foreign Jurisdiction Act and was therefore valid, or it was an act of State which could not be questioned in a court of law. (*Viscount Haldane.*) **SOBHUZA II v. MILLER.** (1926) A. I. R. 1926 P. C. 131 (136) = 30 C. W. N. 961 = 99 I. C. 265.

ACT OF STATE—(Contd.)**Acts amounting to an, or not—(Contd.)**

—*Begum Sumroo—Jaidad tenure held by—Resumption of—Arms and stores purchased by her—Seizure of. See ACT OF STATE—ACT AMOUNTING TO AN, OR NOT—JAIDADAR AND DO.—JAIDAD TENURE.*

(1872) Sup. I. A. 10.

—*Confiscated property—Auction sale by Government of.* In selling the property of rebels which it has confiscated, the Government does not perform an act of State, but stands in the situation of an individual selling his property by auction, and a suit may therefore be properly brought against the Government by the purchaser if the Government refuses to give up possession, or transfers the possession to another.

"The meaning, as their Lordships understand it, of an act of State is something which appertains to the functions of Government. Suppose, for instance, any question had arisen with regard to the propriety of confiscating the rebels' property, that would have been an act of State. Probably, the determination of the Government to sell that confiscated property might also be treated as an act of State, but in the sale the Government was exactly in the situation of an individual selling his property by auction; and when the auction was knocked down, the relation of vendor and vendee existed between the Government and the highest bidder. A suit, therefore, would lie against the Government for specific performance of the sale." **SHEO LAL BOHRA v. SHEIKH MAHOMED.**

(1869) 13 W. R. 4 (P. C.) = 2 Suth. 283.

—Confiscation if and when amounts to. See CONFISCATION—MEANING. (1872) Sup. I. A. 119 (125).

—*Conquered country—Property of native of—Seizure of, by provisional Government established in the country.*

The members of the provisional Government of a recently conquered country seized the property of a native of the conquered country, who had been refused the benefit of the articles of capitulation of a fortress, of which he was Governor, but who had been permitted to reside under military surveillance in his own house in the city in which the seizure was made, and which was at a distance from the scene of actual hostilities. Held, that the seizure must be regarded in the light of a hostile seizure, and that a Municipal Court had no jurisdiction on the subject.

Semble.—The circumstances, that at the time of the seizure the city where it was made had been for some months previously in the undisturbed possession of the provisional Government, and that Courts of Justice under the authority of that Government were sitting in it for the administration of justice, do not alter the character of the transaction.

We think the proper character of the transaction was that of hostile seizure made, if not *flagrante*, yet *mondum cessante bello*, regard being had both to the time, the place, and the person, and consequently that the Municipal Court had no jurisdiction to adjudge upon the subject; but that, if anything was done amiss, recourse could only be had to the Government for redress. (*Lord Tenterden.*) **MOUNTSTUART ELPHINSTONE, THE HON. v. HEERACHUND BEDREECHUND.** (1830) 1 Knapp. 316 = 1 Sar. 11.

—*Conquest—Seizure by right of—Legal right—Seizure under colour of—Distinction.*

The suit was brought against the Secretary of State for India to recover possession of a certain rakh or piece of grassland situated in the Punjab. The suit rakh had been granted by R, the then sovereign of the territory, to plaintiff's father. On the death of plaintiff's father the estate devolved by inheritance upon his deceased brother. Upon the death of that elder brother, one Rajah T, plaintiff's uncle, took possession of it, and a grant of it

ACT OF STATE—(Contd.)**Acts amounting to an, or not—(Contd.)**

was made by the British Government after the conquest of the territory to Rajah T for his life. The title of Rajah T was adverse to the plaintiff, and the plaintiff claimed to recover through his elder brother and not as the heir of Rajah T.

The territory in which the suit property was situated was conquered about 1849. Thereupon a proclamation was issued by the Government declaring "that the Government of the Punjab is at an end, and that all the territories of Maharajah Dulip Singh are now and henceforth a portion of the British Empire in India. The few chiefs who have not engaged in hostilities against the British shall retain their property and their rank. The Jagirs and all the property of sirdars or others who have been in arms against the British shall be confiscated to the State." Two days after that proclamation, a board of administration was appointed by the Governor-General for the Punjab. They were invested with very large powers, judicial and administrative, and with respect to rent-free lands and tenures, among which category the suit description of tenure admittedly fell, special directions were given to them. By those directions, it was contemplated by the Governor-General to make what might be called a *tabula rasa* of tenures of the suit description, and to re-grant them upon terms entirely at the discretion of the British Government. It also appeared from the order granting, *inter alia*, the suit rakh to Rajah T, and from the subsequent proceedings that the Government were dealing with those rakhs as their own property, over which they had absolute control, and that, in granting the property to Rajah T, they acted not by way of recognition of any right, but as conferring a favour and an indulgence upon him.

Held, that the grant to Rajah T was made in pursuance of the right of conquest, which was referred to in the proclamation, and that it was an act of State, and not questionable by any municipal Court (46).

The seizure in this case was a seizure on behalf of the Crown by its right of conquest, and these acts of the Board and of the Governor-General were not acts affecting to justify themselves on grounds of municipal law, but were acts done in the exercise of sovereign authority. There is no pretence for saying that this estate was taken possession of by the Government by virtue of any legal title or under colour of any legal title whatever. The act of the Government in question was done in accordance with the notions of the Government of what was just and reasonable, and not according to any rules of law to be enforced against them by their own Courts (47-8). (*Sir Robert P. Collier.*) **SIRDAR BHAGWAN SINGH v. SECRETARY OF STATE FOR INDIA.** (1874) 2 I. A. 38 = 3 Sar. 413 = 1 P. R. 1875.

—*Ex-King of Delhi—Deposition and confiscation of property of—Legality—Jurisdiction to question—Municipal Courts.*

The late King of Delhi was, at the time of the confiscation, indebted to the plaintiffs upon certain bonds. Either by the terms of those bonds or by his letters to the Resident at the Court of Delhi, the King had, so far as he could lawfully do so, assigned and appropriated to the discharge of the bond debts, certain amounts which the Resident was requested to pay yearly out of the revenues of certain of the royal taiyool villages. The property so alleged to have been mortgaged to the plaintiffs was, together with all rights and interests in and in respect of it, seized and appropriated on behalf of the British Crown.

In a suit by the plaintiffs to recover the amount due to them on the said bonds, *held*, that the seizure and confiscation by the British Government of the property of the Ex-King were acts of absolute power, and were not acts done under power of any legal right of which a Municipal Court could take cognizance (127).

ACT OF STATE—(Contd.)**Acts amounting to an, or not—(Contd.)**

The Government, when they deposed and confiscated the property of the late King, as between them and the King, did not affect to do so under any legal right. Their acts can be judged of only by the law of nations; nor is it open to any other person to question the rightfulness of the deposition, or of the consequent confiscation of the King's property (126-7). (*Sir Barnes Peacock.*) **RAJAH SALIG RAM v. SECRETARY OF STATE FOR INDIA.**

(1872) Sup. I. A. 119 = 12 B. L. R. 167 = 18 W. R. 389 = 3 Sar. 191 = 2 P. R. 1872 = 2 Suth. 726.

—Government—Seizure by—Conquest—Seizure by right of—Legal right—Seizure under colour of—Distinction. *See* ACT OF STATE—ACT AMOUNTING TO—CONQUEST. (1874) 2 I. A. 38 (46-8).

—Government—Seizure of subject's property by, in exercise of powers of war in putting down insurrection. *See* ACT OF STATE—ACT AMOUNTING TO AN—WAR. (1872) Sup. I. A. 119 (125).

—*Jaghir granted by Nawab of Carnatic—Resumption by British Government of—Legality—Municipal Courts—Jurisdiction.*

By the treaty of the 31st of July, 1801, made between the then Nawab of the Carnatic and the Governor in Council at Madras, the sovereign rights of the Nawab in the Carnatic were vested in the East India Company.

Held, that a resumption by the Madras Government of a Jaghir granted by former Nawabs, as *Altamghah inam*, before the date of the treaty, and a re-grant by the Madras Government to another for a life-estate only, was such an act of sovereign power by the East India Company, as precluded the Supreme Court at Madras from taking cognizance of a suit by the heirs of the original grantee in respect of such resumption.

"The treaty did vest the rights of sovereignty in the E. I. Co., and the Company, in exercise of what they considered their right of sovereignty, resumed the Jaghir in question, and granted it to the son of the original grantee, not in the form of the original grant to the father, but in terms totally different, being for life only; and they reserved to themselves the *sayer* (customs) and other revenue duties. It is in effect the same thing, as an act of sovereignty, as if it had been granted to a mere stranger, and no further confirmation of the title of the original grantee than such a grant had been made. Their Lordships are, therefore, of opinion that the Supreme Court had no authority to question an act of sovereignty exercised on the part of the E. I. Co. (*Sir John Leach, M. R.*) **EAST INDIA COMPANY v. SYED ALLY.** (1827) 7 M. I. A. 555 (577-8) = 1 Sar. 867.

—*Jaidadar—Arms and stores purchased by—Seizure by Government of, on resumption of jaidad tenure—Not an act of State.*

On the death of Begum Sumroo, the Government of India resumed her purgannah of Badshapoore Jharma, and at the same time made seizure of the arms, ammunition, and munitions of war in use with her army, or retained for their use at the time of the Begum's death. In a suit brought on behalf of D, claiming as heir of the Begum, to try the right of the Government to effect that seizure, it appeared that the arms and stores were purchased by the Begum.

Held, that the seizure of those arms and stores was not an act of State, but an act done as under a supposed legal right on the resumption of the jaidad upon the Begum's death (32-3). (*Lord Hatherley, L. C.*) **FORESTER v. SECRETARY OF STATE FOR INDIA.**

(1872) Sup. I. A. 10 = 12 B. L. R. 120 = 18 W. R. 349 = 3 Sar. 1 = 1 P. R. 1872 = 2 Suth. 628.

ACT OF STATE—(Contd.)**Acts amounting to an, or not—(Contd.)**

——*Jaidad tenure held by Begum Sumroo—Resumption of lands held on, on her death—Validity of—Municipal courts—Jurisdiction to determine.*

Under treaty or agreement made by the British Government in August 1805 with the Begum Sumroo she held for her life territories in the Doab from the East India Company as she had held them under the Scindia. She was not a sovereign princess but a mere Jaidadar (*i.e.*, a Jaghirdar under obligation to keep up a body of troops to be employed, when called upon, in the service of the sovereign) under the Scindia, and, by the treaty or agreement with the British Government, she was to remain such under the Company also. Her territories were, during her lifetime, practically excluded from the operation of British law and the jurisdiction of British Courts. Her territories were treated as excepted from the conquered territories; and, although the sovereign rights of Scindia over those territories passed under the Treaty of 1803, they passed subject to the rights of the Begum. On her death in 1836, the Government of India resumed her purgannah of Badshapoor Jharma. Owing to the abnormal condition of her territories the resumption was made, not by a resumption suit, but in what was called the political department.

Held, that the resumption by the Government of the Begum's territories was not the seizure by arbitrary power of territories which up to that time had belonged to another sovereign state; but that it was the resumption of lands previously held from the Government under a particular tenure, upon the alleged determination of that tenure (17).

The possession was taken under colour of a legal title; that title being the undoubted right of the sovereign power to resume, and retain or assess to the public revenue all lands within its territories upon the determination of the tenure, under which they may have been exceptionally held rent-free. If by means of the continuance of the tenure or for other cause, a right be claimed in derogation of this title of the Government, that claim, like any other arising between the British Government and its subjects, would *prima facie* be cognizable by the Municipal Courts of India (17). (*Lord Hatherlay, L. C.*) **FORESTER v. SECRETARY OF STATE FOR INDIA.** (1872) **Sup. I. A. 10 =**

12 B. L. R. 120 = 18 W. R. 349 = 3 Sar. 1 = 1 P. R. 1872 = 2 Suth. 628.

——*Legal right—Seizure by Government under colour of—Conquest—Seizure by it by right of—Distinction. See ACT OF STATE—ACT AMOUNTING TO AN—CONQUEST—SEIZURE BY RIGHT OF.* (1874) **2 I. A. 38 (46-8).**

——*Native Ruler—Deposition of, by Viceroy in Council—Order of—Nature of—Appeal to P.C. from—Right of—Commission appointed by Viceroy to inquire into charges against Ruler—Order made on report of.*

The petitioner, the Maharaja of Panna, applied for special leave to appeal to His Majesty in Council against an act of the Governor-General of India in Council removing him from the Government of the State of Panna.

Held, that the act was clearly a political act—an act of State done by the Viceroy in Council in the interest of the State of Panna and the inhabitants of Panna, and for the peace and good Government of India generally, and that their Lordships were precluded from entertaining a petition for leave to appeal against an act of that character.

The order of the Viceroy in Council removing the petitioner from the Government was made on the report of Commissioners appointed by the Viceroy in Council "for the purpose of inquiring into the truth of an imputation against the Maharaja that he had instigated the murder of his uncle and of reporting to the Viceroy and Governor-General in Council how far the same was true to the best of their

ACT OF STATE—(Contd.)**Acts amounting to an, or not—(Contd.)**

judgment and belief." It was therefore contended that the appeal was against a conviction of the Maharaja.

Held further, that the commission in question was appointed by the Viceroy himself for the information of his own mind, in order that he should not act in his political and sovereign character otherwise than in accordance with the dictates of justice and equity, and was not in any sense a Court, or if a Court, was not a Court from which an appeal lay to His Majesty in Council. (*Lord Davey.*) **MAHARAJA MADHAVA SINGH v. SECRETARY OF STATE FOR INDIA IN COUNCIL.** (1904) **31 I. A. 239 =**

32 C. 1 = 8 C. W. N. 841 = 6 Bom. L. R. 763 = 1 A. L. J. 691 = 8 Sar. 731.

——*Non-feudatory Zamindars in Central Provinces—Police, Excise and cattle pounds administration—Withdrawal by Government from the Zamindars of—Nature of—Validity of—Jurisdiction of Courts to question—Cattle Trespass Act I of 1871—Private cattle pounds—Maintenance of.*

The status of the Zamindar of Khanar and the other Zamindars in the District of Rajpur was in 1864 determined by the Government to be that of ordinary British subjects. When their country became British territory, whether by conquest and cession or by lapse, they were left to manage their estates as best they could, binding themselves to use rightly the judicial and administrative powers entrusted to them or left in their hands as a matter of convenience or economy of administration. In no case, however, were they recognised as entitled to independent power or as possessing any sovereign rights. It 1874, Sanads were issued to the Rajpur Zamindars recognising their proprietary rights and ownership. In subsequent years the Government withdrew from them the administration of police, excise, and cattle pounds with compensation for the resulting loss of revenue, and obtained the execution by them under protest of *wajib-ul-arzes* with provisions applicable to the altered arrangements.

Held, that the Rajpur Zamindars in exercising police and excise functions were not acting as of right, but were so acting either by sufferance, or by delegation, and that the resumption of those functions by the Government was a thing done by the Government in exercise of its sovereign powers, and consequently that the suit questioning the validity of the act of the Government was not maintainable. The maintenance of private cattle pounds is incompatible with the provisions of the Cattle Trespass Act, and, under the circumstances, the establishment and maintenance of cattle pounds under the superintendence and control of Government officials empowered to obtain the assistance of the police when required may be considered essential for the maintenance of law and order, and the peace and good Government of the country, and therefore an act of the Executive Government with which it is not competent for the Civil Court to interfere (48). (*Lord Macnaghten.*) **BIR BIKRAM DEO v. SECRETARY OF STATE FOR INDIA IN COUNCIL.** (1912) **39 I. A. 31 = 13 I. C. 965 =**

16 C. W. N. 362 = 9 A. L. J. 585 = 15 C. L. J. 633 = (1912) M. W. N. 657 = 14 Bom. L. R. 812 = 39 C. 615.

——*Sovereign—Acquisition of territory for first time—Rights of inhabitants of acquired territory in case of—Rights prior to acquisition if and when can avail them.*

Where a territory is acquired by a sovereign state for the first time that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest; it may be by cession following on treaty; it may be by occupation of territory hitherto unoccupied by a recognized ruler. In all cases the result is the same. Any inhabitant of the

ACT OF STATE—(Contd.)**Acts amounting to an, or not—(Contd.)**

territory can make good in the Municipal Courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing. (*Lord Dunedin.*) **VAJESINGJI JORAVASINGJI v. SECRETARY OF STATE FOR INDIA IN COUNCIL.**

(1924) 51 I. A. 357 (360-1) = 48 B. 613 =
A. I. R. 1924 P. C. 216 = (1924) M. W. N. 694 =
22 A. L. J. 951 = 26 Bom. L. R. 1143 =
40 C. L. J. 473 = 21 L. W. 28 = 82 I. C. 779 =
47 M. L. J. 574.

—Subjects' property—Seizure by Government of, in exercise of powers of War in putting down insurrection. See ACT OF STATE—ACT AMOUNTING TO—WAR.

(1872) Sup. I. A. 119 (125).

—Tanjore Raja—Seizure by East India Company of private and public property of—Act in part improper—Effect.

The Rajah of Tanjore was an independent sovereign bound by Treaties to a powerful neighbour, which left him, practically, little power of free action; but he did not hold his territory, such as it was, as a fief of the British Crown, or of the East India Company. On his death without male issue, the East India Company, in the exercise of their sovereign power, and in trust for the British Government, seized the Raj of Tanjore, and the whole of the property of the deceased Rajah, public and private, on the ground that the dignity of the Raj was extinct for want of a male heir, and that the property of the late Rajah lapsed to the British Government.

Held, that the seizure was made by the British Government, acting as a sovereign power, through its delegate the East India Company; and that the act so done, with its consequences, was an act of State over which the Supreme Court of Madras had no jurisdiction (540).

Assuming that the East India Company acted improperly in seizing the private, as distinguished from the public, property of the Rajah, the Court cannot, if the whole act of seizure was an act of State, inquire into any part of it, or afford relief on the ground that the sovereign power has been exercised to an extent which Municipal law will not sanction (537).

Of the propriety or justice of that act, neither the Court below nor the Judicial Committee have the means of forming, or the right of expressing, if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to say that, even if a wrong has been done, it is a wrong for which no Municipal Court of Justice can afford a remedy (540). (*Lord Kingsdown.*) **SECRETARY OF STATE IN COUNCIL OF INDIA v. KAMACHEE BOYE SAHEBA.**

(1859) 7 M. I. A. 476 = 13 Moo. P. C. 22 =
7 W. R. (Eng.) 722 = 4 W. R. 42 = 1 Suth. 373 =
1 Sar. 684.

—War—Seizure by Government of property of a subject in exercise of powers of, in putting down an insurrection—Effect—Subject not joining in insurrection.

Quære as to the effect of the seizure of property of a subject by a Government in the exercise of the powers of war in putting down an insurrection, especially in those cases in which the subject has not joined in the insurrection (125). (*Sir Barnes Peacock.*) **RAJAH SALIG RAM v. SECRETARY OF STATE FOR INDIA.**

(1872) Sup. I. A. 119 = 12 B. L. R. 167 =
18 W. R. 389 = 3 Sar. 191 = 2 P. R. 1872 = 2 Suth. 726.

ACT OF STATE—(Contd.)**Acts amounting to an, or not—(Concl'd.)**

—Wrongful act of individual—Test—Enam village granted by Peishwa—Resumption of, by officer of Peishwa—Nature of.

Village *R* was granted in 1803, by the Peishwa, in Enam, to *K*, and was enjoyed by him till his death in 1814. Soon after which, *T*, who was minister of the Peishwa, and resided at Poona, caused the village to be sequestered, and took the revenues. At the time of that sequestration, *T* was Mamlutdar, or farmer of the Talook of Ahmedabad, within which village *R* was situated. In 1815, he was displaced and deprived of all his offices; and the Mamlut of Ahmedabad was conferred by the Peishwa upon *L*. It was afterwards, in consequence of the treaty of Poona in 1817, granted in perpetuity to the Guikowar, who, by the treaty of Baroda, 6—11—1817, assigned it to the East India Company. All the right of the Peishwa against the East India Company, as Mamlutdar, or farmer of Ahmedabad, having ceased by his declaration of war, and consequent subjugation of his territories, and surrender of himself, the Government of the East India Company took possession of the village *R*, and collected the revenues for its own use, from 1817.

In March 1828, the respondent, claiming to be entitled to the village as representing his uncle *K*, commenced the suit out of which the appeal arose to recover from the appellant, the Collector of Kaira, the possession of the village, together with the revenue for eleven years.

The material question in the case was, whether by the sequestration of the village in 1814, the Enam grant made by the Peishwa to *K* in 1803 was put an end to, or whether the representative of *K*, though deprived of the enjoyment of the revenues by *T*, did not continue, till the deposition of the Peishwa, to be treated by him as Enamdar and was *de jure* Enamdar of the village. If the Enam grant was actually revoked by the sequestration which took place in the time of the Peishwa, the Government of the East India Company would be entitled to take advantage of such revocation; but if the grant subsisted at the time of the conquest, the representative of the grantee would be entitled to demand the restoration of the village.

Held, affirming the court below, that the Enam grant continued in force until the deposition of the Peishwa, and that the seizure of the revenue by *T*, and consequent dispossession of the representative of *K*, was the wrongful act of an individual, and not an act of the State (50-1). (*Mr. Justice Bosanquet.*) **COLLECTOR OF KAIRA v. MODEE PESTON-JEE.**

(1838) 2 M. I. A. 37 =
3 Moo. P. C. 368 = 1 Sar. 215.

Legality of—Municipal Court's jurisdiction to consider.

—See ACT OF STATE—ACT AMOUNTING TO AN, OR NOT.

- 1. Tanjore Raja. (1859) 7 M. I. A. 476 (540).
- 2. Jagir granted by, etc. (1827) 7 M. I. A. 555 (577-8).
- 3. Ex-King of Delhi. (1872) Sup. I. A. 119 (126-7).
- 4. Non-feudatory zemindars, etc. (1912) 39 I. A. 31 (48) = 39 C. 615.
- 5. British Protectorate. (1926) A. I. R. 1926 P. C. 131 (136).

Plea of.

—Maintainability—Plea not raised in first instance, but distinctly raised before judgment and made subject of an issue—Effect.

It has been argued on the part of the appellant that this case of the Government (that the seizure of the Crown in

ACT OF STATE—(Concl'd.)**Plea of—(Cont'd.)**

question was an act of State which could not be questioned in the Municipal Courts) was not put forward by their pleader in the first instance, and it would appear that at all events it was not distinctly put forward. But that becomes immaterial, inasmuch as before the judgment it was distinctly stated in the plea, and an issue was raised upon this very plea (41). (*Sir Robert P. Collier.*) **SIRDAR BHAGWAN SINGH v. SECRETARY OF STATE FOR INDIA.** (1874) 2 I. A. 38 = 3 Sar. 413 = 1 P. R. 1875.

—Necessity for specific—Cession of territory—Inhabitants of ceded territory—Suit by, against new sovereign for declaration of their proprietary rights in lands within ceded territory—Plea of "act of State" by new sovereign. See **CESSION OF TERRITORY—INHABITANTS OF CEDED TERRITORY—SUIT BY, AGAINST NEW, ETC.**

(1924) 51 I. A. 357 (361) = 48 B. 613.

Question as to whether an act is or is not an.

—*Impression erroneous of parties as to nature of act—Effect of, on its real nature.*

The fact that all the parties affected by the resumption of a Jaidad tenure by the Government considered it an act of State cannot alter the legal nature of the acts of Government, or make the resumption, under the assertion of a legal title, of lands claimed adversely by a subject an arbitrary act of sovereign power against an independent state (18). (*Lord Hatherley, L. C.*) **FORESTER v. SECRETARY OF STATE FOR INDIA.** (1872) Sup. I. A. 10 =

12 B. L. R. 120 = 18 W. R. 349 = 3 Sar. 1 = 1 P. R. 1872 = 2 Suth. 628.

Suit questioning validity of—Parties.

—*Government if a necessary party.*

To question an act of State, directly or indirectly, the contention must be raised on a suit duly constituted, to which the Government must be a party (550). (*Sir Edward Williams.*) **NAWAB UMJAD ALLY KHAN v. MUSSUMAT MOHUNDEE BEGUM.** (1867) 11 M. I. A. 517 =

10 W. R. P. C. 25 = 2 Suth. 98 = 2 Sar. 315 = R. & J's No. 7 (Oudh).

ADEN.

—Suit in Political Residents' Court at—Removal and trial of, by Bom. H. C.—Power of. See **LETTERS PATENT OF 1865 (BOM.), CL. 13—ADEN.** (1905) 33 I. A. 38 = 30 B. 246.

ADMINISTRATION—SUIT FOR.

—*Alienation by heir or residuary legatee pending—Purchaser's rights under.*

When the estate of a deceased person is under administration by court or out of court, a purchaser from a residuary legatee or heir is subject to any disposition which has been or may be made of the deceased's estate in due course of administration. In fact, the right of the residuary legatee or his heir is only to share in the ultimate residue which may remain for final distribution after all the liabilities of the estate, including the expenses of administration, have been satisfied (16). (*Lord Davy.*) **CHUTTERPUT SINGH v. MAHARAJ BAHADOOR.** (1904) 32 I. A. 1 =

32 C. 198 (218) = 9 C. W. N. 225 = 2 A. L. J. 190 = 7 C. L. J. 395 = 10 Bom. L. R. 262 = 3 M. L. T. 344 = 8 Sar. 713 = 18 M. L. J. 125.

—Decree preliminary in—Form of. (*Sir John Edge.*) **MA CHIT SEN v. NATIONAL BANK OF INDIA, LTD.**

23 L. W. 399 = 91 I. C. 432 = 30 C. W. N. 76 =

A. I. R. 1925 P. C. 261 = L. R. 6 P. C. 285 =

(1925) M. W. N. 847 = (1925) 50 M. L. J. 644 (647-8).

ADMINISTRATION—SUIT FOR—(Cont'd.)

—Heir-at-law representing whole inheritance in—Right to plead true state of the case—Estoppel. See **EVIDENCE ACT, S. 115—ADMINISTRATION SUIT.**

(1892) 19 I. A. 108 (128) = 19 C. 513 (531-2).

—*High Court—Original Side—Jurisdiction on—Executor principal within jurisdiction—Leases of land by executors outside jurisdiction—Decree of Mofussil Court—Setting aside of both on ground of fraud—Suit also praying for—Effect.*

Where the principal executor was resident in the Presidency Town of Calcutta and the estate was actually being administered there and the primary object of the suit was the administration of the estate and as incidental to such administration the plaintiff claimed reliefs as to the setting aside of certain leases granted by the executors fraudulently of property outside the jurisdiction and as to the setting aside of a decree obtained fraudulently in a mofussil court on the basis of such leases:—

Held, (1) that the High Court of Calcutta in its ordinary original civil jurisdiction had jurisdiction to entertain the suit;

(2) that the High Court had jurisdiction to order administration of the estate and as ancillary to such order to set aside deeds obtained by the fraud of the executor;

(3) that the primary object of the suit being the due administration of the estate, the Court had jurisdiction to set aside the fraudulent leases although the land comprised in the lease was outside the territorial limits of the Court; and

(4) that the High Court had jurisdiction to set aside a decree of a mofussil Court making a fraudulent award (relating to property comprised in the lease) an order of Court. (*Lord Davey.*) **BENODE BEHARI BOSE v. SRIMATI NISTARINI DASSI.**

(1905) 32 I. A. 193 (201) = 33 C. 180 (191-2) = 2 C. L. J. 189 = 9 C. W. N. 961 = 7 Bom. L. R. 887 = 15 M. L. J. 331.

—Property subject of—Sale of—Permission for—Jurisdiction of another Court to grant. See **PROB. AND ADM. ACT OF 1881 (AS AMENDED BY ACT VI OF 1889), S. 90—PERMISSION TO ADMINISTRATOR, ETC.**

(1925) 50 M. L. J. 644 (650-1).

—*Sale held in due course of administration in—Sale in execution of ordinary decree pending administration suit—Conflict between—Which prevails.*

Held, that a purchaser at a sale held in due course of the administration of the estate of a deceased person was entitled to priority over a purchaser at a sale held in execution of a decree during the pendency of the administration suit (16). (*Lord Davey.*) **CHUTTERPUT SINGH v. MAHARAJ BAHADOOR.** (1904) 32 I. A. 1 = 32 C. 198 (218) =

9 C. W. N. 225 = 2 A. L. J. 190 =

7 C. L. J. 395 = 10 Bom. L. R. 262 = 3 M. L. T. 344 =

8 Sar. 713 = 18 M. L. J. 125.

ADMINISTRATOR.

—*Suit on behalf of testator's estate—Right of—Letters of Administration—Grant of—Necessity.*

An administrator derives title solely under his grant, and cannot, therefore, institute an action as administrator before he gets his grant (119). (*Lord Parker.*) **MEYAPPA CHETTY v. SUBRAMANIAM CHETTY.** (1916) 43 I. A. 113 =

20 C. W. N. 833 = (1916) 1 M. W. N. 455 =

18 Bom. L. R. 642 = 35 I. C. 323.

—See also **LETTERS OF ADMINISTRATION—ADMINISTRATOR.**

ADMINISTRATION OF JUSTICE.

—See **JUSTICE—ADMINISTRATION OF.**

ADMINISTRATOR-GENERAL'S ACT.

XXIV of 1867.

—S. 30—*Hindu Will—Executor under—Position of, at time of that Act—Change in, effected by Hindu Wills Act, 1870—Position after that Act.*

At the time when Act 24 of 1867 was passed the executor of a Hindu estate could not have availed himself of the provisions of S. 30 of that Act. His powers and functions were not those of an English executor, but rather those of a manager; he did not require probate, and probate, if obtained, would not have vested him with any title to the estate, either real or personal, which he administered. Accordingly he was not, within the meaning of S. 30, a private executor or administrator who could transfer to the Administrator-General any estates "vested in him by virtue of such probate or letters."

A very important change was made in the law by the Hindu Wills Act, 1870, which, *inter alia*, enacted that certain provisions of the Indian Succession Act, 1865 (Ss. 179 to 189, amongst others), should apply to all wills and codicils made by any Hindu on or after 1—9—1870. The immediate effect of the Hindu Wills Act of 1870 was to place a Hindu executor who was in a position, and chose, to take advantage of its provisions, on precisely the same footing as the executor of an Anglo-Indian testator, in so far as concerns the taking out of probate, and the vesting in him of the estate of the deceased (114). (*Lord Watson.*) ADMINISTRATOR-GENERAL OF BENGAL *v.* PREM LAL MULLICK. (1895) 22 I. A. 107 = 22 C. 788 (795-6) = 6 Sar. 603.

II of 1874.

—*Religious trusts—Hindu will involving execution of—Trusts of—Duty of carrying out, if and when may be imposed upon Administrator-General.*

It was maintained that the Legislature cannot have intended that, in any circumstances, the Administrator-General should have the duty imposed upon him of carrying out the trusts of a Hindu will which might probably or possibly involve the execution of religious trusts, with which a public official ought to have no concern. The answer to that argument is that the Administrator may have that duty imposed upon by him by the Court in cases where there is no existing administration and the estate is in danger of being dilapidated (118). (*Lord Watson.*) ADMINISTRATOR-GENERAL OF BENGAL *v.* PREM LAL MULLICK.

(1895) 22 I. A. 107 = 22 C. 788 (799) = 6 Sar. 603.

—S. 31—Executors-nominate—Transfer of entire estate by, to Administrator-General—Property wrongfully retained by executors-nominate or third parties—Power of Administrator-General to realise—Omission to do so—Beneficiary ultimate under will—Remedy of, in such case. See EXECUTOR—HINDU WILL—EXECUTORS-NOMINATE UNDER—TRANSFER OF ENTIRE ESTATE BY, ETC.

(1895) 22 I. A. 203 (207) = 22 C. 1011 (1016).

—S. 31—*Hindu will—Executor under, who has obtained probate—Transfer of estate by, to Administrator-General—Validity.*

By a will executed in August, 1889, *N*, a Hindu, disposed of his whole estate, real and personal, and appointed two persons to be his executors and trustees. Those gentlemen accepted the office thus conferred upon them; and, in March 1891, they obtained a grant of probate from the High Court, and proceeded to administer the trusts of the will. On 14—8—1893, they executed a deed by which they transferred the whole estates, effects, and interests vested in them by virtue of the said probate to the appellant, the Administrator-General of Bengal, professedly in terms of S. 31 of the Administrator-General's Act II of 1874.

Held, reversing the Courts below, that the transferors were private executors within the meaning of S. 31 of Act II

ADMINISTRATOR-GENERAL'S ACT—(Contd.)
II of 1874—(Contd.)

of 1874, and that the transfer by them was therefore valid.

S. 31 of Act II of 1874 was a re-enactment, without verbal alteration, of S. 30 of the Administrator-General's Act 24 of 1867. At the time when that Act passed the executor of a Hindu estate could not have availed himself of the provisions of S. 30. A very important change was made in the law by the Hindu Wills Act, 1870, which, *inter alia*, enacted that certain portions of the Indian Succession Act, 1865 (Ss. 179 to 189 amongst others), should apply to all wills and codicils made by any Hindu on or after the 1st day of September, 1870. The immediate effect of the Hindu Wills Act was to place a Hindu executor who was in a position, and chose, to take advantage of its provisions, on precisely the same footing as the executor of an Anglo-Indian testator, in so far as concerns the taking out of probate, and the vesting in him of the estate of the deceased. The will of the deceased was executed in August, 1889; and his executors, therefore, on their obtaining probate, became immediately vested, by force of Statute, with the whole estates which belonged to him at the time of his decease (114-5).

The right to devolve the property of a deceased testator, with all powers and duties relating to its management and administration, which is conferred by S. 31 of Act II of 1874, is not confined to any particular class of executors or of estates. It is given, in broad and comprehensive terms, to any and every testamentary executor in whom the estates of the deceased testator have been legally vested by virtue of his probate. The clause only attaches one condition to the exercise of the executor's right, which is, that no transfer shall be made to the Administrator-General without his consent. It is left to the discretion of that official to determine whether the property falling under the will, and the trusts which it creates, are of such a character that he ought to undertake the duty of administration (115). (*Lord Watson.*) ADMINISTRATOR-GENERAL OF BENGAL *v.* PREM LAL MULLICK. (1895) 22 I. A. 107 = 22 C. 788 (796-7) = 6 Sar. 603.

ADMIRALTY.

—*Appeal in proceedings in—Limitation—Short period of—Reason for allowing only.*

It is important in Admiralty proceedings that notice of appeal should be given within a short period. When a ship is sued it is usually arrested, and unless it is released upon bail it is detained by an officer of the Court. It is, therefore, important if a party intends to appeal from the decision of the Admiralty Court, that notice should be given within a certain limited time (163). (*Sir Barnes Peacock.*) THE BENHILDA *v.* BRITISH INDIA STEAM NAVIGATION CO. (1881) 8 I. A. 159 = 7 C. 547 (551) = 4 Sar. 236.

—*Appeal in proceedings in—Pre-emption of—What amounts to—Costs awarded—Application for—Leave to appeal—Subsequent to—Grant of—Jurisdiction*

In a salvage case, the Supreme Court of Bombay, by its sentence pronounced in March, 1849, dismissed the claim of the salvors. In April following, the Promovents moved for a rule *nisi* to show cause why the defendants should not pay their costs. This rule the Court refused. In August, in the same year, the Promovents applied for and the Supreme Court granted leave to appeal to England from the principal sentence of March, 1849.

Held, that the application for costs after the decision in the cause had the effect of absolutely pre-empting the appeal, so as to entirely take away from the Supreme Court the power of granting leave to appeal, as nothing could, after the proceedings in April, be done to restore the appeal from the principal sentence (140). (*Dr. Lushington.*) LOUGHNAN *v.* HAJI JOOSUB BHULLADINA.

(1851) 5 M. I. A. 137 = 7 Moo. P. C. 373 = 1 Sar. 410.

ADMIRALTY—(Contd.)

—*Appeal in proceedings in—Pre-emption of—Effect—Appellants' right to appeal thereafter—Protest by respondent—Absence of—Effect.*

When once an appeal has been pre-empted, it is not possible to revive the proceedings, and it would not be within the power of the Court of Admiralty to grant the appeal under any circumstances of mistake or difficulty whatever. The circumstance of the respondents not appearing under protest cannot by possibility affect their right to object to the maintainability of the appeal in such a case (144-5). (*Dr. Lushington.*) LOUGHNAN *v.* HAJI JOOSUB BHULLADINA.

(1851) 5 M. I. A. 137 =
7 Moo. P. C. 373 = 1 Sar. 410.

—*Appeal in proceedings in—Pre-emption of—Effect—Supreme Court of Bombay—Admiralty proceedings in.*

According to the general course of proceedings in the High Court of Admiralty in England, the effect of pre-empting an appeal is entirely to take away the right of the appellants to appeal at all, and nothing that is thereafter done can restore the appellants to the condition in which they were before the time when the act of pre-emption took place. The same rules and the same mode of practice prevail in the Admiralty Court at Bombay (140-1). (*Dr. Lushington.*) LOUGHNAN *v.* HAJI JOOSUB BHULLADINA.

(1851) 5 M. I. A. 137 = 7 Moo. P. C. 373 = 1 Sar. 410.

—*Collision cases—Fact—Question of—Trial Judge's decision on—Appeal—Interference in—Grounds—Misapprehension of questions for decision—Effect of evidence—Questions as to—Distinction.*

In collision cases, no rule is better established than this that, where questions of fact alone arise, a Court of Appeal should be most chary of interfering with the decision of a trial judge, who had seen the witnesses and had the opportunity of forming his estimate of them by their demeanour. Only in exceptional cases and for special reasons should a Court which has not had this advantage reverse the judgment of the trial judge on questions of fact.

The Appellate Court, in effect, treated the appeal as a rehearing of the whole case. Presumably, therefore, their opinion was (though they do not say so in terms) that the trial judge had not rightly addressed himself to the questions before him, so that there had been a mistrial; if they merely differed from the trial judge as to the effect of the evidence they would not have thought themselves justified in allowing the appeal. Accordingly, it becomes necessary to consider the facts, not in order to see how their Lordships would have decided at the trial, but in order to see whether the trial judge so misapplied his mind to the incidents proved before him as to warrant the reversal of his judgment on what, after all, are exclusively questions of fact (160). (*Lord Sumner.*) RIVER STEAM NAVIGATION CO. *v.* HATHOR STEAMSHIP CO.

(1916) 31 M. L. J. 159 =
20 C. W. N. 1022 = (1916) 1 M. W. N. 446 =
4 L. W. 176 = 35 I. C. 193.

—*High Court—Jurisdiction of—Collision in Bay of Bengal.*

The appeal arose out of a suit brought before the High Court in the exercise of its original jurisdiction by the owners of ship A against ship B for a collision which took place in the Bay of Bengal.

Quære whether the collision having taken place in the Bay of Bengal, the High Court deciding the suit exercised Vice-Admiralty or Admiralty jurisdiction (163). (*Sir Barnes Peacock.*) THE BRENHILDA *v.* BRITISH INDIA STEAM NAVIGATION CO.

(1881) 8 I. A. 159 =
7 C. 547 (561-2) = 4 Sar. 236.

—*Supreme Court of Bombay—Admiralty proceedings in—Rule and practice of High Court of Admiralty in*

ADMIRALTY—(Concl'd.)

England—Applicability of—Bombay Charter of December, 1823—Effect.

By the authority of the Bombay Charter of December, 1823, founded upon the Act of Parliament, 4 Geo. IV, c. 71, S. 7, the Court of Bombay became a Court of Admiralty for the purposes therein stated, and the mode of proceeding is strictly enjoined to be, according to the course in use in the High Court of Admiralty in England. The rule and practice of the High Court of Admiralty must necessarily prevail in governing the proceedings of the Court of Bombay (144). (*Dr. Lushington.*) LOUGHNAN *v.* HAJI JOOSUB BHULLADINA.

(1851) 5 M. I. A. 137 =
7 Moo. P. C. 373 = 1 Sar. 410.

Vice-Admiralty Regulation of 1832, Rule 35.

—*Words "after the date of the decree"—Meaning.*

The words "after the date of the decree" in Rule 35 of the rules and regulations made in pursuance of 2 Will. IV, c. 51, do not mean after the date when the decree is drawn up in writing, but after the date on which the decree or sentence is pronounced by the Vice-Admiralty or Admiralty Court, as the case may be. The words which are constantly used in Acts which refer to decrees in the Admiralty Court are "the pronouncing of the sentence or decree." Their Lordships, therefore, think that the date of the decree in Rule 35 did not mean the date on which the decree was reduced to writing, and signed by the Court, but the date on which the High Court delivered their judgment and expressed what the decree was (162-3). (*Sir Barnes Peacock.*) THE BRENHILDA *v.* BRITISH INDIA STEAM NAVIGATION CO.

(1881) 8 I. A. 159 = 7 C. 547 (551) =
4 Sar. 236.

APPEAL TO P. C. UNDER.

—*Decree under appeal—Annexing of copy of—Not necessary because the rule as to annexing of copy of decree applies only to appeals preferred under C. P. C. of 1859.* (*Sir Barnes Peacock.*) THE BRENHILDA *v.* BRITISH INDIA STEAM NAVIGATION CO.

(1881) 8 I. A. 159 (162) = 7 C. 547 (550-1) =
4 Sar. 236.

—*Procedure for.*

Appeal must be asserted within 15 days from date of decree, by declaration in Court of intention to appeal. (*Sir Barnes Peacock.*) THE BRENHILDA *v.* BRITISH INDIA STEAM NAVIGATION CO.

(1881) 8 I. A. 159 (163) =
7 C. 547 (551) = 4 Sar. 236.

ADMISSION.

ADMISSIBILITY OF.

APPEAL.

CLAIM—ADMISSION OF, FOR ONE PURPOSE.

CO-DEFENDANTS.

CONSIDERATION.

CO-PLAINTIFFS.

DECEASED.

DEED.

DEMAND—TRUTH OF—ADMISSION OF.

GUARDIAN—ADMISSION BY.

HINDU LAW—ADOPTED SON—ADOPTIVE MOTHER.

HINDU LAW—ADOPTION—VALIDITY OF.

JUDGMENT-DEBTOR—ADMISSION BY.

LAW—ADMISSION ON POINT OF.

LEGAL PRACTITIONER.

MAHOMEDAN LAW—MARRIAGE.

MORTGAGE—LIABILITY OF THIRD PARTY UNDER.

MORTGAGE DEED—ADMISSION BY MORTGAGOR IN.

ORAL ADMISSION.

PLEADINGS—ADMISSION IN.

PREDECESSOR IN INTEREST—ADMISSION BY.

SELF-SERVING STATEMENT—ADMISSIBILITY OF.

SUIT.

TITLE.

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ADMISSION—(Contd.)**Admissibility of.****PREDECESSOR IN INTEREST.**

—Admission by—Admissibility of, against successor.
See **ADMISSION—PREDECESSOR IN INTEREST.**

SELF-SERVING STATEMENT—ADMISSIBILITY OF.

—See **ADMISSION—SELF-SERVING STATEMENT.**

Appeal.**COURT BELOW.**

—Admission in—Re-opening of, in appeal. See **APPEAL—ADMISSION—COURT BELOW.**

(1911) 38 I. A. 65 (73) = 38 C. 432 (445).

HEARING OF.

—Admission of fact made at—Use of. See C. P. C. OF 1908, O. 41, R. 27—**APPLICABILITY—ADMISSION OF FACT, ETC.** (1919) 12 L. W. 574 = 1920 P. C. 81 (a).

Claim—Admission of, made for particular purpose.

—Effect.

There is no admission here by which the right of the plaintiff to one-half can be considered as established, because, even supposing that the person by whom the admission was given could represent the other party, he made the admission under the authority of the Government for a particular purpose, and neither he nor those whom he represented can be considered as bound by it (153). (*Lord Campbell.*) **JEWAJEE v. TRIMBUCKJEE.**

(1842) 3 M. I. A. 138 = 6 W. R. 38 P. C. = 1 Suth. 141 = 1 Sar. 257.

Co-defendants.

—Guardian—Sale-deed by—Admission in, of his relinquishment of share in property sold—Effect of, against co-defendants—Purchasers. See **HINDU LAW—MINOR—GUARDIAN—SALE-DEED BY—ADMISSION IN, OF HIS HAVING RELINQUISHED, ETC.** (1888) 16 I. A. 96 (103) = 5 Sar. 326 = 16 C. 627 (635).

—Judgment—Admission or confession by one of—Admissibility against others—Decree against them on basis of—Propriety.

To a suit in ejectment brought by a person who had no title to the suit property, two ladies, who were really entitled to the same, were added as defendants. More than 6 months after the filing of the plaint, they presented a petition by which they admitted that the plaintiff was the person entitled to the suit property, and stated that they had no objection to, and agreed in, the suit of the plaintiff.

Held, that the admission contained in the said petition was no evidence against the other defendants in the suit, and could not be made the basis of a decree against them (129-30).

An admission, or even a confession of judgment, by one of several defendants in a suit, is no evidence against another defendant (129). (*Sir Barnes Peacock.*) **AUMIR-TOLALL BOSE v. RAJONIKANT MITTER.**

(1875) 2 I. A. 113 = 15 B. L. R. 10 = 23 W. R. 214 = 3 Sar. 430 = 3 Suth. 94.

—Prior suit—Admission by one in—Admissibility against him and other defendant in subsequent suit.

In a suit by the plaintiff, one of two co-heirs, for the recovery of Government paper, alleged to have been property to which he and the 2nd defendant were entitled as heirs and to have been illegally transferred by him solely to the 1st defendant, *held*, that the admission of the alleged spoliation by the 2nd defendant in a prior suit to which the 1st defendant was not a party was legitimate evidence against the 2nd defendant, though not evidence, such as to establish the

ADMISSION—(Contd.)**Co-defendants—(Contd.)**

case of wrong against his co-defendant (519). (*Lord Justice Giffard.*) **IKBALOODOWLAH v. SAH BUNARSEE DOSS.**

(1869) 12 M. I. A. 507 = 2 Sar. 463 = R. & J's. No. 8 (Oudh).

—Sale-deed by one of—Consideration for—Admission by him of receipt of, before Registering Officer—Value of, against him and against other defendants—Adverse claim by latter to property conveyed.

The plaintiffs claimed to recover the suit property on the strength of a sale-deed executed in their favour by U. The defendants in the suit were U himself and certain others who claimed title to the suit property adversely to U. The defence of all the defendants was that the sale-deed by U had been obtained by fraud without the payment or receipt of the consideration money.

It appeared, however, that, at the time of the registration of the sale-deed, U had acknowledged before the sub-registrar, who registered the deed, the receipt of Rs. 7,500 out of the total consideration of Rs. 10,000.

Held, that, whatever weight that admission might have had against U himself, it was of no weight as against the other defendants (212). (*Sir Barnes Peacock.*) **SHEIKH MUHAMMAD MUMTAZ AHMAD v. ZUBAIDA JAN.**

(1889) 16 I. A. 205 = 11 A. 460 (471-2) = 5 Sar. 433.

Consideration.

—Deed—Consideration for—Receipt of—Admission in deed of—Presumption from.

(1) Where a deed of compromise recited that a sum of money stipulated to be paid by one of the parties to the compromise to the other had in fact been paid, *held*, that the deed must, *prima facie*, be considered as evidence that there was, at the time of its execution, and as part of the same transaction, a payment of money, and that that evidence was *prima facie* proof of the payment (354).

The deed is not conclusive evidence, as the statement of such a fact in a deed, under the seal of the parties, would be in a Court of law in England, but it is evidence as far as it goes (354). (*Mr. Baron Parke.*) **CHOWDRY DEBY PERSAD v. CHOWDRY DOWLUT SINGH.**

(1844) 3 M. I. A. 347 = 6 W. R. 55 P. C. = 1 Suth. 161 = 1 Sar. 288.

(2) In the absence of satisfactory proof of fraud or mistake, every presumption in favour of the statements contained in a mortgage bond as to the consideration for it ought to be made (5).

So *held*, in a case in which the mortgagor, in a suit brought to enforce the mortgage, pleaded that an item of consideration stated in the bond was not truly stated, and that it had found its way into the bond by some fraud or error, and it appeared that the bond was deliberately entered into, that for many years it had been acted upon, and that payments were made under it (45). (*Sir Montague E. Smith.*) **JUNESWAR DASS v. MAHABEER SINGH.**

(1875) 3 I. A. 1 = 1 C. 163 = 25 W. R. 84 = 3 Sar. 581 = 3 Suth. 222.

—Admission in part fictitious—Effect.

In a suit to enforce a bond for Rs. 10,000, the plaintiff rested his case entirely upon the bond and the defendants' acknowledgment therein that a sum of Rs. 8,000 was received in cash. The remaining sum of Rs. 2,000 was admittedly never paid to the defendants. The defendants admitted the receipt of a sum of Rs. 2,500 only, and pleaded that the same had been re-paid by them.

Held that, the statement in the bond being fictitious, the onus was on the plaintiff to prove in some other way the advance which he alleged (83). (*Lord Hobhouse.*) **LALA LAKMI CHAND v. SAYID HAIDAR SHAH.**

(1899) 4 C. W. N. 82.

ADMISSION—(Contd.)**Consideration—(Contd.)****—Evidence rebutting recital in deed.**

A deed of compromise recited that a sum of money stipulated by the compromise to be paid by the appellants to the respondent had in fact been paid. In a suit by the respondent to recover the said sum, on the ground that it had not in fact been paid, all the witnesses present at the time of the transaction of the execution of the deed of compromise either were silent as to the fact of the payment, or they expressly deposed that no such payment took place at the time. The appellant himself admitted in the proceedings that such was the fact, and, while he set up inconsistent cases as to the time when and the place where the payment was made, he never stated that the money was paid at the time when the deed was executed. Again, though the appellant alleged that the payment took place in the presence of respectable witnesses, he did not examine any of them.

Held, that the inference arising from the recital in the deed was completely rebutted by all the evidence in the case, by the admission of the parties, and by all the circumstances of the case (354-5). (*Mr. Baron Parke.*) CHOWDRY DEBY PERSAD *v.* CHOWDRY DOWLUT SINGH.

(1844) 3 M. I. A. 347 = 6 W. R. 55 (P. C.) = 1 Suth. 161 = 1 Sar. 288.

—Re-payment of—Onus of proof of. (*Lord Hobhouse.*) LALA LAKMI CHAND *v.* SAYID HAIDAR SHAH.

(1899) 4 C. W. N. 82 (84).

MORTGAGE-DEED—CONSIDERATION FOR.

Where, in a suit brought to enforce a mortgage, the mortgagor pleaded that an item of consideration stated in the bond was not truly stated, and that that item of consideration did not in fact pass, *held*, that, having executed the bond, the onus was upon the mortgagor to show that the consideration had not passed (5). (*Sir Montague E. Smith.*) JUNESWAR DASS *v.* MAHABEER SINGH.

(1875) 3 I. A. 1 = 1 C. 163 = 25 W. R. 84 = 3 Sar. 581 = 3 Suth. 222.

In a suit to enforce a mortgage, the onus of proving absence of consideration for the mortgage lies upon the mortgagor, and it lies heavily on him, in a case in which the plea is inconsistent with his own written admissions (212). (*Lord Sinha.*) SETH MAGAMMA *v.* DARBARILAL CHOWDHURY.

(1927) 54 M. L. J. 208 = 5 O. W. N. 226 = 30 Bom. L. R. 296 = 107 I. C. 113 = 47 C. L. J. 222 = 27 L. W. 523 = I. L. T. 40 C. 124 = 24 N. L. R. 40 = A. I. R. 1928 P. C. 39.

SALE-DEED—CONSIDERATION FOR.

An acknowledgment in a sale-deed of the payment of the whole consideration may, after the deed has been delivered over or registered, amount to an admission of the payment; although at the time when it was written, payment obviously was not made (791). NAWAB SYUD ALLEE SHAH *v.* MUSST. AMANEE BEGUM.

(1873) 2 Suth. 790 = 19 W. R. 149.

The acknowledgment in the sale-deed of the previous receipt of a portion of the consideration for the sale would no doubt enable the vendee to transmit the property to a second purchaser as between whom and the vendor the latter would not be entitled to deny the payment of that portion of the purchase-money. But as between the vendor and vendee it had not the effect of discharging him (144). (*Lord Davey.*) HAKIM MUHAMMAD IKRAM-UD-DIN *v.* NAJIBAN.

(1898) 25 I. A. 137 = 20 A. 447 (455) = 2 C. W. N. 545 = 7 Sar. 353.

Where, in a registered deed of sale, the vendor states that he has received the consideration money in full, and that he has no further claim to the property sold or the consideration money, the burden is upon him and on people

ADMISSION—(Contd.)**Consideration—(Contd.)****SALE-DEED CONSIDERATION FOR.—(Contd.)**

claiming under him to prove that what apparently happened did not happen, to prove that the deed was not genuine or for consideration; that no right accrued from it to the vendee; and that the vendee did not pay any consideration money to the vendor and refused to complete (372). (*Lord Phillimore.*) EHTISHAM ALI *v.* JAMNA PRASAD.

(1921) 48 I. A. 365 = 15 L. W. 104 = 30 M. L. T. 132 = 9 O. L. J. 71 = 24 O. C. 272 = 24 Bom. L. R. 67 = (1922) P. C. 56 = 27 C. W. N. 8 = 20 A. L. J. 961 = 64 I. C. 299.

—Registering officer—Admission before—Record of, under S. 58 of Registration Act of 1908—Presumption from—Onus of rebutting.

The Registration Act of 1866 does not require that the executant of a sale-deed should, at the time of its registration, make before the Registering Officer at the time of the registration of the deed an admission of the receipt by him of the purchase-money payable thereunder. But S. 65 of the Act requires the registering officer to record the admission if it is made before him. When such an admission is recorded as made, the presumption ought to be in favour of the truth of such a public declaration, requiring cogent and convincing evidence to rebut it. An admission so made is, no doubt, not conclusive, but still it ought to afford a strong presumption of truth, and throw upon him who makes it when he comes to impeach such an acknowledgment, the burden of satisfying the Court, by strong and cogent evidence, that it was made under some circumstances of mistake or error (791-2). NAWAB SYUD ALLEE SHAH *v.* MUSST. AMANEE BEGUM. (1873) 2 Suth. 790 = 19 W. R. 149.

Co plaintiffs.

—Admission by one of—Admissibility in evidence against all—Binding nature of, on all—Joint undivided status—Admission as to, by youth of 19—Admission not brought home to other plaintiffs.

The suit was by the widow and the two sons of Mathew Abraham, an East Indian, for an account of his estate received by the respondent, his brother, subsequently to his decease. The respondent contended that he and his deceased brother were members of an undivided family, and that he was entitled to a moiety of the joint estate. In support of his contention, he relied upon an admission alleged to have been made to that effect by one of the sons of the deceased. That son was only 19 when the alleged admission was made by him. It was not proved that either the widow or the other son was in any way privy to, or cognisant of, that admission.

Held, that, though the alleged admission was evidence against all the plaintiffs, the Court below erred in giving it a binding effect against all the plaintiffs on the record (251-2). (*Lord Kingsdown.*) ABRAHAM *v.* ABRAHAM.

(1863) 9 M. I. A. 195 = 1 W. R. 1 (P. C.) = 1 Suth. 501 = 2 Sar. 10.

Deceased.

—Debt of—Admission by heir of See DEBT—DECEASED—DEBT OF.

—Oral admission of—Evidence of—Weight of.

In a case in which the genuineness of a deed of authority to adopt alleged to have been executed by a deceased person was in question, the evidence of one of the witnesses was to the effect that he met the deceased on the day next after the date of the execution of the alleged deed, and that the deceased, being in full possession of his faculties, told him that he had the day before executed in favour of his widow a written authority to adopt.

ADMISSION—(Contd.)**Deceased—(Contd.)**

Held, that the evidence, if believed, would establish a clear admission by the deceased of his antecedent act, but that it was open to the exception that it was but evidence of an oral admission, said to have been made by a deceased person, and, as such, incapable of contradiction, and open to suspicion (181). (*Sir James W. Colville.*) **SRI RAGHUNADHA v. SRI BROZO KISHORO.** (1876) 3 I. A. 154 = 1 M. 69 = 25 W. R. 291 = 3 Sar. 583 = 3 Suth. 263.

Deed.**ADMISSION IN.**

—*Must be taken as a whole.*

The statement of a person, if relied upon as containing an admission, must be taken as a whole (133-4). (*Sir Robert P. Collier.*) **GOPU LALL v. MUSST. SREE CHUNDROLEE BUHOOJEE.** (1872) Sup. I. A. 131 = 11 B. L. R. 391 = 19 W. R. 12 = 3 Sar. 217 = 2 Suth. 752.

A deed of sale executed by a Hindu widow contained a statement that the property conveyed thereby was the dewutter property of an idol, which was in her possession and enjoyment as Shebait of the idol. The statement was also to the effect that the temple was out of repair, and money was wanted to restore it, and that the sale was made for the purpose of the repair of the temple.

Held, that, if the statements in the deed were relied upon against the alienees as an admission which estopped them from asserting that the property conveyed was not dewutter, the statements must be taken as a whole together with the portion which recited the purpose of the sale, in which case the sale in question would be justifiable, assuming the property to have been dewutter (62). (*Sir Montague E. Smith.*) **KONWUR DOORGANATH ROY v. RAM CHUNDER SEN.** (1876) 4 I. A. 52 = 2 C. 341 (350-1) = 3 Sar. 681 = 3 Suth. 375.

The question was whether, as alleged by the plaintiff, the son of A, A had been educated out of the joint funds of the family of which he (A) was a member. In support of that allegation the only evidence produced was the answer of A and his brothers, the defendant in the present suit being one of them, in a suit filed against them by a third party. That answer contained the following passage:—"A was educated by his said father M by and out of his separate funds or means; and when this defendant A was of sufficient age he was put forward in life by his said father, and by and through his means and influence only, and afterwards by and through the industry and exertions of this defendant A on his own behalf."

Held, that if the passage was relied upon as an admission it must be taken as a whole, and it contained a distinct assertion, that whatever were the charges of A's education, those charges were borne by the separate estate of his father, over which he had an absolute power of disposition, and that there was, therefore, at that time, no joint estate in the proper sense of the word (117). (*Sir Robert P. Collier.*) **PAULIEM VALLOO v. PAULIEM SOORYAH.** (1877) 4 I. A. 109 = 1 M. 252 (260-1) = 3 Sar. 698 = 3 Suth. 387.

—*Deed not inter partes—Admission in.*

What a party himself admits to be true may reasonably be presumed to be so. No doubt, in a case where the party relying on the admission is not a party to the deeds in which the admission is made, and there is therefore no estoppel, the party making the admission may give evidence to rebut this presumption, but unless and until this is satisfactorily done, the fact admitted must be taken to be estab-

ADMISSION—(Contd.)**Deed—(Contd.)****ADMISSION IN—(Contd.)**

lished (35). (*Lord Atkinson.*) **CHANDRA KUNWAR v. NARPAT SINGH.** (1906) 34 I. A. 27 =

29 A. 184 (194-5) = 2 M. L. T. 109 =

5 C. L. J. 115 = 11 C. W. N. 321 = 9 Bom. L. R. 267 =

4 A. L. J. 102 = 17 M. L. J. 103.

—*Judgments and proceedings not inter partes—Admission in.*

The question in the case was whether the respondents were entitled to hold the village of B, in the principality of the appellant, as tenants in perpetuity at a stated rent, under a grant made by the appellant's father in 1863, or whether, as contended by the appellant, their tenancy was liable to be determined by a notice to quit.

To discharge outstanding debts due by the family of the original grantee of the village, each of his sons and the father of each of the respondents had, in the year 1842, made a usufructuary mortgage of his share of the village for Rs. 4,000 to the Darivars. In 1866 the Durivar mortgagees sued the inamdars to enforce the mortgages executed in 1842. The inamdars pleaded that the mortgaged lands having been resumed in 1845 by the Collector, the original right possessed by them therein and the mortgage lien of the plaintiffs thereon had ceased to exist. The suit was dismissed by the First Court, and that decree was affirmed on appeal.

Held, that, as the Maharajah was not a party to that suit, that plea did not operate as an estoppel, but was only an admission and not conclusive, and that the respondents were not therefore precluded from showing the real nature of the grant in 1863 (42). (*Sir Richard Couch.*) **MAHARAJAH MIRZA SRI ANANDA v. PIDAPARTI SURIANARAYANA SASTRI.** (1886) 13 I. A. 32 =

9 M. 307 (318) = 4 Sar. 696.

—*Proceedings inter partes—Admission in.*

In a suit for resumption of lands held on service tenure in which the question was whether the lands were, on the occasion of the Settlement, treated as part of the mal assets of the plaintiff's zemindary, *held*, that an admission of the identity of the suit lands with the mal lands of the zemindary made by the respondents (the tenure-holders) or their predecessors in interest in a suit for resumption of the same lands previously brought by the Government against them, though not amounting to an estoppel, at least cast upon the respondents the burden of explaining it, and of showing that what was then deliberately asserted was not the fact. *Held* so, even where it appeared that the dismissal of the suit by the Government had gone upon a different ground altogether. (*Sir James W. Colville.*) **FORBES v. MEER MAHOMED TUQUEE.** (1870) 13 M. I. A. 438 (459-60) = 14 W. R. 28 (P. C.) = 5 B. L. R. 529 = 2 Suth. 358 = 2 Sar. 588.

CONSIDERATION FOR.

—Admission of. See **ADMISSION—CONSIDERATION.**

EXECUTION OF—ADMISSION OF—EFFECT.

—Validity and real nature of deed—Right to contest—Estoppel. See **DEED—EXECUTION OF—ADMISSION OF.** (1872) 19 W. R. 118 (121).

GENUINENESS OF—ADMISSION BY EXECUTANT OF, NOT inter partes.

—*Decision in favour of genuineness based solely on—Propriety.*

The suit was brought by the appellant to recover two villages which the respondents claimed to hold on a Mocur-ry tenure created by him. Their title was founded on

ADMISSION—(Contd.)**Deed—(Contd.)****GENUINENESS OF—ADMISSION BY EXECUTANT OF, NOT *inter parties*—(Contd.)**

three deeds purporting to have been executed by the appellant. The appellant impeached those documents as forgeries.

The issue raised in the case was not, whether the deeds impeached were genuine, but whether the appellant was precluded by the law of limitation from showing that they were not genuine. The appellant alleged that he first had notice of them within 12 years prior to the date of suit, that is, in 1854, in which case the suit would be in time.

The trial court found the issue against him and dismissed the suit. Its decision proceeded on the ground that, in 1858, the appellant, by his Mooktar, had filed a petition before the Collector, admitting that the respondent was Mocurreredar of the villages in question, and assenting to the payment of some rents in deposit to him out of the collectorate. The trial court held that that was an admission of the deeds impeached, and that the period of limitation was to be calculated from the date of the deeds. Its decision was affirmed by the High Court.

Held, that the decisions could not stand and that the cause must be remanded for trial upon its merits.

The petition filed by the appellant, if taken as mere proof that he knew of the title asserted by the respondents in 1858, does not help the case, for he admits that he knew of it in 1854. On the other hand, to treat it as a conclusive admission of the genuineness of the deeds, and thence to infer that the appellant, having executed them, must have known of their existence at their date, is to determine against him upon one piece of evidence, which may be capable of explanation, the material question in the cause, before the issue raising that question has been settled, and without giving the party the means of bringing forward all the evidence which he may have to adduce upon it (333-4). (*Sir James W. Colville.*) **RAJAH SAHIB PERHLAD SEIN v. RUN BAHADOOR SINGH.** (1869) 12 M.I.A. 289 = 12 W. R. 6 (P. C.) = 2 B. L. R. 111 = 2 Suth. 225 = 2 Sar. 430.

LIABILITY OF THIRD PARTY UNDER—ADMISSION OF.

—What amounts to. *See* ADMISSION—MORTGAGE—LIABILITY OF THIRD PARTY UNDER.

(1892) 19 I. A. 228 (230) = 20 C. 93 (96-7).

RECITALS IN—EFFECT.

—*See* DEED—RECITALS IN.

Demand—Truth of—Admission of.

—What amounts to. *See* BOM. CIVIL COURT SURAT REG. I OF 1800, S. 13. (1837) 1 M.I.A. 155 (170 2).

Guardian—Admission by.

—*Minor—Admissibility against.*

In a case in which the question was whether *M*, sued as a minor under the guardianship of her mother *G*, was the legitimate daughter of *G* by *A*, a certified copy of a statement by *G* taken before a Magistrate was relied upon as conclusively disproving the case that *G* was married to *A*. It was contended that *G* defending as guardian of *M* was a party to the suit, and that under the Indian Evidence Act the statement was admissible as an admission by her.

Quære, whether the document was admissible in the suit as evidence against *M*'s claim. (*Lord Macnaghten.*) **MUS-SUMMAT MAQBULLAN v. AHMAD HUSAIN.**

(1903) 31 I. A. 38 = 26 A. 108 (117-9) = 8 C. W. N. 241 = 6 Bom. L. R. 233 = Sar. 583.

ADMISSION—(Contd.)**Hindu Law—Adopted son—Adoptive mother.**

—Admission in pleadings by—Effect against him of. *See* HINDU LAW—ADOPTION—ADOPTED SON—ADOPTIVE MOTHER—ADMISSION IN PLEADINGS BY.

(1862) 9 M. I. A. 287 (301).

Hindu Law—Adoption—Validity of.

—Admission of—Estoppel based on. *See* HINDU LAW—ADOPTION—ADOPTED SON—STATUS OF—ADMISSION OF.

Judgment debtor—Admission by.

—Execution purchaser—Effect against. *See* HINDU LAW—SELF-ACQUISITION—JOINT FAMILY—MEMBER OF. (1873) 2 Suth 840 (844).

Law—Admission on point of.

—Binding character of. *See* LAW—ADMISSION ON POINT OF.

Legal Practitioner.

—Admission by. *See* LEGAL PRACTITIONER—ADMISSION BY.

Mahomedan Law—Marriage.

—Evidence—Husband alleged—Admission by, of marriage ceremony on a particular date, in agreement of compromise between him and his alleged wife—Evidentiary value of. *See* MAHOMEDAN LAW—MARRIAGE—EVIDENCE—HUSBAND—ADMISSION BY.

(1917) 22 C. W. N. 530 (532-3).

Mortgage—Liability of third party under.

—Admission of—What amounts to—Bond by *B*—Recital in, that money due under mortgage by *A* is "duly repayable"—Effect.

The question was whether one *D* admitted his liability under a mortgage bond executed by his mother who was a co-sharer with him.

A bond executed by *D* in favour of a third party contained the following passage:—"Besides this there are two separate deeds of previous dates; one is the mortgage deed of village, and the other is a bond. The money due under them is also duly repayable". The mortgage deed referred to was the deed executed by the mother. Whether that passage in the bond by *D* was an admission by him of liability under the mortgage by the mother depended upon the construction of the words "duly repayable."

Held, that the words "duly repayable" might and ordinarily would mean, repayable by the party liable to pay, and that they did not amount to an admission of his liability under the mortgage by his mother (230). (*Sir Richard Couch.*) **RAM GOPAL v. SHAMSKHATON,**

(1892) 19 I. A. 228 = 20 C. 93 (96-7) = 6 Sar. 247.

Mortgage deed—Admission by mortgagor in.

—Correctness of—Presumption—Onus of rebutting *See* MORTGAGE DEED—ADMISSION BY MORTGAGOR IN.

(1890) 17 I. A. 145 (149) = 18 C. 224 (230-1).

Oral Admission.

—Value of. *See* ADMISSION—DECEASED—ORAL ADMISSION OF; AND DEBT—DECEASED—DEBT OF.

Pleadings—Admission in.

—*See* PRACTICE—PLEADINGS—ADMISSION IN.

Predecessor in interest—Admission by.

—Successor in interest—Admissibility against.

Documents which, it was contended, were inadmissible against the appellant on the ground that they were *res inter alios acta* and did not come within any of the classes

ADMISSION—(Contd.)**Predecessor in interest—Admission by—(Contd.)**

of evidence mentioned in S. 32 of the Evidence Act, were found to be statements made by persons through whom the appellant claimed.

Held, that the documents were clearly admissible against the appellant. (*Lord Lindley.*) **RANI SRIMATI v. KHAJENDRA NARAYAN SINGH.** (1904) 31 I. A. 127 = 31 C. 871 (883) = 9 C. W. N. 74 = 8 Sar. 635.

—*Deceased—Admission by—Heir-at-law—Admissibility against.*

The question was whether certain parcels of land which had been admittedly purchased in the name of a Hindu lady were purchased by her with her own funds and were, therefore, her Stridhan or peculiar property, or, whether they were purchased in her name by her husband, K, with his own funds, and she was, therefore, a mere benamidar for him. The heir-at-law of the adopted son of K and the lady raised the plea that she was a mere benamidar in a suit brought to recover the parcels from him by persons claiming the same under a deed of gift alleged to have been executed by the lady.

It appeared that the lady's husband had, during his lifetime, solemnly and deliberately admitted that the purchases in question were made out of his wife's funds, and for her benefit, as well as in her name. It was urged for the heir-at-law of the adopted son that credit was not to be given to those admissions, because they might be assumed to have been made falsely, with the object of defeating the claim of the heir-at-law to share in the self-acquired property of K, including the parcels of land in dispute.

Quære, as to how far a Court of Justice was at liberty to disregard admissions so made, in favour or for the benefit of a person, claiming as the heir of him by whom they were made (424-5). (*Sir James W. Colville.*) **GERESH CHUNDER LAHOREE v. MUSSUMAT BHUGGOBUTTY DEBIA.** (1870) 13 M. I. A. 419 = 14 W. R. 7 (P. C.) = 2 Suth. 339 = 2 Sar. 579.

—*See HINDU LAW—ADOPTION—AUTHORITY TO ADOPT—ADMISSION AS TO EXISTENCE OF.*

(1879) 7 I. A. 24 (30-1) = 5 C. 770.

—*Hindu Law—Partition between K and M—Question as to, between K's widow and M's son—Admission of partition by M—Scope and effect of, as against his son.*

The question was whether two brothers, K and M, were divided or not. The question arose in a suit brought by the respondent, the widow of K, against the appellant, the son of M, for the recovery of her husband's share of the estate, on the ground that K and M were divided.

It appeared that in a suit brought by M during his lifetime he pleaded the division of the paternal estate, and the separation from his brother K.

Held, that the averment by M was strong proof against the appellant, who claimed through him, that a division and separation had taken place; and further that it was a complete and entire division, for no limitation was alleged (175). (*Dr. Lushington.*) **REWUN PERSAD v. MUSAMAT RADHA BEEBY.** (1847) 4 M. I. A. 137 = 7 W. R. 35 (P. C.) = 1 Suth. 172 = 1 Sar. 329.

The original of a grant, the construction of which was in question, was lost, and the appellants tendered in evidence a copy thereof, which bore an endorsement by the then predecessor of the respondents that the document was a copy of the original. *Held*, that the statement that the document was a copy of the original was evidence as an admission made by a party and a predecessor in title of the parties. (*Lord Atkin.*) **SEETHAYYA v. SUBRAMANYA SOMAYAJULU.** (1929) 56 M. L. J. 730 (735).

ADMISSION—(Contd.)**Self-serving Statement—Admissibility of.**

—On a claim by a creditor of an insolvent against the Official Assignee to be an equitable mortgagee of certain houses and lands of the insolvent by virtue of a deposit of the title-deeds thereof by the insolvent before the adjudication as collateral security for his debt, *held*, that an admission made by the claimant before the adjudication that the insolvent had deposited the title-deeds in question with him as collateral security was not, under S. 21 of the Evidence Act, relevant evidence and could not be proved on behalf of the claimant. (*Sir Richard Couch.*) **MILLER v. BABU MADHO DAS.**

(1896) 21 I. A. 106 (116) = 19 A. 76 (92) = 7 Sar. 73.

—*Hindu Law—Impartible estate—Alienation by will of joint ancestral estate—Custom against—Evidence of—Statement by last holder, the validity of whose disposition was in question that a previous holder had no right to make a will—Admissibility in evidence of.*

In a case in which the validity of a will by the last holder of a joint ancestral impartible estate disposing of the estate was in question, a statement by him that a previous holder had no right to make a will was relied upon as evidence of a custom restricting alienation of the estate by will.

The statement, when examined, was found to be one, not on oath, but to have been made by way of pleading in proceedings in which the last holder was disputing an alleged will of his predecessor and taking every possible objection to its validity.

Held, that the statement was a self-serving statement, and was not admissible in evidence (298). (*Lord Warrington of Clyffe.*) **PROTAP CHANDRA DEO v. JAGADISH CHANDRA DEO.** (1927) 54 I. A. 289 =

54 C. 995 = 25 A. L. J. 628 = 102 I. C. 599 =

20 Bom. L. R. 1136 = 1927 M. W. N. 513 =

31 C. W. N. 943 = 4 O. W. N. 650 (2) = 39 M. L. T. 1 =

46 C. L. J. 136 = 8 Pat. L. T. 623 =

A. I. R. 1927 P. C. 159 = 53 M. L. J. 30.

—*Sale-deed registered—Dealings subsequent with property by vendor—Admissibility of, as declarations in his own favour—Admissibility on behalf of vendor and of those claiming under him.*

Where a person, who has conveyed property by a registered deed of sale, subsequently deals with the property in favour of third parties, such subsequent dealings by him with the property could not, if regarded as declarations in his own favour, be received in evidence on behalf of that person or of others claiming under him (373). (*Lord Phillimore.*) **EHTISHAM ALI v. JAMNA PRASAD.**

(1921) 48 I. A. 365 = 15 L. W. 104 = 30 M. L. T. 132 =

9 O. L. J. 71 = 24 O. C. 272 = 24 Bom. L. R. 675 =

27 C. W. N. 8 = 20 A. L. J. 961 = 64 I. C. 299 =

(1922) P. C. 56.

—*Will—Admission in.*

The plaintiff's case was that the maternal grandfather of P, his deceased half-brother, agreed to give P a share in his family properties along with his sons, and that the latter assented to that arrangement. To prove his case, plaintiff relied upon a recital in a will left by P which set out the agreement and the assent.

Held, that, even if the recital was a statement which suggested an inference as to a fact in issue, it could not be proved by or on behalf of the person who made it or his representative in interest (Evidence Act, Ss. 17 and 21), and that, therefore, standing alone, the statement in the will could not be proved by or on behalf of the plaintiff as evidence of what it asserted. (*Sir Lawrence Jenkins.*) **NALAM PATTABHIRAMA RAO v. NARAYANAMOORTHY.**

(1921) 15 L. W. 404 (406) = 26 C. W. N. 273 =

L. R. 3 P. C. 29 = (1922) P. C. 102.

ADMISSION—(Concl'd.)**Suit.****ADMISSION PRIOR TO.**

—Estoppel by reason of. *See* EVIDENCE ACT, S. 115
—SUIT—ADMISSION PRIOR TO.

OPPONENT'S TITLE—ADMISSION OF, BY PETITION FILED IN SUIT.

—*Plea of—Proof required in case of.*

To a suit in ejectment brought by a person without title, two ladies, who were the persons really entitled to the suit property, were added as defendants. The High Court gave a decree in favour of the plaintiff on the strength of a petition alleged to have been filed by the said ladies more than 6 months after the filing of the plaint, by which petition they purported to admit the title of the plaintiff and to agree in the plaintiff's suit. There was, however, no evidence of any authority to file the petition.

Quære.—Whether the petition having been filed in the suit could, without proof of the execution of a Vakalatnamah by those ladies, or of any authority to file it, be used against them as an admission by them in the suit that the plaintiff was the person really entitled, and that they had no defence to the suit (129). (*Sir Barnes Peacock.*) AUMIRTOLALL BOSE *v.* RAJONEEKANT MITTER. (1875) 2 I. A. 113 = 15 B. L. R. 10 = 23 W. R. 214 = 3 Sar. 430 = 3 Suth. 94.

Title.

—Admission gratuitous of—Withdrawal of. *See* TITLE—ADMISSION GRATUITOUS OF.
(1898) 25 I. A. 161 (178) = 26 C. 81 (100-1).

ADOPTION.

—Evidence of—Punchayat—Report of, at instance of ancestors of parties—Report signed by them—Admissibility of—Value of. *See* EVIDENCE—ADOPTION—PUNCHAYAT.
(1898) 26 I. A. 48 (53) = 25 B. 1 (7-8).

—*Fabricated adoptions—Securities against, in the Civil Law, Code de Napoleon, and English Law.*

The Romans and other nations which incorporated the Civil with their municipal laws have wisely provided securities against fabricated adoptions.

By the Civil Law the sanction of the Magistrates was essential to the validity of the adoption of an infant; these Magistrates regarding the circumstances of the person proposing to adopt, and those of the child that he was desirous of adopting, being authorised to decide whether the adoption would be to the advantage of the latter.

By the Code de Napoleon, adoptions must be registered in the Court of first instance, and in the Imperial Court; and in the latter an opportunity is afforded to the relations of the person proposing to adopt a child, of showing that the adoption proposed ought not to be allowed, this Court having authority either to confirm or to annul any adoption.

In our own country (England), although wills are revokable, we do not allow the favoured title of heir to be set aside but by a will in writing, attested in the presence of three witnesses. (*Lord Wynford.*) SUTROOGUN SUTPUTTY *v.* SABITRA DYE. (1835) 5 W. R. 109 (P. C.) = 1 Suth. 36 (36) = 2 Knapp 287.

—*Girls—Adoption of—Validity.*

An adoption of a girl could only be made under some local, tribal or family custom, which must be proved by those who allege it (199). (*Lord Hobhouse.*) GHASITI AND NANHI JAN *v.* UNRAO JAN. (1893) 20 I. A. 193 = 21 C. 149 = 6 Sar. 370 = 52 P. R. 1893.

—Hindu Law—Adoption, *See* HINDU LAW—ADOPTION,

ADOPTION—(Cont'd.)

—Parsees—Adoption among. *See* PARSEE—ADOPTION BY.

—*Romans—Adoption by—Object of.*

The law of three children conferred advantages on Roman citizens, which induced them to adopt sons, and when they had got the honors or offices which they desired, they often turned the adopted children loose on the world again. (*Lord Wynford.*) SUTROOGUN SUTPUTTY *v.* SABITRA DYE. (1835) 5 W. R. 109 (P. C.) = 1 Suth. 36 (36) = 2 Knapp 287.

—*Roman and French laws—Who may adopt under.*

The Roman and French laws do not permit persons under fifty years of age to adopt. (*Lord Wynford.*) SUTROOGUN SUTPUTTY *v.* SABITRA DYE. (1835) 5 W. R. 109 (P. C.) = 1 Suth. 36 (37) = 2 Knapp 287.

ADVANCEMENT.

—*See* BENAMI—ADVANCEMENT.

ADVERSE POSSESSION.

—*See* LIMITATION—ADVERSE POSSESSION AND LIMITATION ACT OF 1908, ART. 142 AND ART. 144.

ADVOCATE-GENERAL.

—*Charitable trusts—Proceedings relating to—Appearance on behalf of Crown in—Right of—Order made after refusal to hear him—Validity.*

In a case in which the Supreme Court itself became the trustee of certain charities, a private individual applied to the Court praying that the charity fund might be applied in a particular way, which he said was the proper way. The Advocate-General claimed, on the part of Her Majesty's Attorney-General, a right to appear, and be heard in opposition to such application, in case he should deem it expedient; but the Supreme Court ruled that he had no right in his character of Advocate-General to be heard in respect of such an application, and made an order thereon.

Held, that that was an irregular course of proceeding, that the Advocate-General had a right to be heard, and that the order failed on account of that irregularity.

The Advocate-General was, perhaps, the only person whose duty it was to see that the Court was duly informed of those circumstances, which it was important for the Court to attend to (200). (*Lord Langdale.*) ATTORNEY-GENERAL *v.* BRODIE. (1846) 4 M. I. A. 190 = 6 Moo. P. C. 12 = 11 Jur. 137 = 1 Sar. 335.

AFFIRM AND DISAFFIRM SAME TRANSACTION—RULE AGAINST. *See* A PROBATE AND RE-PROBATE.**AFFIRMATIVE ORDER.**

—Power to make—Negative order—Power to make, if implied. *See* REGISTRATION ACT OF 1871, S. 76—APPLICATION FOR REGISTRATION.
(1876) 3 I. A. 221 (225 6) = 2 C. 131 (137).

AFGHANS.

—Jurisdiction of British Crown over—Amier's consent to exercise of—Implication of—Circumstances justifying. *See* FOREIGN JURISDICTION ACT, 1890 AND CHINA AND COREA ORDER IN COUNCIL, 1904.
(1914) 1 L. W. 989 (993).

AFRICA.

—*Ownership of property—Native law as to—Communal or family, not individual, ownership.*

AFRICA—(Contd.)

It is the characteristic of the native title that what has been called in native cases, the radical title of the Crown applies, and the right of the native is a usufructuary right, and it is a usufructuary right which extends *prima facie* to the whole family. *Prima facie* the title is the usufructuary title of the family, and whoever may be in possession of the legal title holds it with that qualification. The notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. (*Viscount Haldane.*) **SUNMONU v. DISU RAPHAEL.**

47 C. L. J. 333 = 107 I. C. 344 = 27 L. W. 824 =
A. I. R. 1927 P. C. 270 = (1927) 54 M. L. J. 394.

AGARWALAS OR AGARWALA JAINS.

—See JAINS—AGARWALA JAINS.

AGENCY COURTS.

—Proceedings before—Technical rules—Inapplicability—Substantial justice—Sufficiency.

Ganjam is situate in a remote and wild part of the Presidency of Madras, and is governed by an Officer called the Agent of the Governor of Madras, who appears to exercise both judicial and revenue authority within the District. The Courts of Justice there are not subject to the rules prescribed by the Government Regulations for the guidance of the Tribunals in more settled and civilised parts of the country; and, under such circumstances, it is not to be required or expected that the proceedings should be conducted with all the attention to technical rules which might be reasonably demanded from courts differently constituted. It is sufficient if the proceedings have been such, in point of form, as to enable each party fairly to bring forward and establish his case, and if the decision appears to be consistent with law and justice (62-3). (*Lord Kingsdown.*) **PAKALA BALAKRISHNAMA PATRULU v. SREE NARAINA MARDARAZ DEVU.** (1864) 10 M. I. A. 60 = 2 Sar. 66.

AGENT.

—See PRINCIPAL AND AGENT.

AGRAHARAM.

—Nature of.

Agraharam is a grant made to Brahmins (38). (*Sir Richard Couch.*) **MAHARAJAH MIRZA SRI ANAND v. PIDAPARTI SURIANARAYANA SASTRI.**

(1886) 13 I. A. 32 = 9 M. 307 (314) = 4 Sar. 696.

AGRA LAND REVENUE ACT XIX OF 1873.

—S. 241 (i)—Civil Court—Jurisdiction of—Absence of—Court's power to take notice of, though no plea raised. See JURISDICTION—ABSENCE OF—PLEA OF.

(1903) 30 I. A. 172 (174-5) = 25 A. 527 (531).

—Words—Revenue—Sum realizable as claim on account of—Meaning of. See AGRA LAND REVENUE ACT OF 1873, SS. 241 (I) AND 45.

(1903) 30 I. A. 172 (175-6) = 25 A. 527 (531-3).

—Ss. 241 (i) and 45—Canal dues—Moneys wrongly recovered as—Suit for recovery of—Civil Courts—Jurisdiction—Revenue—Sum realisable as—Claim on account of—Meaning of, in S. 241 (i).

The suit was against the Secretary of State for the recovery of a sum of money which the plaintiff alleged to

AGRA LAND REVENUE ACT—(Contd.)**Ss. 241 (1) and 45—(Contd.)**

have been wrongly taken from him under the head of canal dues, such canal dues not being, in fact, payable by him or his ancestors, who were the proprietors of the lands in respect of which the dues were claimed, but by the occupiers of the lands. The plaintiff's case was that the money was paid under a mistake of fact.

Held, that the claim was one arising under S. 241, Sub-S. (i) of Act XIX of 1873, over which, therefore, no Civil Court could exercise jurisdiction (176).

There is no doubt that the canal dues are realizable as revenue under S. 45 of the Northern India Canal and Drainage Act of 1873. The effect of the words "on account of any sum realizable as revenue" in S. 241, Sub-S. (i) of that Act is to make the earlier part applicable not only to revenue property so called, but also to sums realizable as revenue. The subject of the action is either a claim connected with or arising out of the collection of revenue, or else it is a claim for a sum which is realizable as revenue (175-6). (*Lord Davey.*) **RAJA BALWANT SINGH v. SECRETARY OF STATE FOR INDIA IN COUNCIL.**

(1903) 30 I. A. 172 = 25 A. 527 (531-3) =
8 C. W. N. 121 = 8 Sar. 564.

—Canal dues—Money wrongly recovered as—Suit for recovery of—Limitation. See LIMITATION ACT OF 1908, ARTS. 14, 96.

(1903) 30 I. A. 172 (173-4) = 25 A. 527 (531).

AGRA TENANCY ACT (II OF 1901) (N. W. P.).

—Policy of—Sale of Mahal—Sir lands—Agreement to relinquish—Validity.

The policy of Act II of 1901 is to secure and preserve to a proprietor whose proprietary rights in a mahal or in any portion of it are transferred otherwise than by gift or by exchange between co-sharers in the mahal a right of occupancy in his sir lands, and in the land which he has cultivated continuously for twelve years at the date of the transfer, and such right of occupancy is by the Act secured and preserved to the proprietor, who becomes by a transfer the ex-proprietor, whether he wishes it to be secured and preserved to him or not and notwithstanding any agreement to the contrary between him and the transferee. The policy of the Act is not to be defeated by any ingenious devices, arrangements, or agreements between a vendor and a vendee for the relinquishment by the vendor of his sir land or land which he has cultivated continuously for 12 years at the date of the transfer, for a reduction of purchase-money on the vendor's failing or refusing to relinquish such lands, or for the vendor being liable to a suit for breach of contract on his failing or refusing to relinquish such lands. All such devices, arrangements and agreements are in contravention of the policy of the Act and are contrary to law and are illegal and void, and cannot be enforced by the vendee in any civil court or in any Court of Revenue. (*Sir John Edge.*) **MOTI CHAND v. KHWAJA IKRAM ULLAH KHAN.** (1916) 44 I. A. 54 = 39 A. 173 (177-8) =

21 C. W. N. 616 = 21 M. L. T. 267 = 5 L. W. 388 =
15 A. L. J. 150 = 19 Bom. L. R. 433 = 26 C. L. J. 24 =
(1917) M. W. N. 453 = 39 I. C. 454 = 32 M. L. J. 383.

—Ss. 10, 20, 83—Sale of Mahal in N.W. Provinces—Ex-proprietary rights—Agreement to surrender—Validity.

Where the proprietors of a mahal, within the meaning of the N. W. P. Tenancy Act of 1901 executed a deed by which they sold the mahal together with sir lands in their occupation and agreed to execute a deed relinquishing the latter and to pay the purchaser Rs. 16 per bigga damages in default of their giving him possession of the said lands, *held*, that the agreement was invalid as being contrary to the policy of the Act, and that the damages were not recoverable

AGRA TENANCY ACT—(Contd.)**Ss. 10, 20, 83—(Contd.)**

upon a failure to give possession of the sir lands. (*Sir John Edge.*) **MOTI CHAND v. IKRAM ULLAH KHAN.**

(1916) 44 I. A. 54 = 39 A. 173 = 21 M. L. T. 267 =

21 C. W. N. 616 = 26 C. L. J. 24 = 5 L. W. 388 =

(1917) M. W. N. 453 = 15 A. L. J. 150 =

19 Bom. L.R. 433 = 39 I. C. 454 = 32 M. L. J. 383.

—S. 79—"Land held for agricultural purposes"—*Grove if—Suit for recovery of—Limitation.*

On the death of a Hindu widow, who had held possession of the estate of her deceased husband as his heir, the appellant wrongfully took possession of a portion of it, which was a grove. In a suit brought within 12 years of the death of the widow by the respondents, the reversionary heirs of the last male owner, for the recovery of possession of the grove, the appellant contended that the property within the meaning of the Agra Tenancy Act was "land held for agricultural purposes," and that the period of limitation for a suit to recover it was, under S. 79 of that Act, six months only.

Held, affirming the H. C., that the grove in question was not "land held for agricultural purposes" within the meaning of S. 79 of the Agra Tenancy Act, and that the period of limitation prescribed by the section had no application to the suit. (*Lord Blanesburgh.*) **KESHO PRASAD SINGH v. SHEO PRAGASH OJHA.** (1924) 51 I. A. 381 (387) =

46 A. 831 = 10 O. & A. L. R. 1105 = 40 C. L. J. 461 =

A. I. R. 1924 P. C. 247 = 23 A. L. J. 168 =

27 Bom. L. R. 130 = 29 C. W. N. 606 = 21 L. W. 295 =

82 I. C. 962 = 47 M. L. J. 824.

AGREEMENT.

AGENT—COMMISSION PAYABLE TO—PROFITS SHOWN IN EMPLOYER'S BOOKS—PERCENTAGE ON.

ANTE-NUPTIAL AGREEMENT.

APPEAL—RIGHT OF—AGREEMENT RESTRAINING.

CONFIRMED CREDIT.

CONSIDERATION FOR.

CONSTRUCTION—AGENT—COMMISSION PAYABLE TO. COVENANT RUNNING WITH LAND.

COVENANT TO PAY OUT OF SHARE OF INHERITANCE IN PARTICULAR ESTATE.

DEBTOR AND CREDITOR—AGREEMENT BETWEEN—TERMINATION OF.

DECREE—RELIEF NOT AWARDED BY, AND OBTAINABLE ONLY BY FRESH SUIT—AGREEMENT BY JUDGMENT-DEBTOR TO GIVE IN EXECUTION.

EXECUTED AGREEMENT—SUIT TO RESTRAIN ACTS DONE IN CONTRAVENTION OF—DEFENCES IN.

INHERITANCE—LEGAL COURSE OF—ALTERATION OF. INTERNATIONAL AGREEMENT.

JUDGMENT UNDER APPEAL—IGNORING OF—AGREEMENT OF PARTIES AS TO.

LAND.

LEGAL PRACTITIONER—APPEAL—RIGHT OF—AGREEMENT RESTRAINING.

LITIGATION—AGREEMENT RELATING TO SUBJECT-MATTER OF.

MEASUREMENT—LANDLORD AND TENANT.

ORAL AGREEMENT—PROOF OF.

PARTITION—AGREEMENT NOT TO EFFECT.

PERPETUITY.

SALE—RECONVEYANCE—AGREEMENT FOR.

TERMS NECESSARY FOR FAIR AND REASONABLE WORKING OF—SUPPLYING OF.

VALIDITY OF,

AGREEMENT—(Contd.)

Agent—Commission payable to—Profits shown in employer's books—Percentage on.

—Agreement for payment of—Meaning and effect of—Statement in figures of profits and losses in employer's books—Binding nature of. *See* PRINCIPAL AND AGENT—AGENT—COMMISSION PAYABLE TO—PROFITS AS SHOWN IN EMPLOYER'S BOOKS. (1927) 53 M. L. J. 278.

Ante nuptial Agreement.

—*See* ANTE-NUPTIAL AGREEMENT.

Appeal—Right of—Agreement restraining.

—*See* APPEAL—AGREEMENT RESTRAINING RIGHT OF.

Confirmed Credit.

—*Irrevocable—Use of, in reference to agreement—Effect—Contract in its strict sense.*

A confirmed credit is something, formerly provisional, and now turned into something definite by way of promise, and the word "irrevocable" simply closes the door on any option or *locus penitentiae*, and makes the agreement definite and binding—in other words, creates a true contract, which will either be performed or be broken. Neither word would carry the matter further than the word "contract", used in its strict sense (330). (*Viscount Sumner.*) **SASSOON AND SONS, LTD. v. INTERNATIONAL BANKING CORPORATION.** (1927) 54 I. A. 317 = 1 Luck. 241 = 39 M. L. T. 659 =

55 C. 1 = 107 I. C. 225 = 27 L. W. 582 =

29 Bom. L. R. 1181 = 25 A. L. J. 665 = 46 C. L. J. 61 =

(1927) M. W. N. 648 = 32 C. W. N. 30 =

96 L. J. P. C. 153 = A. I. R. 1927 P. C. 195 =

53 M. L. J. 42.

Consideration for.

—Advantage gained under agreement—Consideration apart from—Necessity. *See* AGREEMENT—VALIDITY.

(1928) 56 I. A. 104 (109).

Construction—Agent—Commission payable to.

—Profits as shown in employer's books—Percentage on—Provision for—Statement in employer's books as to profits and losses—Binding nature of. *See* PRINCIPAL AND AGENT—AGENT—COMMISSION PAYABLE TO—PROFITS AS SHOWN IN, ETC. (1927) 53 M. L. J. 278.

Covenant running with land.

—Agreement creating. *See* LAND—PRESENT ESTATE OR, ETC. (1920) 48 I. A. 376

Covenant to pay out of share of inheritance in particular estate.

—Estate insolvent and obligor inheriting nothing—Liability of obligor to pay in case of. *See* COMPROMISE—CONSTRUCTION—PAYMENT OF SUM OUT OF, ETC.

Debtor and creditor—Agreement between—Termination of.

—Right of—Partnership at will—Principles applicable to case of—Applicability of. *See* DEBTOR AND CREDITOR—AGREEMENT BETWEEN—TERMINATION OF.

(1880) 7 I. A. 83 (105) = 2 M. 239 (262-3).

Decree—Relief not awarded by, and obtainable only by fresh suit—Agreement by judgment-debtor to give in execution.

—Validity and enforceability of. *See* DECREE—RELIEF NOT AWARDED BY, AND OBTAINABLE ONLY BY FRESH SUIT. (1875) 2 I. A. 219 (233-4).

AGREEMENT—(Contd.)**Executed agreement—Suit to restrain acts done in contravention of—Defences in.**

———Fraud of plaintiff in procuring compromise if one. *See* COMPROMISE—EXECUTED COMPROMISE.
(1860) 8 M. I. A. 275 (289).

Inheritance—Legal course of—Alteration of.

———Agreement having effect of—Validity. *See* HINDU LAW—INHERITANCE—LEGAL COURSE.

International Agreement.

———*See* INTERNATIONAL AGREEMENT.

Judgment under appeal—Ignoring of—Agreement of parties as to.

———Effect of—Fact—Question of—Case involving. *See* APPEAL—FACT—JUDGMENT BELOW ON QUESTION OF.
(1928) 55 M. L. J. 248 (249).

Land.

———Covenant running with—Agreement creating. *See* LAND—PRESENT ESTATE OR INTEREST IN.
(1920) 48 I. A. 376.

———Present estate or interest in—Agreement creating. *See* LAND—PRESENT ESTATE OR INTEREST IN.
(1920) 48 I. A. 376.

Legal Practitioner—Appeal—Right of—Agreement restraining.

———Effect on party of. *See* LEGAL PRACTITIONER—APPEAL.
(1871) 14 M. I. A. 203 (206-7).

Litigation—Agreement relating to subject-matter of.

———*See* LITIGATION.

Measurement—Landlord and Tenant.

———Agreement for measurement by landlord on notice to tenant—Measurement by landlord on notice incorrect but *bona fide*—Effect. *See* LANDLORD AND TENANT—CHURLAND HELD ON HAWALDARI, ETC.
(1884) 10 C. 895.

Oral agreement—Proof of.

———Evidence of witnesses materially different as regards occurrences most striking in their nature and most likely to endure in the memory—Effect on other parts of their evidence.

When, in a case in which an oral agreement is set up, material differences are found between the parties in their recollections of occurrences, which are the most striking in their nature and the most likely to endure in the memory, they must materially impair the value of statements as to other parts of the conferences which are less likely to endure in the memory, and it would be dangerous to hold an agreement proved upon such evidence (98). (*Lord Hobhouse.*)
PEACOCK v. BYJNAUTH. (1891) 18 I. A. 78 = 18 C. 573 (602-3) = 5 Sar. 551.

Partition—Agreement not to effect.

———Validity against parties and their heirs. *See* HINDU LAW—JOINT FAMILY—PARTITION—AGREEMENT NOT TO EFFECT.
(1901) 28 I. A. 111 (118) = 23 A. 383 (391-2).

Perpetuity.

———Agreement offending against rule of—Land—Agreement to give, free of rent whenever required. *See* PERPETUITY—RULE AGAINST—AGREEMENT TO GIVE, ETC.
(1920) 48 I. A. 376 (380).

AGREEMENT—(Concl'd.)**Perpetuity—(Contd.)**

———Grant of land in—Agreement creating—What amounts to. *See* LAND—PERPETUITY—GRANT IN.
(1920) 48 I. A. 376.

Sale—Reconveyance—Agreement for.

———*See* VENDOR AND PURCHASER—RECONVEYANCE.

Terms necessary for fair and reasonable working of—Supplying of.

———Court's duty.

If the parties to a written agreement have abstained from inserting express provisions for the fair and reasonable working of their supposed agreement, the Court, which is called upon to enforce it, cannot supply them (104-5).

It is one thing for the Court to effectuate the intention of the parties to the extent to which they may have, even imperfectly, expressed themselves, and another to add to the instrument all such covenants as, upon a full consideration, the Court may deem fitting for completing the intentions of the parties, but which they, purposely or unintentionally, have omitted. The former is but the application of a rule of construction to that which is written; the latter adds to the obligations by which the parties have bound themselves, and is, of course, quite unauthorised, as well as liable to great practical injustice in the application (105). (*Sir James Colvile.*) PALLIKALAGATHA MARCAR v. SIGG.

(1880) 7 I. A. 83 = 2 M. 239 (261-2) = 3 Suth. 742 = 4 Sar. 131.

Validity of.

———Consideration apart from advantage gained under it—Necessity.

When two parties enter into an agreement, whether it be of compromise or in some other respect, each procures the advantage of the agreement from the other, and no further advantage need be looked for to support the agreement. (*Lord Pillimore.*) RAM CHARAN RAMANUJ DAS v. GOBINDA RAMANUJ DAS. (1928) 56 I. A. 104 (109) = 33 C. W. N. 346 = A. I. R. 1929 P. C. 65 = 56 M. L. J. 636.

AGRICULTURAL PURPOSES.

———Land held for—Meaning. *See* AGRA TENANCY ACT, S. 79.

AHBANS.**Ahban Thakurs in Oudh.**

———Origin of—Law governing—Mayukha.

It seems that the tribe known in Oudh as Ahban Thakurs came originally from Gujarat and settled in Oudh many centuries ago. The migration of the Ahban Thakurs took place before the Mayukha was written.

Quære.—Whether the Ahban Thakurs settled in Oudh were governed by the Mayukha. (*Lord Macnaghten.*) CHANDIKA BAKHSH v. MUNA KUAR.

(1902) 29 I. A. 70 (74-5) = 24 A. 273 (280) = 6 C. W. N. 425 = 4 Bom. L. R. 376 = 8 Sar. 233.

Law governing.

———Custom.

The parties belong to the tribe of the Ahbans, who appear to be Mahomedans, but with several customs of their own; and it would seem that their law of inheritance and their law of maintenance are tribal laws (135). (*Sir Arthur Hobhouse.*) NAJBAN BIBI v. CHAND BIBI.

(1883) 10 I. A. 133 = 10 C. 238 (240) = 13 C. L. R. 401 = 4 Sar. 472 = R. & J's. No. 74.

AHBANS—(Contd.)**Maintenance—Gift by way of.**

—Maintenance—Gift by way of—Resumption—Grantor's right of—Custom.

The question was whether a lease or gift made orally, and for indefinite duration, by one of the parties to the other, was a lease for life, or a lease or gift resumable either at the pleasure of the lessor or upon notice.

The parties belonged to the tribe of the Ahbans, who appeared to be Mahomedans, but with several customs of their own; and it appeared that their law of inheritance and their law of maintenance were tribal laws. The lessor or the donor was the mother of the lessee or donee. The mother was the talookdar of a talook containing a number of villages. The daughter married, and became a widow. For sometime she lived with her husband's family. She then quarrelled with them, and they deprived her of her share of the husband's property, upon which she came to her mother in destitute circumstances, and her mother gave her the property in question by way of maintenance.

Held, affirming the Courts below, that by the tribal custom to which the parties belonged the right of resumption existed (136). (*Sir Arthur Hobhouse.*) **NAJBAN BIBI v. CHAND BIBI.** (1883) 10 I. A. 133 =

10 C. 238 (241-2) = 13 C. L. R. 401 =
4 Sar. 472 = R. & J's No. 74.

ALIENS.**Army of His Majesty—Aliens enlisted in, along with British subjects.**

—Protection to—Jurisdiction of His Majesty over. See **ARMY—ALIENS LAWFULLY, ETC.**

(1914) 1 L. W. 989 (994).

Conquered or ceded territory—Inhabitants of.

—Relationship to new sovereign of—Not aliens.

The proposition that, upon a conquest or cession, all the inhabitants continue aliens after the change of dominion, unless and until the conqueror or purchaser grants their naturalisation is wholly untenable, for all the authorities lay it down, that upon a conquest the inhabitants *ante nati*, as well as *post nati*, of the conquered country become denizens of the conquered country; and to maintain that the conquered people become aliens to their new sovereign upon his accession to the dominion over them seems extremely absurd. (*Lord Brougham.*) **MAYOR OF THE CITY OF LYONS v. THE HON. EAST INDIA CO.**

(1836) 1 M. I. A. 175 = 1 Moo. P. C. 175 =
3 State Tr. (N. S.) 647 = 1 Sar. 107.

Real property—Capacity to hold or to transfer.

—English law as to—Inapplicability in India.

That part of the law of England, which incapacitates an alien from holding real property to his own use, and transmitting it by descent or devise, has never been introduced into India, so as to create a forfeiture of lands held in Calcutta or the mofussil by an alien, and devised by a will executed according to the Statute of Frauds, for charitable purposes (286). (*Lord Brougham.*) **MAYOR OF THE CITY OF LYONS v. THE HON. EAST INDIA CO.**

(1836) 1 M. I. A. 175 = 1 Moo. P. C. 175 =
3 State Tr. (N. S.) 647 = 1 Sar. 107.

ALIENATION.

—Forfeiture on—Condition of—Importing of—Permissibility. See **FORFEITURE—ALIENATION.**

(1881) 8 I. A. 210 (214) = 8 C. 224 (229).

ALLUVION AND DILUVION.

(N.B.—See also **BENGAL ACTS—ALLUVION AND DILUVION ACT IX OF 1847—BENGAL REGULATIONS—ALLUVION AND DILUVION REGULATION XI OF 1825.**)

ALLUVION AND DILUVION—(Contd.)**ACCRETION.**

CHUR LAND—ACCRETION OF.

ENGLISH RULE AS TO.

GRADUAL ACCRETION.

DRY LAND IN MIDSTREAM OWNED PRIVATELY.

EVIDENCE.

LAND FORMED BY.

LAW OF.

QUESTION AS TO—P. C. APPEAL.

RIPARIAN PROPRIETORS—SUDDEN CHANGE OF BOUNDARY OF RIVER—EFFECT.

RIPARIAN PROPRIETORSHIP—ISSUES. RIVER.

SUIT—NEW ACCRETION AFTER—FRESH SUIT IN RESPECT OF.

GRADUAL SLOW AND IMPERCEPTIBLE ACCRETION—WHAT CONSTITUTES.

MEANING OF.

TITLE BY, TO NEW FORMATION—BASIS OF.

ALLUVIAL LAND.

MEANING—OWNERSHIP OF.

POSSESSION OF—SUIT FOR—ONUS ON PLAINTIFF IN.

RE-FORMED LAND—ORIGINAL OWNERSHIP OF SITE OF—CLAIMS ON BASES OF—DEFENCES OPEN.

CHUR LAND.

ACCRETION OF.

CASES RELATING TO—LOCAL INVESTIGATION OF AMEEN IN.

CLAIM TO—LACHES.

MEANING OF.

NAVIGABLE RIVER—DETACHED CHUR FORMED IN MIDDLE OF A.

RE-FORMATION *in situ*.

CLAIM TO LAND ON GROUND OF—CO-SHARER IN PERMANENTLY SETTLED ESTATE—CLAIM ON GROUND OF.

EVIDENCE—PROCEEDINGS NOT *inter partes* IN RESPECT OF SAME LAND.

OWNERSHIP OF.

POSSESSION OF—SUIT FOR—ONUS ON PLAINTIFF IN.

RIVER NAVIGABLE AND TIDAL—LAND THROWN UP BY—RE-FORMATION *in situ*—ACCRETION—CLAIMS BASED ON.

SUIT FOR POSSESSION OF—ONUS ON PLAINTIFF IN. DHARDHURA CUSTOM.

DILUVIATED LAND.

ABANDONMENT OF.

ABANDONMENT OF RIGHTS IN.

RE-FORMATION OF.

SUBMERGED LAND.

Accretion.

CHUR LAND—ACCRETION OF.

—Findings concurrent as to—P.C.'s reversal of, on strength of Ameen's report not before P. C. See P. C.—PRACTICE—QUESTION OF FACT—CONCURRENT FINDINGS—REVERSAL OF—CHUR LAND.

(1875) 23 W. R. 451.

ENGLISH RULE AS TO.

—Applicability in India of.

Quære.—Whether the English rule that land to be an accretion must be formed by gradual, slow and imperceptible degrees is applicable in India (72-3). (*Lord Carson.*) **SECRETARY OF STATE FOR INDIA v. RAJA OF VIZIANAGARAM.** (1921) 49 I. A. 67 = 45 M. 207 (212-3) =

30 M. L. T. 112 = 26 C. W. N. 348 =

15 L. W. 389 = 20 A. L. J. 438 = 35 C. L. J. 463 =

(1922) M. W. N. 381 = A. I. R. 1922 P. C. 105 =

67 I. C. 1 = 42 M. L. J. 589

ALLUVION AND DILUVION—(Contd.)**Accretion—(Contd.)****ENGLISH RULE AS TO—(Contd.)**

—*Embodiment of, in Bengal Regulation XI of 1825.*

There is another principle recognised in the English law, derived from the civil law, which is this,—that where there is an acquisition of land from the sea or a river by gradual, slow, and imperceptible means, there, from the supposed necessity of the case, and the difficulty of having to determine, year by year, to whom an inch, or a foot, or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land. And the converse of that rule was, in the year 1839, held by the English courts to apply to the case of a similar wearing away of the banks of a navigable river, so that there the owner of the river gained from the land in the same way as the owner of the land had in the former case gained from the sea. To what extent that rule would be carried in this country, if there were existing certain means of identifying the original bounds of the property, by landmarks, by maps, or by a mine under the sea, or other means of that kind, has never been judicially determined (473-4).

This principle of law, so far as relates to accretion, has, to some extent, been made part of the positive written law of India, e.g., Bengal Regulation XI of 1825 (474). (*Lord Justice James.*) *LOPES v. MUDDUN MOHUN THAKOOR.*

(1870) 13 M. I. A. 467 = 14 W. R. P. C. 11 = 5 B. L. R. 521 = 2 Suth. 336 = 2 Sar. 594.

—*Nature of—"Imperceptible" in—Meaning of—"Slow" and "imperceptible"—Effect.*

Quære as to the exact meaning of the word "imperceptible" in the English rule which provides that all accretions must be "gradual, slow and imperceptible." "Slow" and "imperceptible" are only qualifications of the word "gradual," and this word with its qualifications only defines a test relative to the conditions to which it is applied (72-3). (*Lord Carson.*) *SECRETARY OF STATE FOR INDIA v. RAJAH OF VIZIANAGARAM.*

(1921) 49 I. A. 67 = 45 M. 207 (213) = 30 M. L. T. 112 = 26 C. W. N. 348 = 15 L. W. 389 = 20 A. L. J. 438 = 35 C. L. J. 463 = (1922) M. W. N. 381 = A. I. R. 1922 P. C. 105 = 67 I. C. 1 = 42 M. L. J. 589.

GRADUAL ACCRETION.*Dry land in midstream owned privately.*

—*Gradual accretion to—Suit on foot of—Sub-aqueous ownership—Claim in appeal of—Maintainability.*

The appellant sued to establish her right to a lanka which had formed in the river Godaveri on the ground that the lanka was formed by gradual accretions to her previously existing dry land in midstream. Neither in the pleadings nor in the issues settled did she put forward the claim that she was the owner of the whole bed of the river between the banks owned by her, and, therefore, of every formation of soil on that land. The question was not also tried by the trial Judge. In appeal in the H. C., the plaintiff for the first time put forward that claim.

Held, that the sub-aqueous ownership so claimed in appeal raised a totally different question, on which much evidence might and probably would have been given and that the H. C. would have been quite justified in refusing to entertain the question until raised by proper issues and evidence. (*Lord Hobhouse.*) *SRI BALSU RAMALAKSHMAMMA v. COLLECTOR OF GODAVERI.*

(1899) 26 I. A. 107 (111) = 22 M. 464 (468-9) = 3 C. W. N. 777 = 1 Bom. L. R. 696 = 7 Sar. 534.

Evidence.

—The question whether land is formed by gradual accretion depends on evidence, but it would be an error in law

ALLUVION AND DILUVION—(Contd.)**Accretion—(Contd.)****GRADUAL ACCRETION—(Contd.)**

to consider it as conclusive of that fact that the surface of the land had all been changed, and the marks all obliterated, so that no old houses, or trees, or mounds, or vestiges of boundary could be found, and that all the surface of the land was fresh land which had been brought down by the river. *PAHALWAN SINGH v. MAHARAJAH MUHESSUR BUKHSH SINGH BAHADOOR.*

(1871) 9 B. L. R. 150 (166-7) (P. C.) = 16 W. R. P. C. 5 = 2 Sar. 683 = 2 Suth. 442.

Land formed by.

—*Claim to land on foot of its being—Defence in Court below denying that it was land so gained at all—Appeal—Plea for first time in, that entire land was not gained by gradual accretion—Maintainability.*

In a suit for the recovery of land on the ground that it had, by gradual accretion, accreted to the estate of the plaintiff, *held*, that the mere fact that the defendants denied that the land had accreted at all, and pleaded that it had been caused by a sudden change in the river, and had not been caused by gradual accretion, and failed to prove their case, did not preclude them from pleading, in the alternative, that the whole of the land in dispute had not accreted to the plaintiff's land (446). *BABOO PUHLWAN SINGH v. MAHARAJAH MOHESHUR BUKSH SINGH.*

(1871) 2 Suth. 442 = 9 B. L. R. 150 = 16 W. R. 5 = 2 Sar. 683.

Ownership of.

Land formed by gradual accretion belongs to the owner of the adjacent soil (285). (*Sir William H. Maule.*) *DOE DEM—SHEBKRISTO v. EAST INDIA CO.*

(1856) 6 M. I. A. 267 = 10 Moo. P. C. 140 = 1 Sar. 540.

Law of.

—*Defendants' acts—Accretion contributed by—Applicability to case of.*

The land claimed has become land by way of gradual accretion. A question of law was raised, whether, supposing the accretion (granting it to be gradual) was one which had been contributed to, or even purposely contributed to, by the act of the defendants, that would not take the matter out of the ordinary law with respect to the accretion. The Court below thought, and we think rightly, that that made no difference. If there was a gradual accretion, which was not denied, it was one which would be dependent upon ordinary law (285). (*Sir William H. Maule.*) *DOE DEM—SHEBKRISTO v. EAST INDIA CO.*

(1856) 6 M. I. A. 267 = 10 Moo. P. C. 140 = 1 Sar. 540.

Madras—Applicability in.

There does not appear to be in Madras, as in Bengal, an express law embodying the principle that gradual accretion enures to the land which attracts it; but the rule, though unwritten, is equally well-established. (*Lord Hobhouse.*) *SRI BALSU RAMALAKSHMAMMA v. COLLECTOR OF GODAVERI.*

(1899) 26 I. A. 107 (111-2) = 22 M. 464 (469) = 3 C. W. N. 777 = 1 Bom. L. R. 696 = 7 Sar. 534.

Question as to—P. C. appeal.

—The question was as to the ownership of a certain lanka formed by alluvion in the bed of the river Godaveri. The courts below held that the lanka was formed by alluvion in contiguity with the respondents' land and was subsequently separated therefrom by the river, and gave a decree to the respondent.

ALLUVION AND DILUVION—(Contd.)**Accretion—(Contd.)****GRADUAL ACCRETION—(Contd.)***Question as to—P. C. Appeal—(Contd.)*

The Government appealed to the P. C., mainly on the ground that even if the lands in question were accretions to lands of the Maharaja the process of accretion was not such as to give him title to them. They contended that land to be an accretion must be formed by gradual, slow and imperceptible degrees as laid down in the English cases. That contention had, however, not been raised by them in the courts below. They had never suggested that the land in question "was not an accretion in the sense of a gradual formation."

Quære.—Whether under those circumstances it was open to the Government to raise that contention before the P. C. (73-4). (*Lord Carson.*) SECRETARY OF STATE FOR INDIA *v.* RAJAH OF VIZIANAGARAM. (1921) 49 I. A. 67 =

45 M. 207 (214) = 30 M. L. T. 112 =

26 C. W. N. 348 = 15 L. W. 389 = 20 A. L. J. 438 =

35 C. L. J. 463 = (1922) M. W. N. 381 =

A. I. R. 1922 P. C. 105 = 67 I. C. 1 = 42 M. L. J. 589.

Riparian proprietors—Sudden change of boundary of River—Effect.

—Regulation XI of 1825, Ss. 2 & 4, Cl. (2)—Temporary assessment of lands gradually accreted to permanent tenure—Effect.

Two zemindaries were situated, one, on the northern side, and another, on the southern side, of a river. The lands in dispute, which had become an accretion by gradual accession to the estate of the plaintiff were situated to the north of the river, at the time of the settlement with the plaintiff's father in the years 1837 and 1847 under Cl. 1 of S. 4 of Regulation XI of 1825. The latter settlement terminated in about the year 1857. In the interval, however, the river had so suddenly and completely changed its course that the lands in dispute were left on the southern side thereof, but were capable of being identified. In the year 1857, the Government settled with the defendant in respect of the lands in suit and the defendant obtained possession thereof. In a suit by the plaintiff, the owner of the zemindari on the northern side of the river, for possession of the suit lands, *held*, that, in the absence of proof of usage within the meaning of S. 2 of Regulation XI of 1825, that the river should be the boundary not only between the two districts (of plaintiff and defendant) but also between the zemindaries on either side of the river, the lands should be held to have belonged to plaintiff, he having enjoyed the same under the settlements of 1837 and 1847 continuously for 12 years, and that he was entitled to recover the same.

There is no obligation on the part of the Government to assess permanently land, which becomes an increment to an estate by gradual accession under Cl. (i) of S. 4 of Regulation XI of 1825. Nor does a temporary assessment reduce to a temporary estate, or to an estate of a limited and temporary character, the interest of the holder in the accretion which was permanent as being an increment to an estate which was permanent; but it merely fixes the period during which the increment should be subject to the revenue assessed, so that the Government at the expiration of the settlement might be at liberty to raise it according to the value of the land. (*Sir Barnes Peacock.*) RUGHOOBUR DIAL SAHOO *v.* MAHARAJAH KISHEN PERTAB SAHU.

(1879) 6 I. A. 211 = 5 C. L. R. 418 =

4 Sar. 65 = 3 Suth. 670.

* *Riparian proprietorship—Issues.*

—Onus of proof. See RIPARIAN PROPRIETORSHIP.

(1873) 20 W. R. 427.

ALLUVION AND DILUVION—(Contd.)**Accretion—(Contd.)****GRADUAL ACCRETION—(Contd.)***River.*

—Boundary of—Shifting of—Lands identified as those of defendant—Ownership of—Gradual accretion not proved. See BENGAL REGULATIONS—ALLUVION AND DILUVION REGULATION XI OF 1825, S. 4 (2).

(1905) 32 I. A. 165 (170-1) = 27 A. 655.

—Boundary of—Sudden change of—Effect—Riparian proprietors. See ALLUVION AND DILUVION—ACCRETION—GRADUAL ACCRETION—RIPARIAN PROPRIETORS.

(1879) 6 I. A. 211.

—Land gained from—Law relating to—Inapplicability to land left dry by partial recession of waters of a cheel. See RIVER—LAND GAINED FROM—LAW RELATING TO.

(1880) 7 C. L. R. 364.

—Land washed on both sides by—Ownership of. See RIVER—LAND WASHED ON BOTH SIDES BY.

(1899) 26 I. A. 107 (111-2) = 22 M. 464 (469).

—Navigable river—Land washed away and re-formed in bed of. See RIVER—NAVIGABLE RIVER—LAND WASHED AWAY, ETC. (1868) 6 M. I. A. 136 (140-1).

—Navigable and tidal river—Land thrown up by—Accretion—Re-formation *in situ*—Claims to land on ground of—Proof of. See ALLUVION AND DILUVION—CHUR—LAND—RE FORMATION *in situ*—RIVER NAVIGABLE AND TIDAL. (1872) 10 B. L. R. 406.

—Public navigable river—Accretion on either side of—Ownership of. See RIVER—PUBLIC NAVIGABLE RIVER—ACCRETION ON EITHER SIDE OF.

Suit—New accretion after—Fresh suit in respect of.

—See C. P. C. OF 1908, O. 2, R. 2—CASES UNDER—ACCRETION. (1871) 9 B. L. R. 150 (169-70).

GRADUAL, SLOW AND IMPERCEPTIBLE ACCRETION—WHAT CONSTITUTES.

—England and India—Distinction—English and Indian rivers—Conditions of—Distinction.

The words "slow" and "imperceptible" in the English rule which provides that all accretions must be "gradual, slow and imperceptible," are only qualifications of the word "gradual," and this word with its qualifications only defines a test relative to the conditions to which it is applied. In other words, the actual rate of progress necessary to satisfy the rule when used in connection with English rivers is not necessarily the same when applied to the rivers of India. The application of the rule is correctly laid down by *Ayling, J.*, when he says: "The recognition of title by alluvial accretion is largely governed by the fact that the accretion is due to the normal action of physical forces; and the conditions of Indian and English rivers differ so much that what would be abnormal and almost miraculous in the latter is normal and commonplace in the former" (72-3). (*Lord Carson.*) SECRETARY OF STATE FOR INDIA *v.* RAJA OF VIZIANAGARAM. (1921) 49 I. A. 67 =

45 M. 207 (213) = 30 M. L. T. 112 = 26 C. W. N. 348 =

15 L. W. 389 = 20 A. L. J. 438 = 35 C. L. J. 463 =

(1922) M. W. N. 381 = A. I. R. 1922 P. C. 105 =

67 I. C. 1 = 42 M. L. J. 589.

MEANING OF.

—There is an important distinction between mere physical adhesion and that "accretion" or *incrementum latens* which, by reason of its gradual and imperceptible formation, is recognised by the law as belonging to the persons

ALLUVION AND DILUVION—(Contd.)**Accretion—(Contd.)****MEANING OF—(Contd.)**

to whose land it is adjacent (427). *NOGENDER CHUNDER GHOSE v. MAHOMED ESOF.* (1872) 10 B. L. R. 406 = 18 W. R. 113 = 3 Sar. 151 = 2 Suth. 640.

TITLE BY, TO NEW FORMATION—BASIS OF.

—The title by accretion to a new formation generally is not founded on equity of compensation, but on a gradual accretion by adherence to some particular land which may be termed the nucleus of accretion. The land gained will then follow the title to that parcel to which it adheres. (*Lord Chelmsford.*) *SREE ECKOWRIE SINGH v. HEERALOLL SEAL.* (1868) 12 M. I. A. 136 (140-1) = 11 W. R. P. C. 2 = 2 B. L. R. P. C. 4 = 2 Suth. 171 = 2 Sar. 399.

Alluvial land.**MEANING—OWNERSHIP OF.**

—Alluvial land, in the sense of land gradually gained from the river, which has no other owner, belongs by way of accretion to the lands of the adjoining proprietor (405). (*Mr. Pemberton Leigh.*) *MUSSUMAT IMAM BANDI v. HURGOVIND GHOSE.* (1848) 4 M. I. A. 403 = 7 W. R. P. C. 67 = 1 Suth. 208 = 1 Sar. 371.

POSSESSION OF—SUIT FOR—ONUS ON PLAINTIFF IN.

Adverse possession—Title based on—Possession as upon dispossession—Suits on foot of—Distinction.

—The dispute was as to the ownership of alluvial land formed by the Ganges, the plaintiffs (appellants) being the proprietors of a village on the southern bank, and the defendants (respondents) the proprietors of a village on the northern bank. The current, after having encroached upon the southern bank, went away from that side of the river towards the northern, leaving the tract of alluvial land in dispute in the suit. This appeared on its previous site to the south of the main stream. It was then carried away by diluvion, and again appeared after that. The suit land was claimed by the plaintiffs, not as part of their old land, but on the strength of their having held possession, adversely and without interruption, for more than 12 years before their dispossession by the defendants by whom they alleged themselves to have been ousted within 12 years of suit.

It appeared from the evidence that after the second recession of the river towards the north, and after the re-appearance of the alluvial land on the south of the current, the land had been taken by the Government into their possession, and that the latter had made over the greater part of it to the defendants who had since held that part. It was not shown that the plaintiffs had any actual possession of the remainder.

Held, that the onus was on the plaintiffs of proving (1) that for a period of twelve years they were in possession of the land and thereby acquired title; and (2) that they brought the suit within 12 years of their dispossession by the defendants.

Held, further, that the plaintiffs had failed to prove a continuous possession for 12 years to give them title. (*Sir Edward Fry.*) *UDITNARAIN SINGH v. GOLABCHAND SAHU.* (1899) 26 I. A. 236 = 27 C. 221 = 7 Sar. 628.

—*Dispossession—Suit based on—Evidence of possession—Survey officers—Reports of—Value of.*

In a suit to recover certain chur lands claimed by the plaintiff as being identical with those covered by a Magistrate's order confirmed by the decree of the Civil Court of the year 1852, the plaintiff alleged that he, having been in possession of the lands, was shortly after the decree of 1852 dispossessed of the same by the defendant, as a sequel or a consequence of certain measurements which had been made

ALLUVION AND DILUVION—(Contd.)**Alluvial land—(Contd.)****POSSESSION OF—SUIT FOR—ONUS ON PLAINTIFF IN—(Contd.)**

by the surveying officers of the Government which resulted in the lands being measured into the defendant's mouzah.

Held, (1) that the onus lay on the plaintiff of proving that the suit lands were identical with those of which he was put into possession by the Magistrate's order;

(2) that, in questions of the kind raised in the case, where the natural boundaries and landmarks had disappeared, and where there were no fences to mark what was the extent of the property, evidence of possession was very important and very satisfactory;

(3) that the proceedings on the survey were entitled to considerable weight on the question of possession; and

(4) that satisfactory evidence of long possession of the defendant coupled with want of proof of alleged actual dispossession on the part of the plaintiff was an important circumstance against his claim. *GIRJA KANTO CHOWDHRY v. HURRISH CHUNDER CHOWDHRY.*

(1872) 19 W. R. 114 = 5 Sar. 702 = 2 Suth. 753.

RE-FORMED LAND—ORIGINAL OWNERSHIP OF SITE OF—CLAIMS ON BASES OF—DEFENCES OPEN.

—Distinction—Claim on former basis in Courts below—Claim on latter basis in P. C. appeal—Maintainability. See P. C.—APPEAL—NEW POINT—PERMISSIBILITY—ALLUVIAL LAND. (1868) 12 M. I. A. 136 (139-40).

Chur land.**ACCRETION OF.**

—Findings concurrent as to—P. C.'s reversal of, on strength of Ameen's report not before P. C. See P. C.—PRACTICE—QUESTION OF FACT—CONCURRENT FINDINGS—REVERSAL OF—CHUR LAND.

(1875) 23 W. R. 451.

CASES RELATING TO—LOCAL INVESTIGATION OF AMEEN IN.

—*Court's duty to give effect to.*

In chur cases it is always desirable, if possible, to give effect to the local investigation made by an experienced officer, such as an Amin, upon a view of the place (262). (*Sir James W. Colville.*) *RANI SARAT SUNDARI DEBYA v. SOORJYA KANT ACHARJYA.* (1876) 3 Suth. 260 = Bald. 3.

CLAIM TO—LACHES.

—Presumption adverse from—Extent of. See LACHES—PRESUMPTION ADVERSE FROM—CHURS.

(1872) 14 M. I. A. 595 (600).

MEANING OF.

—The streams in the Gangetic delta are capricious and powerful. In the course of ages the land itself has been deposited by the river, which always carries a prodigious quantity of mud in suspension. The river comes down in flood with resistless force and throughout its various branches is constantly eroding its banks and building them up again. It crawls or races through a shifting net work of streams. Sometimes its course changes by imperceptible degrees; sometimes a broad channel will shift or a new one open in a single night. Slowly or fast it raises islands of a substantial height standing above high-water level and many-square miles in extent. Lands so thrown up are called churs (225). (*Lord Sumner.*) *SRINATH ROY v. DINABANDHU SEN.* (1914) 41 I. A. 221 = 42 C. 489 (508) = 16 M. L. T. 319 = 1 L. W. 733 = 18 C. W. N. 1217 = (1914) M. W. N. 654 = 16 Bom. L. R. 901 = 20 C. L. J. 385 = 25 I. C. 467 = 27 M. L. J. 419.

ALLUVION AND DILUVION—(Contd.)**Chur land—(Contd.)****NAVIGABLE RIVER—DETACHED CHUR FORMED
IN MIDDLE OF A.**

—Acquisition of—Proof of. See RIVER—NAVIGABLE RIVER—CHURS DETACHED, ETC.

(1868) 12 M. I. A. 136 (141-2).

—Purchaser *bona fide* of—Ejectment suit against—Onus on plaintiff in. See RIVER—NAVIGABLE RIVER—CHURS DETACHED, ETC.

(1868) 12 M. I. A. 136 (141-2).

RE-FORMATION *in situ*.

Claim to land on ground of—Co-sharer in permanently settled estate—Claim on ground of.

—Onus of proof—Partition of estate—Defence of—Onus of proof of.

The suit was to recover a chur on the ground that it was a reformation *in situ* of plaintiffs' diluviated and permanently settled estate, pergunnah L. She succeeded in proving that the suit lands were the original site of her said estate, as it existed at the time of the Permanent Settlement. The High Court considered that that was not sufficient to entitle plaintiff to obtain a decree, because the pergunnah was partitioned in 1839 and different mouzahs or parts of mouzahs fell to the shares of the different co-sharers and accordingly the parties went to trial, not upon the broad issue, whether the disputed lands were reformations in the original site of the pergunnah but upon the narrower issue whether they were reformations on the original site of certain specified taraps, and that it lay upon the plaintiff to make out the affirmative of that issue.

Held, reversing the decision of the High Court, that the failure of the plaintiff to identify the shares of those taraps should not be regarded as fatal to her case.

The defendant in his written statement did not traverse the allegation of the plaintiff's title to be a co-sharer of the estate and did not mention the alleged partition, and no issue was directed either to the plaintiff's title or to the partition. The plaintiff should be treated as having a *prima facie* title as co-sharer in every part of the permanently settled estate of L which was not shown to have been alienated and no weight should be attached to a suggestion not made in the court of the first instance, where it might have been explained and met by evidence (567-8). (*Lord Davey*.) RANI HEMANTA KUMARI DEBI *v.* SECRETARY OF STATE FOR INDIA. (1906) 3 C. L. J. 560 = 1 M. L. T. 175.

Evidence—Proceedings not inter partes in respect of same land.

—Ameen's map and decrees in—Admissibility and value of.

The two appellants instituted two suits against Government and Messrs. Watson & Co. to recover the whole or part of a chur on the allegations that the lands sought to be recovered were reformations *in situ* of the lands comprised in their estates. Two suits had previously been brought by the predecessors in interest of the appellants to recover the same shares in the chur from Messrs. Watson & Co. A map of the lands in dispute was prepared by an Amin and was made a part of the decrees passed in those suits.

Held, that the proceedings in the previous suits and the Amin's map therein were not evidence against the Government, which was not a party to the said suits, except for the purpose of showing the nature of the claim made and what lands were recovered in them, and explaining the decrees made (563). For that purpose (which will be found to be important) the map may be legitimately, and must neces-

ALLUVION AND DILUVION—(Contd.)**Chur land—(Contd.)****RE-FORMATION *in situ*—(Contd.)**

sarily be used, and is in fact made part of both decrees (563). (*Lord Davey*.) RANI HEMANTA KUMARI DEBI *v.* SECRETARY OF STATE FOR INDIA.

(1906) 3 C. L. J. 560 = 1 M. L. T. 175.

Ownership of.

—Where a person claiming chur land is able to make out that the land claimed is a reformation upon land which belonged to him, he will be entitled to recover it even as a plaintiff from a party in possession. *A fortiori* he is entitled to defend his possession against a party who sets up against him the law of gradual accretion (262). (*Sir James W. Colville*.) RANI SARAT SUNDARI DEBYA *v.* SOORJYA KANT ACHARJYA. (1876) 3 *Suth.* 260 = *Bald.* 3.

Possession of—Suit for—Onus on plaintiff in.

—The dispute was between the appellant and the respondent, two riparian proprietors, holding estates respectively on the opposite sides of a river, concerning certain *churs* formed in the course of that river, each of them maintaining that he was entitled to those *churs*, as appertaining to his estate.

The case of the plaintiff-appellant was, in substance, that he was the owner of a Talook called M, together with certain other persons; that his ancestors, by reason of their possession of that Talook, were entitled to two *churs* in the channel formed by the junction of two rivers; that those *churs* were, what is called diluviated, that is, covered by water, some fifty or more years before. The case of the appellant was that those *churs* had gradually reappeared, chiefly owing to a change in the course of the river; in fact, that they had re-formed upon their original sites not many years after they were diluviated.

Held, that, whether cl. (2) or clause (5) of S. 4 of Beng. Reg. XI of 1825, applied to the case, it was essential for the maintenance of the plaintiff's case to prove that the spot which he claimed was identical with that of the *chur* which he alleged to have been diluviated (603); and that he had failed to prove the lands which had reformed, if lands had reformed in the bed of the river, to have been the same as those which had belonged to his predecessors and had been diluviated (604-5). (*Sir Robert P. Collier*.) SHAM CHAND BYSACK *v.* KISHEN PROSAUD SURMA.

(1872) 14 M. I. A. 595 = 18 W. R. 4 = 2 *Suth.* 587 = 3 *Sar.* 113.

*River navigable and tidal—Land thrown up by—Reformation *in situ*—Accretion—Claims based on.*

—Proof of.

Suit in respect of a portion of *chur* land thrown up by a navigable and tidal river. The appellants, who were seeking to disturb the respondents' possession of nearly seven years' duration, and on whom the *onus* lay to show a good title to the land in dispute, claimed the lands and proved it to be a reformation on a site identified with that of lands originally included in their zemindary and afterwards swept away by the river, and were held to have a better title to it than the respondents who claimed it as an accretion to their settled *chur* but failed to prove that it was such a gradual and imperceptible accretion of *incrementum latens* as the civil law contemplates. NOGENDER CHUNDER GHOSE *v.* MAHOMED ESOF.

(1872) 10 B. L. R. 406 = 18 W. R. 113 = 3 *Sar.* 151 = 2 *Suth.* 640.

SUIT FOR POSSESSION OF—ONUS ON PLAINTIFF IN.

—Long possession with defendant. See ONUS OF PROOF—CHURLAND.

ALLUVION AND DILUVION—(Contd.)

Dhardhura custom.

—Sunnads granted in Oudh in 1859—Effect.

Where one talukdar of land in Oudh claimed from another possession of land, which had by a change in the course of the river, been transferred to its opposite bank, on the basis of the custom of Dhardhura; and where it appeared that in a previous suit between these parties, it was decided that the custom of Dhardhura was replaced by the sunnads and that the boundary to the defendant's estate was the southern bank of the old bed of the river.

Their Lordships were of opinion that the rights of the parties depended upon the sunnads granted to each party in 1859 and upon the operation of the rules of law with reference to those sunnads; and *held*, upon the construction of the decree passed in the previous suit, that the decree did not fix a hard and fast line as a boundary between the two estates but had fixed as the boundary the southern bank of the old bed of the river wherever that might be. (*Sir Arthur Hobhouse.*) THAKUR RAGHBIR SINGH v. RAJA NORINDAR BAHADUR SINGH. (1881) **Bald.** 411 = **R. & Js. No. 66 (Oudh).**

Diluviated land.

ABANDONMENT OF.

—Merger of, into public domain—Rights of old owner—Effect on.

Their Lordships, however, desire it to be understood that they do not hold that property absorbed by a Sea or a River is, under all circumstances, and after any lapse of time, to be recovered by the old owner. It may well be that it may have been so completely abandoned as to merge again, like any other derelict land, into the public domain, as part of the Sea or River of the State, and so liable to the written law as to accretion and annexation (478). (*Lord Justice James.*) LOPEZ v. MUDDUN MOHUN THAKOOR.

(1870) **13 M. I. A.** 467 = **14 W. R. P. C.** 11 = **5 B. L. R.** 521 = **2 Suth.** 336 = **2 Sar.** 594.

ABANDONMENT OF RIGHTS IN.

—Bengal Act (IX of 1847), S. 5—Application successful under—Effect of.

The proprietor may, in certain cases, be taken to have abandoned his rights in the diluviated soil.

Quare.—Whether this might not be the result of a successful application for a remission of revenue under S. 5 of Act IX of 1847 (432). NOGENDER CHUNDER GHOSE v. MAHOMED ESOF.

(1872) **10 B. L. R.** 406 = **18 W. R.** 113 = **3 Sar.** 151 = **2 Suth.** 640.

RE-FORMATION OF.

—Adverse possession of—Suit to recover land in case of—Limitation.

The right of the original proprietor to reclaim land which had been diluviated and has reappeared is subject to the claim of another landed proprietor who, after the first re-appearance of that land, has obtained adverse possession of it and has retained such possession for more than the period of limitation, namely, twelve years. (*Sir Robert Collier.*) MAHARAJAH RADHA PROSHAD SINGH v. BABOO UMBICA PERSHAD SINGH. (1879) **3 Suth.** 631 = **Bald.** 269 = **3 I. J.** 422.

—Adverse possession of—Title to reformed land acquired by—Diluviation of, subsequently—Re-appearance again of—Ownership on.

In a case in which it was found that the plaintiff had acquired an indefeasible title by adverse possession to diluviated lands re-forming on their old site, *held*, that the subsequent diluviation and re-appearance of the land could

ALLUVION AND DILUVION—(Contd.)

Diluviated land—(Contd.)

RE-FORMATION OF—(Contd.)

not defeat the title to the site which the plaintiff had previously acquired (801-802).

According to the strict doctrine in Lopez's case, it would be the plaintiff, and not the original owner of the land, who would be entitled to claim the benefit of that doctrine (801). (*Sir James W. Colville.*) RADHA PROSHAD SINGH v. RAM COOMAR SINGH. (1877) **3 C.** 796 =

1 C. L. R. 259 = **3 Suth.** 485 = **3 Sar.** 776.

—Ownership of.

The whole of the district adjoining the land in dispute, as well as that land itself, was flat, and was very liable to be covered, or washed away, by the waters of the Ganges, which river frequently changed its channel. The land in dispute was inundated about the year 1787; it remained covered with water till about 1801; it then became partially dry till, in the year 1814, it was again inundated. After that period it once again re-appeared above the surface of the water, and by the year 1820, had become very valuable land.

Held, that whoever was the owner of the land in dispute before the inundation remained the owner while it was covered with water, and after it became dry (406). (*Mr. Pemberton Leigh.*) MUSSAMAT IMAM BANDI v. HURGOVIND GHOSE. (1848) **4 M. I. A.** 403 =

7 W. R. P. C. 67 = **1 Suth.** 208 = **1 Sar.** 371.

—The plaintiff-appellant was the proprietor of a mouzah on the banks of the Ganges. By the year 1840, by reason of the continued encroachment of that river, it was wholly submerged, and it was diluviated; that is, the surface soil the culturable soil, was wholly washed away. After the lapse of some years, and after one temporary recession and re-encroachment which had occurred in the interval, the water ultimately retired, and the land, having been for some time in a state described as admitting of only temporary cultivation by hand-sowing, became hard and firm soil, capable of being cultivated in the usual manner. The plaintiff said: "This was my property. The Ganges, which swallowed it, has again yielded it up, and I claim my property, which, having been buried and lost to sight, has again re-appeared."

The defendants' contention was, that the plaintiff's land having been wholly submerged, so as to make their (the defendants') land the River boundary, the subsequent recession of the River caused a gradual accession to their land, and an increment by annexation to their estate, notwithstanding that the land had been re-formed on the ascertainable and ascertained site of the plaintiff's mouzah. The defendants relied upon cl. 1 of S. 4 of Regulation XI of 1825.

Not only did the parties themselves take the proper, prudent and honest means of preventing the necessity of any dispute arising by inter-changing a Tanabundu, but the plaintiff, as between him and the State, did also take the most effectual means in his power (having the description and measurement of the submerged mouzah recorded, and continuing to pay rent for it) to prevent the possibility of any question of dereliction or abandonment being raised against him.

Held, reversing the High Court, that S. 4 of Regulation XI of 1825 did not govern the case, that the question fell to be determined by the general principles of equity, to which all cases not in terms provided for were referred by the 15th section, and that the property being capable of identification, the property having been the property of the plaintiff when it was submerged, never having been abandoned or derelict, having afterwards emerged from the Ganges, was still his

ALLUVION AND DILUVION—(Contd.)**Diluviated land—(Contd.)****RE-FORMATION OF—(Contd.)**

property (478). (*Lord Justice James.*) **LOPEZ v. MUDDUN MOHUN THAKOOR.** (1870) 13 M. I. A. 467 =

14 W. R. P. C. 11 = 5 B. L. R. 521 = 2 Suth. 336 = 2 Sar. 594.

———*Lopez's case—Doctrine of—Applicability—Conditions.*

Lopez's case was a case where the river first went forward, and then, after a certain number of years, came back again, and brought to the surface the ground which had been sunk. It was held that that went back to the old owner. That case has no application to one in which the question is, —has the land, by gradual accretion, been accreted to the estate of the plaintiff, the defendants not having at all raised the issue that it was their old ascertainable land, swallowed up and then restored? (445). **BABOO PUHLWAN SINGH v. MAHARAJA MOHESHUR BUKSH SINGH.**

(1871) 2 Suth. 442 = 9 B. L. R. 150 = 16 W. R. 5 = 2 Sar. 683.

———*Extent of—Reformation on original site.*

A title founded on the original ownership and identification of site is to be confined *prima facie* to the reformation on that site (433). **NOGENDER CHUNDER GHOSE v. MAHOMED ESOF.** (1872) 10 B. L. R. 406 =

18 W. R. 113 = 3 Sar. 151 = 2 Suth. 640.

———*English rule as to—Applicability of, in India.*

The rule of the English law applicable to the ownership of land which is diluviated and is afterwards reformed on the ascertainable site is this:—

If a subject hath land adjoining the Sea, and the violence of the Sea swallow it up, but so that yet there be reasonable marks to continue the notice of it; or though the marks be defaced, yet if by situation and extent of quantity and bounding up on the firm land, the same can be known, or if it be by art or industry regained, the subject doth not lose his property. If the mark remain or continue, or the extent can reasonably be certain, the case is clear. If the land be freely left again by the reflux and recess of the Sea, the owner may have his land as before, if he can make out where and what it was; for he cannot lose his propriety of the soil, although it for a time becomes part of the Sea, and within the Admiral's jurisdiction while it so continues (472-3).

This principle is one not merely of English law, not a principle peculiar to any system of Municipal law, but it is a principle founded in universal law and justice; that is to say, that whoever has land, wherever it is, whatever may be the accident to which it has been exposed whether it be a vineyard which is covered by lava or ashes from a volcano, or a field covered by the Sea or by a River, the ground, the site, the property, remains in the original owner (472-3). (*Lord Justice James.*) **LOPEZ v. MUDDUN MOHUN THAKOOR.** (1870) 13 M. I. A. 467 = 14 W. R. P. C. 11 = 5 B. L. R. 521 = 2 Suth. 336 = 2 Sar. 594.

———*Identification of reformed land possible—Effect—Permanently settled lands of an estate—Lands themselves an accretion to an estate and settled with the proprietor—Accretion to—Distinction between cases of.*

Where land which has been submerged reforms and is identified as having formed part of a particular estate, the owner of that estate is entitled to it (32).

There is no distinction in the application of this principle between the lands which were the permanently settled lands of an estate and the lands which had been in themselves an accretion, and which were temporarily settled only with the proprietor of the estate (32-3).

ALLUVION AND DILUVION—(Contd.)**Diluviated land—(Contd.)****RE-FORMATION OF—(Contd.)**

The suit was brought by the appellants, the proprietors of mouzah M, against the respondents, the proprietors of mouzah R, to recover the possession of a large quantity of land which had been submerged by the River Ganges. The river flowed between the estates of the plaintiffs and the defendants, and in its course between the two estates there were from time to time various changes. There were two or three defined channels, which at times the river overflowed, and formed a pool or lake. The land which was the subject of the suit was submerged, and when it first became free from water and re-appeared, it adhered to and adjoined the estate of R, and *prima facie* the accretion was to that estate; but upon an inquiry made by the Judge of Patna, he came to the conclusion that the submerged land, although it had reformed close to mouzah R, was, in point of fact, land which belonged to mouzah M, and that there were means by which he could identify, and did identify, the land as having been, before its diluviation, part of that mouzah.

Held, reversing the H. C., that on the above facts the appellants and not the respondents were entitled to the suit land.

The respondents sought to distinguish between the lands which were the permanently settled lands of mouzah M and some lands which had been in themselves an accretion, and which were temporarily settled only with the proprietor of M. *Held*, further, that that distinction could not prevail (32-3).

There is evidence from which it may be presumed that those lands accreted to the estate of M, and it may be inferred from the mode of accretion that the Government settled with the proprietor upon the ground that they had so accreted, and therefore that he was entitled to the settlement (33). (*Sir Montague E. Smith.*) **HURSUHAI SINGH v. SYUD LOOTF ALI KHAN.** (1874) 2 I. A. 28 =

14 B. L. R. 268 = 3 Sar. 411 = 23 W. R. 8 = 3 Suth. 56.

———*Proof of—Onus—Quantum—Evidence of identity—Thak and survey maps—Value of.*

Where the question was whether certain specific plots or chunks of chur or alluvial lands comprised in a mouzah called Diar S. were reformations of the chunks which separately belonged to the plaintiffs in 1853, when that diar was surveyed and thaked, and which were depicted in the thak map then made; and where the evidence was reasonably sufficient to establish the identity of the sites of the two lands, *held*, that the plaintiffs were entitled to the reformed lands, that the onus was not on them to prove that the area and boundaries before diluvion were accurately represented on the thak map of that period and the sites in suit exactly corresponded therewith, and that the agreement of boundaries of the lands in suit with those in the survey map was sufficient evidence of identity. (*Sir Richard Couch.*) **MONMOHINI DEBI v. WATSON & CO.**

(1899) 27 I. A. 44 = 27 C. 336 = 4 C. W. N. 113 = 7 Sar. 562.

———*River—Public navigable river—Private property submerged by water of, and then left bare—Claim to. See RIVER—PUBLIC NAVIGABLE RIVER—PRIVATE PROPERTY SUBMERGED, ETC.* (1917) 43 I. C. 361.

———*Surface and site—Ownership of—Distinction between—Property wholly lost and absorbed and no part of surface remaining capable of identification.*

The Calcutta High Court held in one case that lands washed away and afterwards reformed on an old site, which could be clearly recognised, are not lands gained within the meaning of S. 4, Regn. XI of 1825, *viz.*, they do not become the property of the adjoining owner, but remain the

ALLUVION AND DILUVION—(Concl'd.)**Diluviated land—(Cont'd.)****RE-FORMATION OF—(Cont'd.)**

property of the original owner. In a subsequent case, however, it was held that all gradual accessions from the recess of a River or the Sea are no increment to the estate to which they are annexed without regard to the site of the increment, and a distinction was taken between the two cases; and it seems to have been considered that the former case did not apply to any case where the property was to be considered as wholly lost and absorbed, and no part of the surface remained capable of identification; where there was a complete diluviation of the usable land, and nothing but a useless site left at the bottom of the river. Their Lordships, however, are unable to assent to any such distinction between surface and site. The site is the property, and the law knows no difference between a site covered by water and a site covered by crops, provided the ownership of the site be ascertained (477-8). (*Lord Justice James.*) *LOPEZ v. MUDDUN MOHUN THAKOOR.*

(1870) 13 M. I. A. 467 = 14 W. R. P. C. 11 =
5 B. L. R. 521 = 2 Suth. 336 = 2 Sar. 594.

—Title to reformed land acquired by adverse possession or otherwise—Effect.

The doctrine in *Lopez's* case that diluviated lands, reforming on their old site, remain the property of their original owner, cannot be taken to apply to land in which, by long adverse possession or otherwise, another party has acquired an indefeasible title (800).

Where, therefore, the plaintiff relied on an alleged adverse possession for more than 12 years of the lands after their reformation, held, that the real point to be decided was whether a title had been thus acquired by the plaintiff (800). (*Sir James W. Colvile.*) *RADHA PROSHAD SINGH v. RAM COOMAR SINGH.*

(1877) 3 C. 796 =
1 C. L. R. 259 = 3 Suth. 485 = 3 Sar. 776.

Submerged land.

—See ALLUVION AND DILUVION—DILUVIATED LAND.

ALTUMGAH INAM.

—Nature of—Resumability.

An Altumgah inam means a grant in perpetuity, not resumable by the Zemindar (132). (*Dr. Lushington.*) *UNIDE RAJAH RAJE BOMMARAUZE BAHADUR v. PEMMASAMY VENKATADRY NAIDOO.*

(1858) 7 M. I. A. 128 =
4 W. R. 121 = 1 Suth. 300 = 1 Sar. 637.

AMANAT DUFTER.

—The *amanat dufter* was an office for the deposit of revenue records during the Mahomedan rule (486). (*Lord Justice Turner.*) *BENGAL GOVERNMENT v. NAWAB JAFUR HOSSEIN.*

(1854) 5 M. I. A. 467 = 1 Sar. 472.

AMARAM GRANT.**Nature of—Resumability.**

—In the absence of all evidence to the contrary, *amaram* grants are resumable at the pleasure of the Zemindar (133, 142). (*Dr. Lushington.*) *UNIDE RAJAH RAJE BOMMARAUZE BAHADUR v. PEMMASAMY VENKATADRY NAIDOO.*

(1858) 7 M. I. A. 128 =
4 W. R. 121 = 1 Suth. 300 = 1 Sar. 637.

Resumable grant—Conversion of, into perpetual grant upon a fixed payment.

—Zemindar's power of.

It is a possible case, looking at the extensive powers with which the Zemindar is invested, that the grant being

AMARAM GRANT—(Cont'd.)**Resumable grant—Conversion of, into perpetual grant upon a fixed payment—(Cont'd.)**

originally "Amaram", and resumable, might, when the military service was dispensed with, and circumstances had changed, been converted into a perpetual grant upon a fixed payment (140). (*Dr. Lushington.*) *UNIDE RAJAH RAJE BOMMARAUZE BAHADUR v. PEMMASAMY VENKATADRY NAIDOO.*

(1858) 7 M. I. A. 128 =
4 W. R. 121 = 1 Suth. 300 = 1 Sar. 637.

Resumption of.

—What amounts to.

The resumption of an *amaram* grant consists in putting an end to the grant under which the grantees held, remitting the services, and requiring them to pay the full assessment (142). (*Dr. Lushington.*) *UNIDE RAJAH RAJE BOMMARAUZE BAHADUR v. PEMMASAMY VENKATADRY NAIDOO.*

(1858) 7 M. I. A. 128 = 4 W. R. 121 =
1 Suth. 300 = 1 Sar. 637.

—Evidence of.

The law has not prescribed any particular form in which a resumption of an *amaram* grant shall take place (146).

Where there was abundant evidence that a formal instrument of resumption was executed by the Zemindar, that such resumption was publicly proclaimed, and that the grantees were allowed to retain possession, but required to pay the full assessment, held, that the grant had been duly resumed by the Zemindar, and that the grantees became liable thereafter to pay the full assessment to the Zemindar (146-7). (*Dr. Lushington.*) *UNIDE RAJAH RAJE BOMMARAUZE BAHADUR v. PEMMASAMY VENKATADRY NAIDOO.*

(1858) 7 M. I. A. 128 = 4 W. R. 121 =
1 Suth. 300 = 1 Sar. 637.

—Notice prior—Publicity—Necessity.

So long as the lands (held under an *amaram* grant) remain in the actual possession of the respondents (grantees), upon payment of a certain *kist*, and the rendering certain services, the Zemindar, though entitled to resume, was of course bound to give notice, and that in some public form (142). Justice requires that a resumption should take place with due publicity and upon reasonable notice (146). (*Dr. Lushington.*) *UNIDE RAJAH RAJE BOMMARAUZE BAHADUR v. PEMMASAMY VENKATADRY NAIDOO.*

(1858) 7 M. I. A. 128 = 4 W. R. 121 = 1 Suth. 300 =
1 Sar. 637.

AMENDMENT.**Decree.**

—See C. P. C. OF 1908, S. 152.

Judgment.

—See JUDGMENT—ALTERATION OR AMENDMENT OF.

Pleadings.

—See PRACTICE—PLEADINGS—AMENDMENT OF.

AMERICAN DECISIONS.**P. C.—Binding character of decisions on.**

—See P. C.—AMERICAN DECISIONS.

(1923) 51 I. A. 109 (121) = 48 B. 308.

Weight due to—Resort to, in cases where question is to be decided according to English law.

—See ENGLISH LAW—QUESTION TO BE DECIDED ACCORDING TO.

(1908) 19 M. L. J. 20 (28).

ANALOGY.

Legal rule—Application of—Reliance on mere analogy—Deduction from logical apprehension of principle—Oriental and occidental habits.

—See **LEGAL RULE—APPLICATION OF.**
(1921) 48 I. A. 162 (174) = 2 Lah. 40.

Positive law—Extension of, by analogy.

—See **LAW—POSITIVE LAW.**
(1876) 3 I. A. 72 (75) = 1 C. 289 (291).

Reasons founded on—Statute—Provisions positive of—Inapplicability to.

—See **STATUTE—INTERPRETATION—ANALOGIES.**
(1873) 19 W. R. 353 (P. C.).

ANNUAL VALUE OF HOUSES, ETC.

—Ascertainment of—Principle. See **ASSESSMENT—ANNUAL VALUE OF HOUSES, ETC.**
(1845) 3 M. I. A. 408.

ANNUITY.**Charge in respect of.**

GRANTEE AND HIS HEIRS—CHARGE ON ESTATE FOR.

—Validity—Perpetuity—Enforceability against grantor's successors. See **COMPROMISE—CONSTRUCTION—ANNUITY.**
(1918) 46 I. A. 64 (68-9) = 42 M. 581 (585-6).

IMMOVEABLE PROPERTY—CHARGE ON—WHAT AMOUNTS TO.

—Maintenance—Annuity granted for.

In January 1858, the widow of a former Nawab Nazim died without issue. She was a lady of great wealth and the proprietor of pergunnah G, which she had purchased in the name of one M. On her death the then Nawab Nazim claimed to succeed to all her property to the exclusion of her heirs, of whom M was one. M approached the then Nawab Nazim with a petition, dated 12—2—1858, admitting in terms the Nawab's claim, and soliciting from him an allowance for maintenance. Thereupon the Nawab passed the following order:—"Out of the properties, mehals, and zemindaries of the Begum Sahiba, deceased, let a monthly allowance of Rs. 600, besides the sum given in the report, be fixed for M, and nothing further shall be allowed to him by the Sirkar at any time or in any way."

Then after about a fortnight's interval, M executed a *ladavinama*, or agreement of disclaimer, dated 24—2—1858, in which in the most unqualified terms he renounced every claim to the property of the late Begum. Thereupon the Nawab executed the following *perwana*:—

"The late Begum Sahiba, deceased, adopted you as her son, and maintained and supported you, and she died. After the death of the deceased, you along with your children and dependents appeared before me, and made application for support and maintenance from the Sirkar. Consequently for the purpose of your support and maintenance, the sum of Co.'s Rs. 600 per mensem will be paid to you out of the *tehlil* of the Sirkar mehals. You and your heirs shall be supported and maintained one after another out of the said stipend. It is incumbent on you never to prove faithless to the Sirkar." That document was dated 25—2—1858.

Held, that neither by the order of 12—2—1858 nor by the *perwana* of 25—2—1858 was any change intended to be created in respect of the said annuity of Rs. 600 a month on any part of the Nawab's property (100).

Taking all the documents together, it is plain that no charge was contemplated by either party. The order of the 12th of February is nothing more than a mandate by the Nawab Nazim to his own officials for their convenience. The *perwana* of the 25th of February, 1858, does not even

ANNUITY—(Contd.)**Charge in respect of—(Contd.)**

IMMOVEABLE PROPERTY — CHARGE ON—WHAT AMOUNTS TO—(Contd.)

purport to charge any property. It simply says that the amount is to be paid out of the Nawab's State Treasury (100). (*Lord Macnaughten.*) **OMRAO BEGUM v. SECRETARY OF STATE FOR INDIA IN COUNCIL.**

(1892) 19 I. A. 95 = 19 C. 584 (592-3) = 6 Sar. 192.

Government Securities—Deposit into Court for payment of interest to annuitant.

—Conversion of securities and deficiency in income—Depositor's liability in case of—Conversion due to act of Court and Government.

Government securities bearing interest at 5 per cent. were deposited in Court for payment of interest thereon to certain annuitants, and the Registrar of the Court, in pursuance of notices given by the Government Agent, converted the notes into 4 per cent. papers. The conversion had the effect of reducing the amount which the annuitants were entitled to receive by one-fifth.

Held, that, though the conversion of the notes was the act of Government and of the Court, not of the parties, the appellant was liable, under his agreement, to pay the annuitants the sum originally agreed upon. **RAJAH SUTTEESH CHUNDER ROY v. SAMASOONDERY DEBIA.**

(1864) 2 W. R. 48 (P. C.) = 1 Suth. 553 = 4 Sar. 777.

Grantee and his heirs—Provision for—Collateral heirs if excluded.

—See **COMPROMISE—CONSTRUCTION—ANNUITY.**
(1918) 46 I. A. 64 (68-9) = 42 M. 581 (585-6).

Interest on—Government securities deposited into Court for payment of.

—Conversion of securities and deficiency in income—Depositor's liability in case of—Conversion act of Government and of Court. See **ANNUITY—GOVERNMENT SECURITIES.**
(1864) 2 W. R. 48 (P. C.).

ANTE-NUPTIAL AGREEMENT—PROOF OF—ORAL EVIDENCE.**Nature of, required.**

—It would be unwise to accept as proved an oral ante-nuptial agreement by a Hindu to settle property upon his wife except on the clearest and most satisfactory evidence of credible witnesses (292).

Held, reversing the appellate Court and restoring the trial Judge, that such an agreement was not proved by the plaintiff. (*Sir John Edge.*) **SURA LAKSHMIAH CHETTY v. KOTHANDARAMA PILLAI.**

(1925) 52 I. A. 286 =

48 M. 605 = 23 A. L. J. 662 = 42 C. L. J. 8 =

27 Bom. L. R. 1076 = 29 C. W. N. 1013 =

(1925) M. W. N. 717 = 3 P. L. R. 290 = 23 L. W. 138 =

A. I. R. 1925 P. C. 181 = 88 I. C. 327 = 49 M. L. J. 109.

Written evidence contemporaneous to corroborate—Necessity.

—An ante-nuptial agreement may be orally proved in an Indian case, but it would be unwise of a Judge to act in a disputed Indian case upon oral evidence that there had been an ante-nuptial agreement, which would in effect be a marriage settlement, unless there was contemporaneous written evidence to corroborate oral evidence (293). (*Sir John Edge.*) **SURA LAKSHMIAH CHETTY v. KOTHANDARAMA PILLAI.**

(1925) 52 I. A. 286 =

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APPEAL.

ABATEMENT AGAINST ONE RESPONDENT.

ACCOUNTS.

ACCOUNT BOOKS.

ADMISSION.

COURT BELOW—ADMISSION IN—POINT COVERED BY—RE-OPENING OF.

FACT—ADMISSION OF, MADE AT HEARING OF APPEAL—USE OF.

AGREEMENT TO COURT BELOW NOT TO PREFER.

AGREEMENT RESTRAINING RIGHT OF — LEGAL PRACTITIONER—ADMISSION BY.

APPEALABLE CASE—ISSUES IN—FINDINGS ON ALL.

APPELLANT—JUDGMENT UNDER APPEAL—INCORRECTNESS OF—DUTY TO SHOW.

APPELLATE COURT.

FUNCTION OF—DECREE WHICH COURT BELOW OUGHT TO HAVE PASSED—PASSING OF.

JURISDICTION TO HEAR AND DECIDE APPEAL—DECREE UNDER APPEAL DEAD BEFORE HEARING.

LOCAL VISIT—SUGGESTION AS TO—CONSENT OF COUNSEL TO—SCOPE AND EFFECT.

CIVIL COURT—DECISION OF—APPEAL FROM—DEPRIVATION OF RIGHT OF.

COMPROMISE PENDING—DECREE IN APPEAL NOT IN ACCORDANCE WITH—VALIDITY.

COMPROMISE OF SUIT BY SOME PARTIES ONLY—DECREE IN TERMS OF, AGAINST ALL—APPEAL FROM, BY PERSONS NOT PARTIES TO COMPROMISE.

CONSENT DECREE OR ORDER—APPEAL FROM.

COSTS—APPEAL AS REGARDS MERE.

COSTS OF—PRINCIPAL'S LIABILITY FOR — SUIT BROUGHT IN HIS NAME BY AGENT.

CROSS-APPEAL.

DECLARATION — DECREE GRANTING — APPEAL AGAINST—IMPERTINENT INTERVENOR.

DECLARATION IN—EFFECT OF—DUTY OF COURT BELOW TO GIVE EFFECT TO.

DECREE IN—

AFFIRMING DECREE.

FORM OF.

OPERATIVE DECREE IN CASE OF.

FINDING FAVOURABLE—DECREE ON FOOT OF—RIGHT TO.

NATURE OF—

ENGLAND—NATURE IN.

ONLY THAT WHICH COURT BELOW OUGHT TO HAVE PASSED.

DECREE UNDER.

DEFENDANTS SEVERAL—PRINCIPAL AND DERIVATIVE INTERESTS—DEFENDANTS WITH.

DISCRETION OF COURT BELOW.

EVIDENCE.

EXECUTION SALE—TIME FIXED FOR—POSTPONEMENT OF—DISCRETION OF COURT BELOW AS TO.

Ex parte DECISION IN.*Ex parte* HEARING OF.

CITATION OF AUTHORITIES IN.

COURT'S DUTY IN CASE OF.

FACT.

FAVOURABLE DECREE.

FINAL DECREE.

FINDING ADVERSE—APPEAL FROM—RIGHT OF—DECREE FAVOURABLE.

FINDING FAVOURABLE—DECREE IN APPEAL ON FOOT OF—RIGHT TO.

FINDING OF FACT.

HEARING AND DECISION OF—JURISDICTION.

APPEAL—(Contd.)

IMPERTINENT INTERVENOR.

INTERLOCUTORY ORDER—QUESTION OF, IN APPEAL FROM FINAL DECREE.

ISSUES.

JUDGMENT UNDER.

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LEGAL PRACTITIONER.

LEGAL REPRESENTATIVE—REVIVOR OF APPEAL AT INSTANCE OF.

LIMITATION—PLEA OF.

LIMITATION LAW APPLICABLE TO.

LOCAL VISIT.

MINOR—GUARDIAN—APPEAL BY — WITHDRAWAL OF, BY MINOR.

NEW POINT IN—PERMISSIBILITY.

ONUS OF PROOF.

ORIGINAL SIDE APPEAL—DIFFERENCE OF OPINION BETWEEN JUDGES' HEARING.

PARTY.

PARTIES.

PLAINTIFF-APPELLANT—DEATH OF.

PLEADINGS—AMENDMENT OF.

PLEADINGS.

PRESENTATION IN WRONG COURT—LIMITATION—DISMISSAL OF APPEAL AS BARRED BY.

REMAND IN.

RESPONDENT.

RIGHT OF.

SUIT.

UNDERTAKING TO COURT BELOW NOT TO APPEAL IN CERTAIN EVENTS—APPEAL IN BREACH OF.

VALUATION OF, FOR PURPOSES OF JURISDICTION.

WITNESSES.

Abatement against one respondent.— — — Whole appeal if abates by reason of. *See* C. P. C. OF 1908, O. 22, R. 4 (3); R. 11—PRE-EMPTION.

(1928) 56 M. L. J. 304.

Accounts.— — — *See* ACCOUNTS—APPEAL.**Account books.**— — — *See* ACCOUNT BOOKS AND EVIDENCE ACT, S. 34.**Admission.**

COURT BELOW—ADMISSION IN—POINT COVERED BY—RE-OPENING OF.

— — — Where in a suit to recover a plot of land on the ground that the plaintiff was the proprietor of the same, that the defendant was his tenant, and that the tenancy had expired, the defendant at the trial admitted that the suit land was the private land of the plaintiff and the case proceeded and was dealt with on the footing of that admission, *held*, that the High Court were in error in going behind that admission and re-opening the question whether the land was the private land of the proprietor (73). (*Sir Arthur Wilson.*) DAMODAR NARAYAN CHOUDHRI *v.* DALGLEISH. (1911) 38 I. A. 65 = 38 C. 432 (445) =

15 C. W. N. 345 = 9 M. L. T. 364 = 8 A. L. J. 441 =

13 C. L. J. 512 = 13 Bom. L. R. 396 =

9 I. C. 913 = (1911) 2 M. W. N. 182.

FACT—ADMISSION OF, MADE AT HEARING OF APPEAL—USE OF.

— — — *See* C. P. C. OF 1908, O. 41, R. 27—APPLICABILITY — — — FACT—ADMISSION OF, ETC. (1919) 12 L. W. 574.**Agreement to Court below not to prefer.**

— — — Appeal in breach of. *See* DECREE—APPEAL FROM — — — RIGHT OF—UNDERTAKING TO COURT BELOW NOT TO APPEAL IN CERTAIN EVENTS.

(1871) 14 M. I. A. 203 (206-7).

APPEAL—(Contd.)**Agreement restraining right of—Legal Practitioner—Agreement by.**

—Effect on party of. *See* LEGAL PRACTITIONER—APPEAL. (1871) 14 M. I. A. 203 (206-7).

Appealable case—Issues in—Findings on all.

—Recording of—Necessity. *See* PRACTICE—ISSUES—APPEALABLE CASES.

Appellant—Judgment under appeal—Incorrectness of—Duty to show.

—(Mr. Justice Parke.) RAJAH HARMUN CHULL SINGH *v.* KOOMAR GHUNSHIAM SINGH.

(1834) 5 W. R. 69 = 1 Suth. 4 (6) = 2 Knapp. 203 = 1 Sar. 37.

—(Sir Thomas Erskine.) RAJAH ROW VENKATA NILADRY ROW *v.* ENOOGOONTY SOORIAH.

(1834) 5 W. R. 79 = 1 Suth. 16 (17) = 1 Sar. 51 = 2 Knapp. 259.

—(Lord Brougham.) SOORIAH ROW *v.* COTAGHERY BOOCHIAH.

(1838) 2 M. I. A. 113 (124) = 5 W. R. 127 = 1 Suth. 91 = 1 Sar. 159.

—On appeal, the onus is not on the respondent to show that the judgment in his favour is right; it is for the appellant to show that it is wrong, and where and why it is wrong. (Lord Lindley.) DINOMONI CHOWDHURANI *v.* BROJO MOHINI CHOWDHURANI.

(1901) 29 I. A. 44 (34) = 29 C. 187 (199) = 6 C. W. N. 386 = 4 Bom. L. R. 167 = 8 Sar. 224 = 12 M. L. J. 83.

—(Lord Buckmaster.) MUSST. FAKRUNNISSA *v.* MOULVI-IZARUS-SADIK.

(1921) 25 C. W. N. 866 (875) = 6 I. C. 898 = 17 N. L. R. 72.

—(Lord Buckmaster.) NABAKISHORE MANDAL *v.* UPENDRA KISHORE MANDAL.

(1921) 15 L. W. 417 = 20 A. L. J. 22 = 26 C. W. N. 322 = A. I. R. 1922 P. C. 39 = 35 C. L. J. 116 =

(1922) M. W. N. 95 = 24 Bom. L. R. 346 = L. R. 3 P. C. 77 = 30 M. L. T. 234 =

3 Pat. L. T. 311 = 65 I. C. 305 = 42 M. L. J. 253 (257).

—The presumption is that the judgment below is correct, and the onus is on the appellant to show that it is wrong. (Lord Sumner.) JAMNABAI *v.* FAZALBHOY HEPTOOLA.

(1923) 18 L. W. 437 (440) = (1923) P. C. 184 = 33 M. L. T. 376 (P. C.) = 26 Bom. L. R. 189 =

40 C. L. J. 272 = 77 I. C. 355 = 47 M. L. J. 164.

Appellate Court.**FUNCTION OF—DECREE WHICH COURT BELOW OUGHT TO HAVE PASSED—PASSING OF.**

—Their Lordships, ought, upon general principles, to give now the decision which the Sudder Court (Trial Court) should have given (452). (Lord Chelmsford.) MAHARAJAH RAJENDUR KISHWUR SING BAHADOOR *v.* SHEOPURSUN MISSER. (1866) 10 M. I. A. 438 = 5 W. R. P. C. 55 = 1 Suth. 628 = 2 Sar. 174.

—The function of an appellate Court is to determine what decree the court below ought to have made. It may affirm, reverse, or vary the decree under appeal. In the first case, it leaves the original decree standing, superadding, it may be, an order for the payment of the costs of the appeal, or for interest on the amount originally decreed. In the other two cases it substitutes other relief for the relief originally given (490). (Sir James W. Colville.) KRISTO KINKUR ROY *v.* RAJAH BURRODACAUNT ROY.

(1872) 14 M. I. A. 465 = 17 W. R. 292 = 10 B. L. R. 101 = 2 Suth. 564.

APPEAL—(Contd.)**Appellate Court—(Contd.)****JURISDICTION TO HEAR AND DECIDE APPEAL—DECREE UNDER APPEAL DEAD BEFORE HEARING.**

—*See* LIMITATION ACT OF 1908, ART. 181—MORTGAGE SUIT—FINAL DECREE.

(1926) 54 I. A. 52 = 8 Lah. 253.

LOCAL VISIT—SUGGESTION AS TO—CONSENT OF COUNSEL TO—SCOPE AND EFFECT.

—Decision of appeal based on impression formed from such visit and without considering evidence in case—Propriety of. *See* APPEAL—LOCAL VISIT.

(1907) 34 I. A. 115 (124) = 31 B. 361 (392)

Civil Court—Decision of—Appeal from—Deprivation of right of.

—Statutory provision—Necessity. *See* DECREE—APPEAL FROM—RIGHT OF—CIVIL COURT.

Compromise pending—Decree in appeal not in accordance with—Validity.

—*Remedy of aggrieved party.*

After the decree of the first Court in favour of the plaintiff and before the decree of the High Court upon the appeal against that decree, one of the defendants compromised the claim against him. *Held*, that the High Court ought, according to the provisions of S. 98 of C. P. C. of 1859, to have disposed of the suit in accordance with the terms of the compromise, and that the decree of the High Court which, after referring in express terms to the compromise, dismissed the appeal, and thereby in substance upheld the decision of the first Court, was certainly not in accordance with the compromise (144).

Where, notwithstanding that the decree of the High Court was not in accordance with the terms of the compromise, the said defendant did not join in an appeal to Her Majesty in Council against it, *held*, that the decree of the High Court must stand against him, and that he must avail himself of the compromise in such manner as he might be advised, should the plaintiff endeavour to execute the decree against him (146).

If he had appealed he would have been entitled to have the suit disposed of in accordance with the compromise according to the provisions of S. 98 of Act VIII of 1859 (146). (Sir Barnes Peacock.) MUSSUMAT MULLEEKA *v.* MUSSUMAT JUMEEA.

(1872) Sup. I. A. 135 = 11 B. L. R. 375 = 5 W. R. 23 = 3 Sar. 220 = III C. G. Sup. Vol. 82 = 2 Suth. 766.

Compromise of suit by some of parties only—Decree in terms of, against all—Appeal from, by persons not parties to compromise.

—Right of. *See* MORTGAGE—SUIT TO ENFORCE—COMPROMISE OF, ETC. (1926) 52 M. L. J. 407.

Consent order or decree—Appeal from.

—*See* DECREE—APPEAL FROM—RIGHT OF—CONSENT ORDER OR DECREE.

Costs—Appeal as regards mere.

—Right of. *See* COSTS—APPEAL AS REGARDS MERE—RIGHT OF.

Costs of—Principal's liability for—Suit brought in his name by agent.

—Dismissal of, on ground of want of authority—Appeal by principal against—Dismissal of—Costs in case of. *See* PRINCIPAL AND AGENT—AGENT—SUIT IN NAME OF PRINCIPAL—DISMISSAL FOR, ETC.

(1892) 19 I. A. 135 (139) = 19 C. 678 (683).

Cross-appeal.

—*See* APPEAL—RESPONDENT—CROSS-APPEAL.

APPEAL—(Contd.)

Declaration—Decree granting—Appeal against—Impertinent intervenor.

——Right of. *See* DECLARATION—PERSON IN POSSESSION. (1916) 43 I. A. 179 = 38 A. 440.

Declaration in—Effect of—Duty of Court below to give effect to.

——Mode of doing so. *See* P. C.—APPEAL—DECLARATION IN—EFFECT. (1872) 2 Suth. 668 (677).

Decree in.

AFFIRMING DECREE—

Form of.

Operative decree in case of.

——*See* DECREE—APPEAL FROM—AFFIRMANCE ON. FINDING FAVOURABLE—DECREE ON FOOT OF—RIGHT TO.

——Appellant not willing to accept finding. *See* APPEAL—FINDING FAVOURABLE. (1815) 3 Suth. 157 (158-9).

NATURE OF—

England—Nature in.

Only that which Court below ought to have passed.

——*See* DECREE—APPEAL FROM—DECREE IN—NATURE OF.

Decree under.

——Acquiescence in—Right of appeal—Effect on. *See* DECREE—ACQUIESCENCE IN.

——Affirmance on appeal.

(1) Appellate decree in case of—Form of.

(2) Operative decree in case of.

——*See* DECREE—APPEAL FROM—AFFIRMANCE ON.

——Consent decree or order—Appeal from. *See* DECREE—CONSENT DECREE OR ORDER.

——Devolution of interest subsequent to—Reversal of decree on ground of. *See* DECREE—APPEAL FROM—REVERSAL ON—GROUNDS—EVENTS OR DEVOLUTION OF INTEREST SUBSEQUENT TO DECREE. (1862) 9 M. I. A. 287 (299-300).

——Events subsequent to—

(1) Cognizance of. *See* DECREE—APPEAL FROM—EVENTS SUBSEQUENT TO DECREE.

(2) Reversal of decree on ground of. *See* DECREE—APPEAL FROM—REVERSAL ON—GROUNDS—EVENTS OR DEVOLUTION OF INTEREST, ETC.

——Operation of—Effect on, of dismissal of appeal. *See* DECREE—APPEAL—AFFIRMANCE ON.

——Part of—Appeal from—Scope of. *See* DECREE—APPEAL FROM—PART OF DECREE.

——Reversal of. *See* DECREE—APPEAL FROM—REVERSAL ON.

——Variation of, to avoid misconception by other tribunals—Permissibility. *See* DECREE—APPEAL FROM—VARIATION OF DECREE IN, ETC.

(1862) 9 M. I. A. 287 (302).

Defendants several—Principal and derivative interests—Defendants with.

——*Finding of fact of Court below in favour of former—No appeal from—Effect of, against defendants with derivative interests only parties to appeal.*

The suit was to set aside a sale-deed in favour of the 1st defendant. The other defendants in the suit were purchasers from the 1st defendant of properties conveyed to him under that sale-deed. The trial Court declared the sale-deed to the 1st defendant to be perfectly valid as between him and the plaintiff and dismissed the suit. The plaintiff appealed against the decree dismissing his suit, making all the defendants other than the 1st defendant respondents in the appeal.

APPEAL—(Contd.)

Defendants several—Principal and derivative interests—Defendants with—(Contd.)

Held, that as, by plaintiff's failure to make the 1st defendant a respondent, there was no appeal from the finding in favour of the validity of the sale-deed to the 1st defendant, which consequently became *res judicata*, as between him and the plaintiff, the finding of the Court below that the sale-deed to the 1st defendant was good carried with it a finding that it was also good as between the plaintiff and the other defendants, and that the plaintiff could not in the appeal be allowed to question the validity of the sale to the 1st defendant. (*Sir John Wallis.*) CHOCKALINGAM CHETTY v. SEETHAI ACHE.

(1927) 55 I. A. 7 = 6 R. 29 = 27 L. W. 1 =

1928 M. W. N. 20 = 4 O. W. N. 1231 =

32 C. W. N. 281 = 47 C. L. J. 136 = I. L. T. 40 R. 18 =

30 Bom. L. R. 220 = 107 I. C. 237 = 26 A. L. J. 371 =

A. I. R. 1927 P. C. 252 = 54 M. L. J. 88.

Discretion of Court below.

——Interference with. *See* DISCRETION.

Evidence.

ADDITIONAL EVIDENCE.

DOCUMENT.

OPPORTUNITY TO ADDUCE—REFUSAL BY COURT BELOW OF—PLEA OF.

WITNESSES—CREDIBILITY OF—TRIAL JUDGE'S FINDING OF FACT BASED ON.

ACCEPTANCE OF—NECESSITY—RULE AS TO.

NON-ACCEPTANCE OF—GROUNDS.

WITNESSES—CREDIBILITY OF—TRIAL JUDGE'S OPINION AS TO.

ACCEPTANCE OF—NECESSITY—RULE AS TO.

NON-ACCEPTANCE OF—GROUNDS

WITNESSES—CROSS-EXAMINATION OF—OPPORTUNITY FOR.

WITNESSES—EVIDENCE OF—REJECTION OF—PROPRIETY.

WITNESSES—EXAMINATION OF.

ADDITIONAL EVIDENCE.

——Admission in appeal of. *See* C. P. C. OF 1908 S. 107 (d) AND C. P. C. OF 1908, O. 41, R. 27.

DOCUMENT.

——Rejection of, as not genuine, from mere inspection—Propriety—Court below relying on document. *See* EVIDENCE—DOCUMENT—REJECTION IN APPEAL OF, AS NOT GENUINE, FROM MERE INSPECTION.

(1877) 3 Suth. 414 (421).

——Secondary evidence of contents of—Admission of—Objection to—Maintainability for first time in appeal of. *See* EVIDENCE—DOCUMENT—SECONDARY EVIDENCE OF CONTENTS OF—ADMISSION OF—OBJECTION TO—APPEAL. (1915) 29 M. L. J. 307 (312).

OPPORTUNITY TO ADDUCE—REFUSAL BY COURT BELOW OF—PLEA OF.

——Maintainability—Mode of enquiry pointed out by Court below—Parties not objecting to, and not adducing evidence—Effect. *See* EVIDENCE—OPPORTUNITY TO ADDUCE—REFUSAL OF—PLEA IN APPEAL OF—MAINTAINABILITY. (1836) 1 M. I. A. 1 (18-9).

——Onus on appellant in case of. *See* EVIDENCE—OPPORTUNITY TO ADDUCE—REFUSAL OF—PLEA IN APPEAL OF—ONUS ON APPELLANT IN CASE OF.

(1836) 1 M. I. A. 1 (18).

——Proof of—Quantum necessary—Judgment of Court below directly contradicting plea. *See* EVIDENCE—OPPORTUNITY TO ADDUCE—REFUSAL OF—PLEA IN APPEAL OF—PROOF OF. (1869) 13 M. I. A. 209 (225).

APPEAL—(Contd.)**Evidence—(Contd.)****WITNESSES—CREDIBILITY OF—TRIAL JUDGE'S FINDING OF FACT BASED ON.***Acceptance of—Necessity—Rule as to.*

—See also UNDER HINDU LAW—WILL—EXECUTION—CAPACITY—DECISION AS TO—TRIAL JUDGE.

—(Lord Campbell.) DHURM DAS PANDEY v. MT. SHAMA SOONDRI DEBIAH. (1843) 3 M. I. A. 229 (239) = 6 W. R. P. C. 43 = 1 Suth. 147 = 1 Sar. 271.

—(Lord Justice Knight Bruce.) GOPEEKRIST GOSAIN v. GUNGAPERSAUD GOSSAIN.

(1854) 6 M. I. A. 53 (80) = 2 Suth. 13 = 4 W. R. 46 = 1 Sar. 493.

—Local description — Matter of — Decision of, depending upon local knowledge. (Sir William H. Maule.) DOE—DUM SHEBKRISTO v. E. I. CO.

(1856) 6 M. I. A. 267 (268) = 10 Moo. P. C. 140 = 1 Sar. 540.

—(Lord Justice Knight Bruce.) HUNOOMANPERSAUD PANDAY v. MT. BABOOEE MUNRAJ KOONWAREE.

(1856) 6 M. I. A. 393 (415) = 18 W. R. 81 = 2 Suth. 29 = 1 Sar. 552 = Sevestre 253 N.

—MT. HURMUT-OL-NISSA BEGUM v. ALLAHADIA KHAN. (1871) 17 W. R. 108 (112) = 2 Suth. 525.

—It is obvious that an opinion can be formed with much greater accuracy and certainty by those who hear the witnesses examined, and who see the papers and observe the manner in which the witnesses receive and deal with them, and give their opinion respecting them, than by those who only see the result of the inquiry when it is committed to paper; and, therefore, in all inquiries of this kind, the Court which has not the advantage of hearing the witnesses and seeing the documents must be in a position far less able to judge of the genuineness of the document which is impeached than those who heard the evidence, and saw and watched all that took place (434-5). (Sir Montague E. Smith.) DWARKA DASS v. RAI SITA RAM.

(1879) 5 C. L. R. 430 = Bald. 308.

—(Sir Arthur Wilson.) CHABILDAS LALLOOBHAI v. DAYAL MOWJI.

(1907) 34 I. A. 179 (185) = 31 Bom. 566 (582-3) = 2 M. L. T. 394 = 6 C. L. J. 674 = 11 C. W. N. 1109 = 9 Bom. L. R. 1062 = 4 A. L. J. 750 = 9 Sar. 225 = 17 M. L. J. 465.

—The dispute is one entirely of fact, and under such circumstances great weight naturally attaches to the finding of the Trial Judge. (Lord Robson.) MUSAMMAT DURGA KUNWAR v. MUSAMMAT MATHURA KUNWAR.

(1911) 15 C. W. N. 717 (720) = 10 I. C. 963 = 10 M. L. T. 216.

Fact—Simple issue of.

On appeal the whole case, including the facts are, no doubt, within the jurisdiction of the appeal court. But, generally speaking, it is undesirable to interfere with the findings of fact of the trial judge who sees and hears the witnesses and has an opportunity of noting their demeanour, especially in cases where the issue is simple and depends upon the credit which attached to one or other of conflicting witnesses. Nor should his pronouncement with respect to their credibility be put aside on a mere calculation of probabilities by the Court of Appeal. In making these observations their Lordships have no desire to restrict the discretion of the appellate Courts in India in the consideration of evidence. They only wish to point out that where the issue is simple and straightforward and the only question is which set of witnesses is to be believed the verdict of a judge trying

APPEAL—(Contd.)**Evidence—(Contd.)****WITNESSES—CREDIBILITY OF—TRIAL JUDGE'S FINDING OF FACT BASED ON—(Contd.)***Acceptance of—Necessity—Rule as to—(Contd.)*

the case should not be lightly disregarded (113). (Sir George Farwell.) BOMBAY COTTON MANUFACTURING CO., LTD. v. MOTILAL SHIVLAL.

(1915) 42 I. A. 110 = 39 B. 386 (397) =

17 M. L. T. 408 = (1915) M. W. N. 788 =

2 L. W. 521 = 17 Bom. L. R. 455 = 21 C. L. J. 528 =

19 C. W. N. 617 = 29 I. C. 229 = 28 M. L. J. 593.

—(Lord Shaw.) RAM PARKASH DAS v. ANAND DAS.

(1916) 43 I. A. 73 (83) = 43 C. 707 (722) =

33 I. C. 583 = 20 C. W. N. 802 = 14 A. L. J. 621 =

(1916) 1 M. W. N. 406 = 18 Bom. L. R. 49 =

24 C. L. J. 116 = 20 M. L. T. 267 = 3 L. W. 556 =

31 M. L. J. 71.

—In a case involving a question of fact, the decision of which depends on the reliance to be placed on the testimony of witnesses, the view of the Judge who tried the case and saw nearly all the witnesses is obviously entitled to great weight (643). (Viscount Haldane.) ADWAITYA PRASAD v. BALDEO DAS.

(1916) 20 C. W. N. 650 =

(1916) 1 M. W. N. 377 = 4 L. W. 587 =

33 I. C. 852 = 30 M. L. J. 635 (643).

—Where, in a suit for sale on a mortgage, the question was whether the debt had been truly discharged and the bond returned to the mortgagor, held, that the evidence in the litigation, taken as a whole, was of such a character and so full of doubtful statements that it could only be weighed adequately by the trial Judge who had seen the witnesses, and that as the trial Judge had formed an opinion, after seeing them, adverse to the mortgagor and the balance of probabilities lay on the side of the conclusion to which he had come, the appellate court had no sufficient reason for overruling his judgment. (Viscount Haldane.) KUNDAN LAL v. MUSAMMAT BEGAM-UN-NISSA.

(1918) 8 L. W. 233 (239-40) =

47 I. C. 337 = 22 C. W. N. 937.

—In reversing the judgment of the trial judge upon this mere question of fact, the Judges in the Court of Appeal have not given the weight which they ought to have given to the opinion he expressed upon the demeanour, intelligence, position, and character of the witnesses who were brought before him. They have attributed perjury to witnesses whom the trial Judge accepted as truthful; they have rested their judgment upon the evidence of a witness whose recollection the Judge who saw him thought was not to be relied upon. Their Lordships cannot follow the Court of Appeal in thus reviewing the findings of a learned Judge, who upon such matters was in a position to form a much better judgment than could be formed by Judges who had not had the advantage of suing the witnesses. (Lord Wrenbury.) BANUBAI FRAMJI COMMISSARIAT v. MANILAL JUGALDAS.

(1923) 18 L. W. 148 =

(1923) P. C. 62 = (1923) M. W. N. 580 =

L. R. P. C. 147 = 45 M. L. J. 242 (246).

—According to well-established rules great regard is to be paid to the findings of a Judge who has decided matters of fact deposed to by witnesses at the trial before him. (Lord Darling.) LIM YAM HONG v. LAM CHOON.

(1927) 47 C. L. J. 288 = 107 I. C. 437 =

30 Bom. L. R. 757 = A. I. R. 1928 P. C. 127 =

56 M. L. J. 88 (90).

—Held, that no sufficient reason had been shown for interfering with the finding of fact of the trial Judge, who was in a much better position to gauge the truth and value of the oral evidence than the learned Judges of the High Court.

APPEAL—(Contd.)

Evidence—(Contd.)

WITNESSES — CREDIBILITY OF — TRIAL JUDGE'S FINDING OF FACT BASED ON—(Contd.)

Acceptance of—Necessity—Rule as to—(Contd.)

(*Sir Lancelot Sanderson.*) ARUNACHALA NAYUDU v. BALAKRISHNA & CO. 47 C. L. J. 576 = 107 I. C. 349 = A. I. R. 1927 P. C. 266 (267).

—On a question of pure fact, namely, whether the signature of an attesting witness on a document was genuine, the trial Court, which had the opportunity of seeing the witnesses give their evidence, accepted their evidence and decided in favour of the genuineness of the signature. The learned Judges of the High Court, who did not see the witnesses, rejected their evidence and came to the contrary conclusion. *Held*, that there were no cogent reasons for overruling the finding of fact arrived at by the trial court. (*Sir Lancelot Sanderson.*) BHAGWAN SINGH v. UJAGAR SINGH. (1927) 27 L. W. 672 = 47 C. L. J. 189 = 107 I. C. 20 = 30 Bom. L. R. 267 = 29 Punj. L. R. 182 = 32 C. W. N. 538 = I. L. T. 40 Lah. 49 = 26 C. L. J. 553 = A. I. R. 1928 P. C. 20 = 54 M. L. J. 254 (259).

—The case resolves itself into a simple example of a charge of commercial misconduct based almost entirely on the evidence of a professed accomplice which the trial Judge, after hearing the accused and his witnesses, has found to be disproved. There is no sufficient balance of improbability to displace the trial Judge's finding as to the truth of the oral evidence. It must require very cogent proof of mistake by the trial Judge to displace his findings in such a case as that. No one doubts that where an appeal on fact lies it is within the jurisdiction of an appellate Court to reverse a finding of fact; but it is well established that such a course is only to be adopted upon very clear proof of error where the case depends upon the credibility of witnesses whom the trial Judge has seen and believed. (*Lord Atkin.*) MACDONALD v. FRED LATIMER. (1928) 29 L. W. 155 = 112 I. C. 375 (2) = A. I. R. 1929 P. C. 15.

Non-acceptance of—Grounds.

—*Agreed facts—Inference from—Demeanour of witnesses and their mode of giving evidence—Finding based on former and not on latter.*

Where, on a question of pure fact, the judgment of the trial Judge was not based on what might be called his personal observation of the demeanour and mode of giving evidence of the witnesses whom he saw but proceeded by inference from agreed facts, *held*, that such a judgment did not give very much further advantage to the Judge of first instance over the judges in the Court of Appeal. (*Lord Phillimore.*) SRIMATI TARA KUMARI v. TRIBENI PRASAD SINGH. (1928) 28 L. W. 873 = A. I. R. 1928 P. C. 306 = 56 M. L. J. 286.

—*Additional evidence before appellate Court.*

In a case in which the question was whether a mortgage was a real transaction or a sham transaction intended by the executant, who was at the time of its execution heavily involved, to be a shield to protect his property from other creditors, no documentary evidence was produced to show that money passed for the mortgage, and the only witnesses examined on the point were disbelieved by the trial Judge who held, relying mainly upon the fact of the executant being heavily indebted at the time, that the mortgage was a sham transaction. The trial Judge was not, however, aware of, and overlooked the fact that the executant had nevertheless ample surplus of assets and had therefore no need to create a fictitious mortgage. On appeal the High Court elicited this important fact and reversed the finding of the Court below. On further appeal to their Lordships it was contended that inasmuch as the trial Judge who saw the

APPEAL—(Contd.)

Evidence—(Contd.)

WITNESSES—CREDIBILITY OF — TRIAL JUDGE'S FINDING OF FACT BASED ON—(Contd.)

Non-acceptance of—Grounds—(Contd.)

witnesses who spoke to the alleged passing of consideration for the mortgage were disbelieved, his finding ought not to have been set aside by the High Court who did not see the witnesses and 42 I. A. 110 was relied upon for this contention. *Held*, that the principle of that decision did not apply to the circumstances of the present case by reason of the fact that the trial Judge was not in possession of an important piece of knowledge. (*Lord Phillimore.*) BHARAT INDU v. HAMID ALI KHAN. (1920) 47 I. A. 177 (186-7) = 42 A. 487 (496-7) = 18 A. L. J. 717 = (1920) M. W. N. 413 = 28 M. L. T. 98 = 22 Bom. L. R. 1362 = 25 C. W. N. 73 = 58 I. C. 386 = 39 M. L. J. 41.

—Duty of P. C. to accept appellate court's finding unless satisfied that it was wrong. (*Sir Arthur Wilson.*) JAGANNATH PERSHAD v. HANUMAN PERSHAD. (1909) 36 I. A. 221 (224) = 36 C. 833 (839-40) = 10 C. L. J. 74 = 13 C. W. N. 830 = 8 M. L. T. 7 = 11 Bom. L. R. 861 = 3 I. C. 465 = 19 M. L. J. 435.

—Where the High Court had an additional advantage over the trial judge, *viz.*, a witness who produced certain account books which, so far as they went, made against the case found by the trial Judge, *held*, that the High Court was justified in reversing the finding of fact of the trial judge. (*Lord Phillimore.*) BALKRISHEN alias BALLI (BANSIDHAR) v. RAMCHARAN. (1928) 56 M. L. J. 172.

—Review—Evidence fresh on—Appellate finding on review based on. RAJAH JUGGJEEBUN LALL DHUBAL DEB v. KARTICK CHUNDER BONDOPADHYA. (1875) 3 Sar. 559.

—Collision cases—Finding in—Misapprehension of questions for decision—Effect of evidence—Cases of—Distinction. See ADMIRALTY—COLLISION CASES—FACT—QUESTION OF. (1916) 31 M. L. J. 159 (160).

—Conclusion drawn from statements of witnesses erroneous—Credibility of witnesses not impeached.

While the Board always think that great weight should be given to the decision upon a question of fact by a Judge who has had the opportunity of hearing and seeing the witnesses, yet, in a case where the conclusion that is drawn from statements made by witnesses whose credibility is not impeached is a conclusion that those statements will not support, they cannot rely with the same confidence that they otherwise would upon the opinion that has been formed by the Judge who has had the advantage of hearing and seeing the witnesses first hand. (*Lord Buckmaster.*) MAUNG PO NAING v. MA ON GAING. (1917, 26th October) High Court file for 1917. (P. C. A. 85 of 1916).

—Documents—Demeanour of witnesses—Finding based on former and not on latter.

If the decision of the trial Judge had proceeded upon the impression which he had formed from the demeanour of the witnesses, as to which of them was telling the truth, it would be impossible on the material before the Board to reverse that decision. But the trial Judge did not proceed upon that principle. His judgment was not based upon his impression of the value of the evidence given by the witnesses in the witness-box, but rather from his inference from the documents which were put in evidence before him.

Their Lordships, on a consideration of the probabilities of the case, accepted the finding of the Court of Appeal which had reversed that of the trial Judge. (*The Lord Chancellor.*) BHAGAT RAM v. KHETU RAM. (1929) A. I. R. 1929 P. C. 110.

APPEAL—(Contd.)

Evidence—(Contd.)

WITNESSES—CREDIBILITY OF—TRIAL JUDGE'S
FINDING OF FACT BASED ON—(Contd.)

Non-acceptance of—Grounds—(Contd.)

———*Judge not seeing witnesses himself—Effect.*

Where, in a case which entirely depended upon questions of fact, neither of the Courts dealing with the case had the benefit of seeing the witnesses and had to appreciate the evidence recorded by another judge, *held*, that, under the circumstances, the P. C. would not attach the same importance as they otherwise would have done to the findings of fact of the trial Court, and that it was necessary that the P. C. should feel convinced that the judgment of the appellate Court was wrong before they could advise that it should be set aside. (*Lord Sinha.*) SETH MAGANMAL v. DARBARILAL CHOWDHRY. (1927) 5 O. W. N. 226 =

30 Bom. L. R. 296 = 107 I. C. 113 = 47 C. L. J. 222 =

27 L. W. 523 = I. L. T. 40 C. 124 = 24 N. L. R. 40 =

A. I. R. 1928 P. C. 39 = 54 M. L. J. 208 (212).

———*Nature of claim and proof of it required—Mistake as to—Finding based on.* (*Lord Chelmsford.*) SREE EKOWRIE SINGH v. HEERALOLL SEAL.

(1868) 12 M. I. A. 136 (143-4) = 11 W. R. P. C. 2 =

2 B. L. R. 4 = 2 Suth. 171 = 2 Sar. 399.

———*Onus of proof—Error as to—Finding vitiated by.*

The weight to be attached to the judgment of the learned judge of first instance, who saw the witnesses, is a good deal lessened by reason of his having apparently thrown the burden of proof on the wrong party (7). (*Sir Walter Phillimore.*) DWARKANATH RAI MOHAN CHAUDHURI v. RIVERS STEAM NAVIGATION CO.

(1917) 8 L. W. 4 = 20 Bom. L. R. 735 =

23 M. L. T. 376 = (1918) M. W. N. 435 =

46 I. C. 319 = 27 C. L. J. 615.

———*Probabilities—Demeanour of witnesses—Finding based on former and not on latter.*

It is quite true that the trial Judge disregarded that testimony, and, if he had based his judgment upon the matter upon the demeanour of the witness and said that he thought from her demeanour that she was lying, or that the corroboratory witness was lying, it would be another instance of what has so often been said, that a Judge who sees the witness is in a better position than a Court of appeal which does not; but that is scarcely what the learned Judge of first instance said. He did not seem to go so much upon the demeanour of the witness as upon what may be called the inherent probabilities of the story. In such a case, it is perfectly open to the High Court on appeal, on a consideration of the inherent probabilities of the story, to arrive at a different conclusion and to hold that the testimony rejected by the trial Judge ought to be accepted and acted upon. (*Viscount Dunedin.*) MAUNG KYI OH v. MA THET PON. (1926) 4 R. 513 =

(1926) M. W. N. 489 = 3 O. W. N. 735 =

94 I. C. 916 = A. I. R. 1926 P. C. 29.

———*Review—Appellate Court's finding on, based on evidence produced on review.* RAJAH JUGJEEBUN LALL v. KARTICK CHUNDER. (1875) 3 Sar. 559.

———*Speculation unsatisfactory—Finding based on, and not on evidence.* (*Lord Sumner.*) JURAWAN LAL v. BALDEO SINGH. (1918) 48 I. C. 225 = 21 O. C. 104 = 5 O. L. J. 440

WITNESSES—CREDIBILITY OF—TRIAL JUDGE'S
OPINION AS TO.

Acceptance of—Necessity—Rule as to.

———Where the whole question depends upon the credit to be given to witnesses, the known character of those witnesses, and the mode in which they gave their testimony, a tribunal sitting at a distance cannot be so competent to

APPEAL—(Contd.)

Evidence—(Contd.)

WITNESSES—CREDIBILITY OF—TRIAL JUDGE'S
OPINION AS TO—(Contd.)

Acceptance of—Necessity—Rule as to—(Contd.)

decide as the tribunal who heard the evidence and saw the witnesses. (*Sir Thomas Erskine.*) RAJAH ROW VENCATA NILADRY ROW v. ENOOGOONTY SOORIAH.

(1834) 5 W. R. 79 =

1 Suth. 16 = 1 Sar. 51 = 2 Knapp. 259.

———It is of great importance that the Judge should know the character of the parties, and it is of great advantage to the decision of the case, that it is heard by a Judge acquainted with the character of the parties produced as witnesses, who is capable, therefore, of forming an opinion upon the credit due to them (203). (*Mr. Pemberton Leigh.*) BAMUNDOS MOOKERJEA v. MUSSAMUT TARINEE. (1858) 7 M. I. A. 169 = 1 Sar. 616.

———(*Sir Richard Kindersley.*) WISE v. SUNDULOO-NISSA CHOWDRANEE. (1867) 11 M. I. A. 177 (187) =

7 W. R. P. C. 13 = 1 Suth. 667 = 2 Sar. 249.

———Where the trial Judge has discredited certain witnesses and given credit to certain other witnesses, it would be contrary to the practice of this Committee and to sound reason to say that he ought to have believed the one and disbelieved the other, unless there are very strong grounds for the conclusion that he was wrong (391). SRI KRISHNA DEVU MAHARAJALINGAM v. SRI RAMCHANDRA DEVU MAHARAJALINGAM. (1870) 5 M. J. 389.

———KHUGOWLEE SINGH v. HOSSEIN BUX KHAN.

(1871) 7 B. L. R. 673 (681) = 15 W. R. P. C. 30 =

6 M. J. 146 = 2 Sar. 645 = 2 Suth. 404.

———The trial Judge heard these witnesses. They were all examined in his presence, and it is impossible not to consider that the Judge who hears the witnesses is really the best person, and very often the only person, who can judge of the credit to be given to them, because he not only hears what they have to say, but he observes the manner in which they say it. This is especially so where the Judge is much more conversant with the general position of the persons who come before him than any Court of appeal can be. KHAJAH GONHUR ALI KHAN v. KHAJAH AHMAD KHAN. (1873) 2 Suth. 882 (884) = 20 W. R. 214.

———It is the duty of the Board upon any matter of fact upon which the testimony is conflicting to adopt the finding of the trial Judge who heard the witnesses and observed their demeanour and whose finding had been adopted by the appellate Court (259-60). (*Sir James W. Colville.*) CHEDAMBARA CHETTY v. RENGAKRISHNA MUTHU VIRA PUCHAIYA NAICKER. (1874) 1 I. A. 241 =

22 W. R. 148 = 13 B. L. R. 509 = 3 Sar. 373.

———In the case of a question as to the credibility of witnesses, a good deal of weight ought to be attached to the opinion of the trial Judge who had the opportunity of seeing and hearing the witnesses. It is difficult to come to a satisfactory conclusion on the general trustworthiness of written evidence against the opinion of a Court which had heard and seen the witnesses. (*Sir Robert Collier.*) MUSSAMAT BASMATI KOWARI v. BABOO KIRUT NARAIN SINGH.

(1880) 3 Suth. 753 (754) = Bald. 362 = 4 I. J. 362.

———The Subordinate Judge before whom the numerous witnesses who testified to these payments were examined, did not believe them; and that is a circumstance to which their Lordships attach considerable weight, especially in a case where the conclusion drawn by the Judge who saw the witnesses under examination is in accordance with all the presumptions arising from facts established beyond dispute (28). (*Lord Watson.*) COOMARI RODESHWARI v. MANROOP KOER. (1885) 13 I. A. 20 = 4 Sar. 689.

APPEAL—(Contd.)

Evidence—(Contd.)

WITNESSES—CREDIBILITY OF—TRIAL JUDGE'S
OPINION AS TO—(Contd.)*Acceptance of—Necessity—Rule as to—(Contd.)*

—The fact that the judge, who heard and saw the witnesses, disbelieved the witnesses is entitled to the utmost weight. (*Sir Arthur Wilson.*) CHANDRASANGJI HIMAT-SANGJI v. MOHANSANGJI HAMIRSANGJI.

(1906) 33 I. A. 198 (203) = 30 B. 523 (532) =
4 C. L. J. 181 = 8 Bom. L. R. 705 = 1 M. L. T. 301.

—It is always difficult for judges who have not seen and heard the witnesses to refuse to adopt the conclusions of fact of those who have; but that difficulty is greatly aggravated where the Judge who heard them has formed the opinion, not only that their inferences are unsound on the balance of probability against their story, but that they are not witnesses of truth. (*Lord Collins.*) SHUNMUGA-ROYA MUDALIAR v. MANIKKA MUDALIAR.

(1909) 36 I. A. 185 (191) = 32 M. 400 (408-9) =
6 M. L. T. 304 = 10 C. L. J. 276 =
11 Bom. L. R. 1206 = 3 I. C. 799 = 19 M. L. J. 640.

—There are cases in which, in face of the irrefragable testimony of contemporary written communications, or of a course of business, an appellate tribunal may bring their knowledge of life and business to bear and say, confidently and rightly, that evidence given about them at the trial court cannot be true, be the trial Judge's impression of the witness what it may. The present, however, is by no means such a case (274). (*Lord Sumner.*) BRITISH SOUTH AFRICA CO. v. LENNON LIM. (1915) 34 I. C. 273.

—In a case in which the question was whether a paper writing alleged to have been the last will of a lady was in fact executed by or on her behalf, the District Judge pronounced against the will. On appeal, the High Court reversed his decision and decreed that probate of the will should issue to the proponent of the will.

On further appeal, *held* by their Lordships, that the case was eminently one where the value of the proof depended upon an appreciation by the trial Judge of the credibility of the witnesses, and that there was no sufficient reason for disturbing that appreciation.

Their Lordships accordingly reversed the High Court and affirmed the trial Judge. (*Sir Lawrence Jenkins.*) BAIKUNTHA NATH CHATTORAJ v. PRASANNA MOYI DEBYA. (1922) 27 C. W. N. 797 = 9 O. & A. L. R. 501 = 72 I. C. 286 = (1922) P. C. 409 = 44 M. L. J. 699 (704).

—Where the Judge, who has seen a witness, and has heard his evidence, comes to the conclusion that the witness is credible, that is to say, a witness who to the best of his recollection intends to tell the truth, it requires circumstances of exceptional character to justify a Court of Appeal in coming to a different conclusion. It is not a question of the weight of evidence, but of the attitude and trustworthiness of the witness, and of the effect of his whole demeanour in the witness-box. (*Lord Parmoor.*) MA THAN THAN v. MA PWA THIT. (1923) 1 B. 451 = (1923) P. C. 156 = 33 M. L. T. 361 (P. C.) = 2 Bur. L. J. 260 = (1923) M. W. N. 711 = 29 C. W. N. 610 = 77 I. C. 63 = 46 M. L. J. 334 (338).

—Their Lordships are of opinion that the Court of Appeal, in disregarding the evidence of the defendant and the broker, on the question of authority, did not sufficiently bear in mind the fact that the learned trial Judge, who believed both the said witnesses, had the advantage of seeing them examined and cross-examined (312). (*Lord Carson.*) PALANIAPPA CHETTIAR v. KATHIRESAN CHETTIAR. (1925) 22 L. W. 309 = 88 I. C. 351 = A. I. R. 1925 P. C. 172.

APPEAL—(Contd.)

Evidence—(Contd.)

WITNESSES—CREDIBILITY OF—TRIAL JUDGE'S
OPINION AS TO—(Contd.)*Acceptance of—Necessity—Rule as to—(Con 1.)*

—The trial Judge, who had the opportunity of seeing the witnesses and hearing them give their evidence, was in a much better position to gauge the truth and value of the oral evidence than the learned Judges of the High Court. (*Sir Lancelot Sanderson.*) ARUNACHALA NAYUDU v. BALAKRISHNA & CO. (1927) 47 C. L. J. 576 = 107 I. C. 349 (1) = A. I. R. 1927 P. C. 266.

—Their Lordships necessarily attach much weight to the opinion of the trial Judge that the evidence of a witness was unsatisfactory. (*Lord Buckmaster.*) ANNAMALAI CHETTY v. SUBRAMANIAN CHETTY. (1928) 27 A. L. J. 9 = 6 O. W. N. 104 = 29 L. W. 91 = (1929) M. W. N. 39 = A. I. R. 1929 P. C. 1 = 56 M. L. J. 435 (438).

Account books—Interference on strength of.

The probabilities being thus balanced, the disregard which the High Court has shown to the opinion of credibility of the witnesses formed by the Judge who saw and heard them, if founded upon the accounts alone, can only be supported, if the accounts are at least nearly conclusive (187).

The accounts being in a confused state, it would be wrong to discard the view of the value of the witnesses taken by the trial Judge, because of mere deductions from these accounts (189). (*Lord Phillimore.*) DEBI RAI v. PAHLAD DAS. (1924) 21 L. W. 183 = A. I. R. 1925 P. C. 38 = 86 I. C. 251 = 6 L. R. P. C. 92.

Non-acceptance of—Grounds.

—Character or manner and demeanour of witnesses—Opinion not based upon. (*Lord Chelmsford.*) NEELKISTO DEB BURMONO v. BEERCHUNDER THAKOOR. (1869) 12 M. I. A. 523 (543) = 12 W. R. P. C. 21 = 3 B. L. R. 13 = 2 Suth. 243 = 2 Sar. 523.

—Demeanour of witnesses—Argumentative inferences from undisputed facts—Opinions based on—Distinction between cases of.

When you have to deal with a pure question of credibility of witnesses very great weight ought necessarily to be given to the judgment of the Judge who saw the witnesses.

There are, however, two ways in which one may approach the question of credibility. When the question is whether a witness is speaking the truth or not, light is thrown upon it by the demeanour of that witness in the box by the manner in which he answers questions, and by how he seems to be affected by the questions that are put to him, and so on. No doubt there the trial Judge has an advantage which cannot possibly be shared by any appellate Court. But when the views upon credibility are founded upon argumentative inferences from facts which are not disputed, then the Court of Appeal is really in just as good a situation as the Judge of first instance. (*Lord Dunedin.*) PALCHUR SANKARAREDDI v. PALCHUR MAHALAKSHMAMA. (1922) 17 L. W. 1 (3-4) = (1922) P. C. 315 = 31 M. L. T. 307 (P. C.) = 70 I. C. 949 = 27 C. W. N. 414.

—Judge who did not see and hear witnesses—Opinion of.

The Sub-Judge who decided the case had not the opportunity of seeing the witnesses who were examined in Court. When he took the case up, they had been examined already before a different Sub-Judge so that the appellate Judges were in as good a position to judge of the credibility of the witnesses, and the weight to be attached to their evidence as the learned judge of first instance. (*Lord Macnaghten.*) AMJAD ALI KHAN v. NAWAB ALI KHAN. (1906) 5 C. L. J. 1 = 9 Bom. L. R. 264 = 2 M. L. T. 477 = 17 M. L. J. 56.

APPEAL—(Contd.)**Evidence—(Contd.)****WITNESSES—CROSS-EXAMINATION OF—
OPPORTUNITY FOR.**

——Necessity—Court—Examination in appeal by. *See* EVIDENCE—WITNESSES—CROSS-EXAMINATION OF—OPPORTUNITY FOR. (1922) 17 L. W. 481 (493).

**WITNESSES—EVIDENCE OF—REJECTION OF—
PROPRIETY.**

——Discrepancy in record of evidence — Rejection on ground of—Discrepancy not put to witness. *See* EVIDENCE—WITNESSES—EVIDENCE OF—REJECTION IN APPEAL OF—PROPRIETY—DISCREPANCY IN RECORD OF EVIDENCE. (1884) 12 I. A. 23 (45) = 11 C. 301 (316).

——Evidence accepted by Court below—Rejection of—Decision of case based on probabilities and conduct of parties—Propriety. *See* EVIDENCE—WITNESSES—EVIDENCE OF—REJECTION IN APPEAL OF—PROPRIETY—EVIDENCE ACCEPTED BY COURT BELOW. (1867) 11 M. I. A. 177 (187-8).

——Independent witnesses—Rejection on ground of witnesses not being—Evidence accepted by Court below. *See* EVIDENCE—WITNESSES—EVIDENCE OF—REJECTION IN APPEAL OF—PROPRIETY—INDEPENDENT WITNESSES. (1903) 31 I. A. 38 = 26 A. 108 (116).

——Part rejected by Court below—Rejection of whole on ground of. *See* EVIDENCE—WITNESSES—EVIDENCE OF—REJECTION IN APPEAL OF—PROPRIETY—PART REJECTED BY COURT BELOW. (1904) 31 I. A. 160 (167) = 32 C. 84 (95).

——Youth of witnesses—Rejection on ground of—Evidence accepted by trial Judge. *See* EVIDENCE—WITNESSES—YOUTH OF. (1923) 45 M. L. J. 242 (245).

WITNESSES—EXAMINATION OF.

——Cross-examination—Opportunity for—Necessity—Court—Examination by. *See* EVIDENCE—WITNESSES—CROSS-EXAMINATION OF—OPPORTUNITY FOR. (1922) 17 L. W. 481 (493).

——Failure—Adverse inference from—Propriety—No such point made in Court below. *See* EVIDENCE—WITNESSES—EXAMINATION OF—FAILURE—ADVERSE INFERENCE IN APPEAL FROM. (1918) 45 I. A. 284 (287-8) = 41 A. 63 (67).

——Refusal by Court below to allow—Interference with—Application for examination made in midst of hearing. *See* EVIDENCE—WITNESSES—EXAMINATION OF—REFUSAL BY COURT BELOW TO ALLOW. (1848) 4 M. I. A. 392 (402-3).

**Execution Sale—Time fixed for—Postponement of—
Discretion of Court below as to.**

——Interference with. *See* EXECUTION SALE—TIME FIXED FOR. (1884) 12 I. A. 7 (10) = 11 C. 244 (248).

Ex parte decision in.

——Scope and effect of. *See* P. C.—APPEAL—*Ex parte* DECISION IN—SCOPE AND EFFECT OF. (1879) 6 C. L. R. 121.

Ex parte hearing of.**CITATION OF AUTHORITIES IN.**

——Legal Practitioner—Duty of. *See* LEGAL PRACTITIONER—*Ex parte* HEARING OF APPEAL. (1916) 44 I. A. 30 (34) = 44 C. 573.

COURT'S DUTY IN CASE OF.

——Where the respondent appears not, *ex necessitate* the Court must hear and determine the case upon the best consideration of its merits which the matters before the Court

APPEAL—(Contd.)**Ex parte hearing of —(Contd.)****COURT'S DUTY IN CASE OF—(Contd.)**

enable it to give (222). (*Lord Brougham.*) RAJINDER NARAIN RAE *v.* BIJAI GOVIND SING. (1839) 2 M. I. A. 181 = 1 Moo. P. C. 117 = 1 Sar. 175.

Fact.**ADMISSION OF, MADE AT HEARING OF APPEAL.
FINDING OF—REVERSAL OF.****APPELLATE COURT'S DUTY TO COME TO CLOSE
QUARTERS IN CASE OF.****CONDUCT OF DEFENDANT IN FABRICATING FALSE
DOCUMENTS — FINDING IN PLAINTIFF'S
FAVOUR BASED ALSO ON INFERENCES FROM.****EVIDENCE—FINDING BASED ON.****PROBABILITIES AND CONDUCT OF PARTIES.****WITNESSES—CREDIBILITY OF—FINDING BASED
ON.****JUDGMENT BELOW BASED ON QUESTION OF—IGNOR-
ING OF—AGREEMENT OF PARTIES AS TO.****QUESTION OF—DECISION ON, BEHIND BACK OF
PARTY AFFECTED.****QUESTION OF, ABANDONED IN COURT BELOW—RE-
OPENING OF.****STATEMENT AS TO, IN JUDGMENT BELOW.****ADMISSION OF, MADE AT HEARING OF APPEAL.**

——Use of. *See* C. P. C. OF 1908, O. 41, R. 27—APPLICABILITY—FACT—ADMISSION OF, ETC. (1919) 12 L. W. 574.

FINDING OF—REVERSAL OF.*Appellate Court's duty to come to close quarters in case of.*

——On this question of fact (as to whether the plaintiff in a suit of ejectment was in possession within 12 years of suit and was dispossessed by the defendant while so in possession), the Judge of first instance decided in favour of the plaintiff. His judgment was reversed on appeal; but the judgment of the High Court on appeal does not come to close quarters with the judgment which it reviews, and indeed never discusses or even alludes to the reasoning of the Judge of first instance. This characteristic of the judgment of the High Court seriously invalidates its authority when it is remembered that the case of the plaintiff is that, in a specified month of a specified year, she was forcibly dispossessed under circumstances graphically described. If her averments be true, the plaintiff was in possession within the period of limitation and her case is made out. That they are true the Judge of first instance has held. Yet of this crucial question in the case the High Court takes no notice whatever. (*Lord Robertson.*) RANI HEMANTA KOMARI DEBI *v.* MAHARAJAH JAGADINDRA NATH ROY BAHADOOR. (1906) 10 C. W. N. 630 = 1 M. L. T. 135 = 3 A. L. J. 363 = 8 Bom. L. R. 400 = 16 M. L. J. 272 (274).

*Conduct of defendant in fabricating false documents
—Finding in plaintiff's favour based also on
inferences from.*

——Reversal of, without considering question of genuineness of these documents—Propriety. *See* MAHOMEDAN LAW—MARRIAGE—FINDING IN FAVOUR OF. (1867) 1 M. I. A. 177 (188).

Evidence—Finding based on.

——Document—Signature in—Genuineness of—Impression formed by appellate court as to, on comparison of signature with admitted signatures—Reversal on strength of—Propriety—Impression formed without expert advice.

It is unsatisfactory and dangerous in any event to stake a decision in such a case (*i.e.*, a case involving a pure ques-

APPEAL—(Contd.)**Fact—(Contd.)****FINDING OF—REVERSAL OF—(Contd.)***Evidence—Finding based on—(Contd.)*

tion of fact on which the trial Judge has found in a particular way on a consideration of the evidence in the case) on a correct determination of the genuineness of a signature by mere comparison with admitted signatures, especially without the aid in evidence of microscopic enlargements or any expert evidence. (*Lord Atkin.*) **KESSAR BAI v. JETHABHAI.** (1928) 28 L. W. 737 = 111 I. C. 169 =

A. I. R. 1928 P. C. 277.

—*Inspection of suit document—Suspicious formed on—Reversal on ground of—Propriety—Conditions.*

In a suit to enforce a mortgage bond the defendant denied dealings with the plaintiff, and alleged that the suit bond was an entire forgery. That was his pleading and that was defendant's statement on examination as a witness in his own behalf.

The trial Court considered the evidence adduced, and held against the defendant, and gave a decree to the plaintiff. On appeal by the defendant, the appellate Court, without any fresh materials before it, and on the strength of a mere inspection of the document and of a suggestion that there was an alteration apparent in an endorsement made by the obligor of the bond, held that the bond was originally given in blank, so far as the body of it was concerned, that he had given it with a limit, limiting it to Rs. 6,200; that then it was filled up by fraud with Rs. 16,200, instead of Rs. 6,200; and that then, as connected with that, without the knowledge or assent of the defendant, there had been a fraudulent alteration of the endorsement, from Rs. 6,200 to Rs. 16,200; and that, therefore, the whole thing ought to be treated as a forgery. It accordingly reversed the decree below, and dismissed the suit.

Held, that the course followed by the appellate Court was wholly unjustifiable, and that its decree ought to be set aside.

If, upon the inspection of the document, it had appeared to the appellate Court that there was something on the face of it which required explanation, it ought to have taken or allowed fresh evidence to be taken on the points on which it had formed suspicions (690). **BHUGWAN DOSS v. HUNNOOMAN PERSHAD SAHOO.**

(1872) 5 Sar. 689 = 2 Suth. 678 = 18 W. R. 184.

—*Local visit by appellate Judges—Impression formed on—Reversal based on—Propriety—Railway passenger—Accident to—Case of.*

In a suit against a Ry. Co. for damages for personal injuries alleged to have been sustained through their negligence, the trial Judge examined the evidence adduced in the case carefully, found the plaintiff's case established, and awarded damages to the plaintiff. The plaintiff's case was that the train had overshot the platform, that at the place where the train stopped it was dark and there were no lamps; that no warning was given to the plaintiff that the train had passed the platform or that special care must be taken in descending; that the plaintiff fell heavily, and was seriously injured in consequence.

On appeal, the appellate Court also found that the train had overshot the platform, but, considering that the cause of the case was the question of light, they visited the scene of the accident after arrangements had been made to place the scene under conditions approximating as closely as possible to those which prevailed when the plaintiff met with his injuries. And from the observation of what they saw on the night of that visit the appellate Judges came to the conclusion that the accident in question was due not to defective lighting but to plaintiff's own carelessness. They did not at all con-

APPEAL—(Contd.)**Fact—(Contd.)****FINDING OF—REVERSAL OF—(Contd.)***Evidence—Finding based on—(Contd.)*

sider the evidence given at the trial. They accordingly reversed the trial Judge's decree and dismissed the suit.

Held, that the course adopted by the appellate Judges was an unprecedented chapter in appellate procedure (123); and that it was impossible to admit the legitimacy of such procedure or the soundness of such conclusions (124).

Even if the question of light could be isolated from the rest of the case, there was no ground whatever for despairing of sound results being yielded by a careful analysis of the evidence, and, in fact, this was demonstrated by the excellent judgment of the trial Judge. On the other hand, the method actually adopted is subject to the most palpable objections and fallacies (124). (*Lord Robertson.*) **KESSOWJI ISSUR v. GREAT INDIAN PENINSULA RY. CO.**

(1907) 34 I. A. 115 = 31 B. 381 (391-2) =

6 C. L. J. 5 = 11 C. W. N. 721 = 2 M. L. T. 435 =

9 Bom. L. R. 671 = 4 A. L. J. 461 =

17 M. L. J. 347.

—*Mistake of fact—Pleader's suggestion as to—Reversal on basis of—Propriety.*

In this case in which the question was as to the date of the plaintiff's birth, the Sub-Judge who tried the case came to the conclusion on the evidence that the plaintiff had failed to prove her story as to the date of her birth, and dismissed the suit. His judgment was reversed on appeal, the appellate court being influenced in its decision by a suggestion, apparently made for the first time in that court, of the legal gentlemen representing one of the parties that there had been a confusion as to dates. There was no evidence to support the suggestion which was purely a point of fact.

Held, it is very dangerous to adopt such a conclusion in a court of appeal, merely on the suggestion of the legal gentlemen representing one of the parties (5).

If the point had been put forward by the witnesses, and they had said that they had been thus misled, it might have carried weight; on the other hand it might have been displaced by cross-examination (5). (*Sir Arthur Wilson.*) **ARA BEGAM v. NANHI BEGAM.**

(1906) 34 I. A. 1 = 29 A. 29 (32-3) =

1 M. L. T. 429 = 5 C. L. J. 4 = 11 C. W. N. 130 =

9 Bom. L. R. 80 = 17 M. L. J. 32.

—*Probabilities of case—Reversal on basis of supposed—Propriety.*

In a suit upon a bond, alleged to have been executed by the defendant in favour of the plaintiffs for an amount borrowed by the former from the latter, the defendant denied the transaction of loan and impugned the suit bond as a forgery. In support of their case the plaintiffs adduced evidence which made out a strong *prima facie* case in their favour, and practically the evidence was all one way. The trial Judge believed the plaintiffs' evidence, and decreed the suit. His decision was on appeal reversed by the High Court, who dismissed the suit upon certain assumed improbabilities of the plaintiffs' case. The High Court, however, overlooked the most striking improbability of all, *viz.*, that the defendant should, if his case of fraud and forgery were true, have failed to substantiate it by his own testimony and that of his brother.

Their Lordships reversed the High Court, and restored the trial Judge, observing that, if they did not do so, they would be sanctioning a mode of decision which would be productive of the worst consequences in the administration of justice. **RUGHOOBUR DUTT CHOWDRY v. FUTTEH NARAIN CHOWDRY.** (1872) 2 Suth. 648 = 7 M. J. 311.

APPEAL—(Contd.)**Fact—(Contd.)****FINDING OF—REVERSAL OF—(Contd.)***Probabilities and conduct of parties.*

——Reversal on basis of—Propriety.

(1867) 11 M. I. A. 177 (187-8).

Witnesses—Credibility of—Finding based on.

——See APPEAL—EVIDENCE — WITNESSES—CREDIBILITY OF—TRIAL JUDGE'S FINDING BASED ON.

JUDGMENT BELOW BASED ON QUESTION OF—IGNORING OF—AGREEMENT OF PARTIES AS TO.

——Effect of.

In an appeal from a finding of fact of the trial court, the parties agreed that no reference should be made to the judgment of the trial court. *Quære* as to the technical effect which such an agreement might be deemed to have. (*Viscount Sumner.*) RAMGOPAL v. DHANJI JADHAOJI BHATIA.

(1928) 55 I. A. 299 = 55 C. 1048 = 32 C. W. N. 1117 = 30 Bom. L. R. 1389 = 28 L. W. 55 = 111 I. C. 480 = 24 N. L. R. 154 = (1928) M. W. N. 924 = 48 C. L. J. 567 = A. I. R. 1928 P. C. 200 = 55 M. L. J. 248 (249).

QUESTION OF—DECISION ON, BEHIND BACK OF PARTY AFFECTED.

——Reversal of decree on ground of. *See* P. C.—APPEAL—DECREE UNDER—REVERSAL OF—GROUNDS—FACT. (1835) 5 W. R. 100 P. C. = 1 Suth. 25 (27).

QUESTION OF, ABANDONED IN COURT BELOW—RE-OPENING OF.

——See LEGAL PRACTITIONER—FACT—ABANDONMENT, ETC. (1908) 35 I. A. 166 (172-3) = 30 A. 510 (521-2).

STATEMENT AS TO, IN JUDGMENT BELOW.

——Binding nature of.

When a Court of Justice states a fact, that fact is conclusive in the case; if a Judge at *nisi prius* states a fact, the court above will not suffer that fact to be enquired into, but takes it upon his statement. (*Lord Wynford.*) PETAMBER MANIKJEE v. MOTEECHUND MANIKJEE.

(1837) 1 M. I. A. 420 = 5 W. R. 53 (P. C.) = 1 Suth. 71 (72) = 1 Sar. 136.

——When there is a distinct statement of fact in the judgment of the High Court, their Lordships cannot go behind that statement. (*Viscount Dunedin.*) MAUNG KYI OH v. MA THET PON.

(1926) 4 R. 513 = (1926) M. W. N. 489 = 3 O. W. N. 735 = 94 I. C. 916 = A. I. R. 1926 P. C. 29.

Favourable decree.

——Appeal from—Right of. *See* DECREE—APPEAL FROM—RIGHT OF—FAVOURABLE DECREE.

——Finding adverse in—Appeal from—Right of. *See* APPEAL—FINDING ADVERSE.

——Right of party to a—Deprivation of, on light grounds—Propriety. *See* DECREE—FAVOURABLE DECREE—RIGHT OF PARTY TO A. (1927) 55 I. A. 7 = 6 R. 29.

Final decree.

——Appeal from—Interlocutory order not appealed from if may be questioned in. *See* APPEAL—INTERLOCUTORY ORDER.

Finding adverse—Appeal from—Right of—Decree favourable.

——Out of three issues in a suit, each of which went to the root of the plaintiff's case, the trial Court decided two

APPEAL—(Contd.)**Finding adverse—Appeal from—Right of—Decree favourable—(Contd.)**

against the plaintiff, and dismissed his suit with costs, while it decided the third issue, as to limitation, against the defendant. Plaintiff alone appealed against the decree, and the appellate Court reversed the finding on the issue as to limitation and dismissed his suit on the strength of that finding, though the defendant had not appealed on the issue as to limitation. On further appeal by plaintiff to the P. C. it was contended that, inasmuch as the defendant had not appealed to the Court below from the decision of the first Court on the issue as to limitation, the appellate Court had no authority to reverse the decision of the first Court on that issue. *Held*, that the appeal of the plaintiff having brought the whole cause before the appellate Court, the defendant, who had the decision in his favour, was not bound to appeal from a finding unfavourable to him on a single issue (349-50). (*Lord Kingsdown.*) PRANNATH ROY CHOWDRY v. ROOKEA BEGUM. (1859) 7 M. I. A. 323 = 4 W. R. 37 = 1 Suth. 367 = 1 Sar. 692.

——Plaintiff, the survivor of two brothers, sued the widow of his deceased brother for the recovery of possession of the property held by the deceased on the ground that the brothers were joint in estate, and that the plaintiff was entitled to the property by survivorship. The widow maintained that the brothers were separate, and claimed a widow's estate in the property of her husband. She further maintained that the question had been conclusively determined in her favour in a former suit between her and the plaintiff. The High Court determined the plea of *res judicata* in her favour and dismissed the plaintiff's suit. They also enquired into the question of fact and held that the brothers were joint in estate. From the decree dismissing his suit, the plaintiff appealed to Her Majesty in Council. The widow did not appeal against the decree, but she appealed against the finding that the brothers were joint in estate. *Held*, that the widow could not appeal against the finding that the brothers were joint in estate (34). (*Sir Robert P. Collier.*) RUN BAHADOOR SINGH v. LACHOO KOER.

(1884) 12 I. A. 23 = 11 C. 301 (306) = 4 Sar. 602.

Finding favourable—Decree in appeal on foot of—Right of.

——Appellant not willing to accept finding.

Held, that the appellant, who was not disposed to accept a finding of the Court below in his favour, was not in a position to ask for a decree based upon it in the appeal, though, if the finding was a correct one, the appellant ought to have the benefit of it in some future proceeding (158-9). KOER PORESH NARAIN ROY v. ROBERT WATSON & CO. (1875) 3 Suth. 157 = 23 W. R. 451 = 3 Sar. 504.

Finding of fact.

——See APPEAL—FACT—FINDING OF.

Hearing and decision of—Jurisdiction.

——Decree under appeal dead before hearing. *See* LIMITATION ACT OF 1908, ART. 181—MORTGAGE SUIT—FINAL DECREE. (1926) 54 I. A. 52 = 8 Lah. 253.

Impertinent intervenor.

——Title of person in possession—Declaration of—Appeal from—Right of. *See* DECLARATION—PERSON IN POSSESSION. (1916) 43 I. A. 179 = 38 A. 440.

Interlocutory order—Question of, in appeal from final decree.

——No appeal from interlocutory order.

It is not imperative upon the suitor to appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not do so, of

APPEAL—(Contd.)**Interlocutory order—Question of, in appeal from final decree—(Contd.)**

forfeiting for ever the benefit of the consideration of the appellate Court. Nothing would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing; whereby on the one hand he might be harassed with endless expense and delay, and on the other inflict upon his opponent similar calamities (302). (*Dr. Lushington.*) **MAHARAJAH MOHESHUR SINGH v. BENGAL GOVERNMENT.** (1859) 7 M. I. A. 283 = 3 W. R. 45 = 1 Suth. 325 = 1 Sar. 645.

Where an order is an interlocutory one and does not purport to dispose of the cause, the omission to appeal from it does not preclude the party aggrieved from impeaching it on appeal from the final decree (359-60). (*Sir James Colville.*) **FORBES v. AMEEROONISSA BEGUM.** (1865) 10 M. I. A. 340 = 5 W. R. 47 = 1 Suth. 621 = 2 Sar. 153.

See **ARBITRATION—AWARD—DECREE IN ACCORDANCE WITH—APPEAL AGAINST—APPOINTMENT OF ARBITRATORS.** (1865) 10 M. I. A. 413 (423).

It is not too late, on an appeal from a final decree, to raise a question as to interest decided in an interlocutory decree not appealed from (184-5). (*Lord Chelmsford.*) **SHAH MUKHUN LALL v. BABOO SREE KISHEN SINGH.** (1868) 12 M. I. A. 157 = 11 W. R. P. C. 19 = 2 B. L. R. P. C. 44 = 2 Suth. 190 = 2 Sar. 403.

Issues.

Abandonment in Court below of—Proof of—Opportunity for—Grant of. See **PRACTICE—ISSUES—ABANDONMENT IN COURT BELOW OF.**

(1923) 50 I. A. 239 (243-4) = 50 C. 929 (934-5).

Appealable case—Issues in—Findings on all—Necessity. See **PRACTICE—ISSUES—APPEALABLE CASES.**

Case raised in—Parties when confined to. See **PRACTICE—ISSUES—CASE RAISED IN.**

(1871) 14 M. I. A. 67 (71).

Form of—Defect in—Reversal of decree on ground of—Parties and Courts below treating issue as properly raised. See **P. C.—APPEAL—FACT—FINDING OF—ISSUE.** (1872) 18 W. R. 230.

Framing of—Failure—Decision on merits notwithstanding—Propriety. See **PRACTICE—ISSUES—FRAMING OF—FAILURE—DECISION ON MERITS NOTWITHSTANDING.** (1872) 14 M. I. A. 433 (442).

Objection to—Maintainability—Waiver of objection in trial Court—Failure of justice by reason of omission. See **PRACTICE—ISSUE—FRAMING OF—FAILURE—OBJECTION TO—APPEAL.** (1870) 13 M. I. A. 573 (584).

Remand on ground of. See **PRACTICE—ISSUE—FRAMING OF—FAILURE—REMAND ON GROUND OF.** (1863) 10 M. I. A. 1 (13-4).

Reversal of decree on ground of. See **PRACTICE—ISSUES—FRAMING OF—FAILURE—REVERSAL OF DECREE ON GROUND OF.**

Framing of—Reference thereof to Court below for trial—Power of. See **C. P. C. OF 1908, O. 41, R. 25—ISSUES—FRAMING OF.**

(1919) 47 I. A. 76 (83) = 43 M. 567 (575).

Framing and remitting of—Grounds—Issue actually raised too general—Parties' attention not specifically directed to question necessary to be tried. See **PRACTICE—ISSUES—APPEAL TO P. C.** (1874) 1 I. A. 268 (316).

APPEAL—(Contd.)**Issues—(Contd.)**

New issue—Framing of—Power of. See **C. P. C. OF 1908, O. 41, R. 25—ISSUE NEW—FRAMING OF—POWER OF.** (1892) 14 A. 366.

New issues—Framing of—Remand of cause for rehearing thereon—Jurisdiction. See **APPEAL—REMAND—ISSUE NEW.** (1916) 43 I. A. 172 (177-9) = 43 C. 1104 (1116).

Point not covered by—Decision of, on evidence on record—Jurisdiction. See **C. P. C. OF 1908, O. 41, R. 24—ISSUES—POINT NOT COVERED BY.**

(1885) 12 I. A. 166 (169-70) = 11 C. 239.

Judgment under.

Consent to—Withdrawal in appeal of.

It is only in special circumstances that a consent which formed the foundation of the judgment appealed from is in the Appeal Court to be treated open to withdrawal. Such an indulgence ought not to be extended as a matter of course. (*Lord Blanesburgh.*) **DIWAN CHAND KIRPA RAM & CO. v. WELD & CO.** (1925) 88 I. C. 54 = (1925) M. W. N. 459 = A. I. R. 1925 P. C. 150 (154).

Fact—Judgment on question of—Ignoring of—Agreement of parties as to—Effect. See **APPEAL—FACT—JUDGMENT BELOW ON QUESTION OF.** (1928) 55 M. L. J. 248 (249).

Statement as to—Binding nature of. See **APPEAL—FACT—STATEMENT AS TO, ETC.**

Incorrectness of—Onus on appellant to establish. See **APPEAL—APPELLANT—JUDGMENT UNDER APPEAL.**

Mistake in—Correction of—Duty to see to—Omission—Plea of mistake if can be set up in appeal. See **P. C.—APPEAL—JUDGMENT UNDER—MISTAKE IN.** (1927) 54 M. L. J. 651 (654).

Jurisdiction.

Absence of—Plea of—Maintainability for first time. See **JURISDICTION—ABSENCE OF—PLEA OF.**

Usurpation of—Order made in—Appeal from. See **JURISDICTION—USURPATION OF.**

(1882) 10 I. A. 4 (17) = 9 C. 482 (493-4).

Valuation of appeal for purposes of. See **MORTGAGE—SUIT TO ENFORCE—DECREE IN—APPEAL AGAINST—VALUATION OF, FOR PURPOSES OF JURISDICTION.**

Legal Practitioner.

Admission by. See **LEGAL PRACTITIONER—ADMISSION BY.**

Agreement restraining right of appeal by—Validity as against client of. See **LEGAL PRACTITIONER—APPEAL.** (1871) 14 M. I. A. 203 (206-7).

Fact—Abandonment of question of, in Court below—Reliance on same in appeal. See **LEGAL PRACTITIONER—FACT—ABANDONMENT OF QUESTION OF.**

(1908) 35 I. A. 166 (172-3) = 30 A. 510 (521-2).

Fees allowed to—Appeal against—Right of. See **LEGAL PRACTITIONER—FEES ALLOWED TO.** (1839) 2 M. I. A. 253 (260).

Legal Representative—Revivor of appeal at instance of.

Plaintiff—Appellant—Death of—Substitution of defendant as his legal representative—Irregularity—Reversal of decree at instance of legal representative on ground of—Substitution on his own application. See **PRACTICE—PARTIES—PLAINTIFF—APPELLANT—DEATH OF.**

(1862) 9 M. I. A. 287 (302).

Revivor of appeal by—Scope of revived appeal—Personal claims of legal representative if can be advanced in it. See **P. C.—APPEAL—REVIVOR OF—SPECIAL LEAVE—REVIVOR BY—SCOPE OF REVIVED APPEAL.**

(1894) 21 I. A. 163 (169) = 21 C. 997 (1004-5).

APPEAL—(Contd.)**Limitation—Plea of.**

——Maintainability for first time of. *See* LIMITATION—PLEA OF.

Limitation Law applicable to.

——Change of law between dates of decree below and of filing of appeal—Effect of, on decision in appeal. *See* LIMITATION—APPEAL—LAW APPLICABLE TO.

(1835) 5 W. R. 95.

Local Visit.

——Suggestion by Court of—Counsel's consent to—Decision based on impression formed from such visit, and without considering evidence in the case—Appeal against—Right of—Effect of counsel's consent on.

The suit was by a passenger against a railway company for damages for personal injuries alleged to have been sustained through their negligence. The trial Judge decided in favour of the plaintiff on the evidence adduced in the case. The appellate judges thought that the crux of the case was the question whether there was any defect in the lighting arrangements made by the company, on the night when the accident in question happened and that that question could be settled with certainty if they visited the scene of the accident under conditions approximating as closely as possible to those which prevailed where the accident happened. That suggestion, according to the statement in the appellate judgment, was welcomed by counsel on both sides. The learned judges, accordingly, visited the scene of the accident attended by the legal advisers of both parties. And on the strength of the impressions formed by them from their said visit, they decided the case against the plaintiff, reversing the decree below. They did not consider the evidence in the case at all.

On objection taken in appeal to the P. C. to the procedure adopted by the appellate court, it was suggested that the proceeding was so remote from regular judicial methods as to constitute an arbitration, and that the result was not appealable.

Held, that the appellant was not shown to have done anything to exclude his appeal (124).

The suggestion came from the judges in appeal. Even if it had been tentatively carried out, it did not necessarily follow that the Court would cast to the winds the legal evidence in the case, and decide on impressions arising on the concerted representation. It would be too strict to hold that it is the duty of counsel, at their peril, to restrain judges within the *cursus curiæ*, and to insist on their abstaining from experiments which to some may prove too alluring to admit of adherence to legal *media concludendi* (124). (*Lord Robertson.*) *KESSOWJI ISSUR v. GREAT INDIAN PENINSULA RY. CO.* (1907) 34 I. A. 115 = 4 A. L. J. 461 = 31 B. 381 (392) = 6 C. L. J. 5 = 11 C. W. N. 721 = 2 M. L. T. 435 = 9 Bom. L. R. 671 = 17 M. L. J. 347.

Minor—Guardian—Appeal by—Withdrawal of, by minor.

——On attaining majority—Guardian's right to oppose. *See* HINDU LAW—MINOR—GUARDIAN—APPEAL BY. (1870) 13 M. I. A. 602.

New point in—Permissibility.

——*See also* P. C.—APPEAL—NEW POINT.

——Accretion—Gradual accretion—Claim to land on foot of its being—Defence in Court below denying that it was land so gained at all—Appeal—Plea for first time in, that entire land was not gained by gradual accretion. *See* ALLUVION AND DILUVION—ACCRETION—GRADUAL ACCRETION—LAND FORMED BY—CLAIM TO, ETC.

(1871) 16 W. R. 5.

——Accretion—Gradual accretion—Dry land already owned in midstream—Gradual accretion to—Claim in

APPEAL—(Contd.)**New point in—Permissibility—(Contd.)**

Court below of—Sub-aqueous ownership—Claim in appeal of. *See* ALLUVION AND DILUVION—ACCRETION—GRADUAL ACCRETION—DRY LAND IN MIDSTREAM, ETC. (1899) 26 I. A. 107 (111) = 22 M. 464 (468-9).

——Alluvial land—Claim in Courts below on basis of—Original ownership of site of lands reformed—Claim in appeal on basis of—Defences open in the two cases—Distinction.

Had the case now sought to be raised been alleged in the Court below, some defence might have been made, founded on the nature of a boundary river, the ownership of its soil, the character, sudden or gradual, of the original loss of land, and the effect of change from such causes in the land itself on the ownership in the soil; which defence, as is apparent from the frame of Bengal Regulation XI of 1825, would admit of variation with varying circumstances of inundations, identification and accretion (139-40). (*Lord Chelmsford.*) *SREE ECKOWRIE SINGH v. HEERALOLL SEAL.* (1868) 12 M. I. A. 136 =

11 W. R. P. C. 2 = 2 B. L. R. P. C. 4 = 2 Suth. 171 = 2 Sar. 399.

——Attachment—Formalities for—Non-observance of—Invalidity of attachment on ground of—Point as to. (*Sir James Colville.*) *RAMKRISHNA DAS SURROWJI v. SURFUNNISSA BEGUM.* (1880) 7 I. A. 157 (160-1) = 6 C. 129 (134) = 4 Sar. 151 = 3 Suth. 755.

——Benamidar—Purchaser from—Real owner's suit to recover property from—Purchaser for value without notice—Plea by purchaser of. *See* BENAMI—BENAMIDAR—PURCHASER FROM—REAL OWNER'S SUIT TO RECOVER PROPERTY FROM.

——Cause of action abandoned in Court below. *See* LIMITATION ACT OF 1908, ART. 132—MORTGAGE FOR A TERM. (1926) 53 I. A. 187 (195-6) = 48 A. 457.

——Champerty and maintenance—Plea of. *See* CHAMPERTY AND MAINTENANCE—PLEA OF—APPEAL. (1860) 8 M. I. A. 170 (186-7).

——Deed—Undue influence—Execution under—Case of—Forgery of deed—Case in Court below of. *See* DEED—SETTING ASIDE OF—SUIT FOR—FORGERY.

——Ejectment suit—*Jus tertii*—Plea of—New ground of *jus tertii* in appeal. *See* EJECTMENT SUIT—*Jus tertii*. (1878) 5 I. A. 61 (67-9) = 1 M. 316 (327).

——Fraud—Suit based on one kind of—Fraud of different kind—Maintainability of. *See* PRACTICE—PLEADINGS—FRAUD. (1887) 14 I. A. 111 (124-5) = 11 B. 620 (643).

——Jurisdiction—Absence of—Plea of. *See* JURISDICTION—ABSENCE OF—PLEA OF.

——Legal representative—Personal decree against—Objection to. *See* LEGAL REPRESENTATIVE—PERSONAL DECREE AGAINST—APPEAL. (1835) 5 W. R. 98 (P.C.).

——Limitation—Plea of. *See* LIMITATION—PLEA OF.

——Onus of Proof—Objection to. *See* ONUS OF PROOF—OBJECTION TO.

——Partnership—Minor—Admission of, to benefit of partnership—Case of. *See* PARTNERSHIP—PARTNER—MINOR—ADMISSION OF, TO BENEFIT OF PARTNERSHIP.

(1922) 49 I. A. 108 = 49 C. 560.

——Partnership—Surviving partner—Contract by partnership with third party—Arbitration in relation to—Reference to, and award thereon—Legal representatives of deceased partner—Validity against—Objection to. *See* PARTNERSHIP—PARTNER—SURVIVING PARTNER.

(1914) 27 M. L. J. 192 (194-5).

——Suit—Maintainability of—Objection to—Tender before suit—Absence of—Objection on ground of. *See*

APPEAL—(Contd.)**New point in - Permissibility—(Contd.)**

SUIT—MAINTAINABILITY OF—OBJECTION TO—APPEAL—MAINTAINABILITY FOR FIRST TIME IN.

(1870) 5 B. L. R. 570 (576-7).

Onus of Proof.

—See ONUS OF PROOF—OBJECTION TO.

Original Side Appeal.

—Difference of opinion between Judges' hearing—Procedure on. See C. P. C. OF 1908, S. 98—ORIGINAL SIDE APPEAL.

(1921) 48 I. A. 181 (184-5) = 45 B. 718 (722-3).

—See LETTERS PATENT, CALCUTTA, S. 36—ORIGINAL SIDE APPEAL. (1871) 14 M. I. A. 209 (221).

Party.

—Examination of, for first time in appeal—Propriety See EVIDENCE—PARTY—EXAMINATION OF—APPEAL.

(1872) 19 W. R. 118.

Parties.

—Non-joinder of—Objection to—Maintainability for first time. See PRACTICE—PARTIES—NON-JOINDER—OBJECTION TO. (1843) 3 M. I. A. 228 (242).

Plaintiff appellant - Death of.

—Revivor of appeal by his legal representative—Scope of revived appeal—Personal claims of legal representative if can be advanced in it. See P. C.—APPEAL—REVIVOR OF—SPECIAL LEAVE—REVIVOR BY—SCOPE OF REVIVED APPEAL.

(1894) 21 I. A. 163 (169) = 21 C. 997 (1004-5).

—Substitution of defendant as his legal representative—Irregularity—Reversal of decree at instance of legal representative on ground of—Substitution on his own application. See PRACTICE—PARTIES—PLAINTIFF-APPELLANT—DEATH OF. (1862) 9 M. I. A. 287 (302).

Pleadings—Amendment of.

—See PRACTICE—PLEADINGS—

(1) ALTERNATIVE CASE.

(2) APPEAL—AMENDMENT IN.

—Declaration—Suit for—Consequential relief—Addition of—Amendment allowing—Permissibility—Limitation—Plea of—Avoidance of—Amendment having effect of. See PRE-EMPTION—RIGHT OF—DECLARATION OF—SUIT FOR. (1920) 47 I. A. 255 (262) = 48 C. 110 (116-7).

—Discretion of Court below as to—Interference with. See PRACTICE—PLEADINGS—AMENDMENT OF—DISCRETION AS TO—APPEAL.

—Hindu Law—Joint family—Manager—Contract for sale by—Specific performance or damages for breach of—Suit for—Earnest-money with interest—Claim against heirs of manager for recovery of—Amendment of plaint in appeal so as to set up. See HINDU LAW—JOINT FAMILY—MANAGER—CONTRACT FOR SALE BY.

(1926) 54 I. A. 55 (59-60) = 6 P. 323.

—Limitation—Plea of—Amendment so as to avoid. See PRACTICE—PLEADINGS—AMENDMENT OF—LIMITATION.

—Mortgage—Redemption—Suit for—Mortgaged property—Sale of, in execution of third party's decree—Mortgagee's purchase at—Nullity of—Suit on foot of—Setting aside of purchase and adding decree-holder as a party—Amendment so as to allow case of. See MORTGAGE—REDEMPTION OF—SUIT FOR—MORTGAGED PROPERTY.

(1900) 27 I. A. 216 (227-8) = 25 B. 337 (351-2).

—Mortgage—Suit to enforce—Error in form of—Amendment in case of—Power and duty of Court. See TRANSFER OF PROPERTY ACT, S. 67—TENANTS IN COMMON.

(1919) 46 I. A. 272 (277-8) = 47 C. 175 (179-80).

APPEAL—(Contd.)**Pleadings—Amendment of—(Contd.)**

—Mortgage—Suit to enforce—Personal decree—Claim to—Amendment so as to allow—Discretion as to. See MORTGAGE—SUIT TO ENFORCE—PERSONAL DECREE.

(1925) 47 A. 459.

—Oudh Estate—Superior proprietary right—Settlement of—Suit for—Sub-proprietary right—Sub-settlement of—Claim for—Amendment so as to set up. See OUDH ESTATE—SUPERIOR PROPRIETARY RIGHT—SETTLEMENT OF.

(1878) 6 I. A. 1 (8 9) = 4 C. 839 (848).

—Pre-emption—Right of—Declaration of—Suit for—Possession on pre-emption—Claim for—Amendment so as to allow—Limitation—Plea of—Amendment having effect of avoiding. See PRE-EMPTION—RIGHT OF—DECLARATION OF—SUIT FOR.

(1920) 47 I. A. 255 (262) =

48 C. 110 (116-7).

—Suit—Nature of—Alteration by amendment of—Permissibility. See PRACTICE—PLEADINGS—AMENDMENT OF—P. C. APPEAL—AMENDMENT IN—SUIT AS FRAMED.

(1926) 54 I. A. 55 (60) = 6 P. 323.

Pleadings.

—Case in Court below—Facts basis of—Facts wholly different from—Relief on foot of—Grant of. See PRACTICE—RELIEF—PLEADINGS—CASE IN COURTS BELOW.

(1912) 17 C. W. N. 427.

—Case laid in—Relief on different footing from—Grant of—Gift—Setting aside of deed of, for fraud—Suit for—Accounts of share as from agent—Decree for—Grant of. See HINDU LAW—GIFT—DEED OF—SETTING ASIDE OF, FOR FRAUD.

(1912) 23 I. C. 332.

—Defects in—Reversal of decree on ground of—No prejudice to appellant—Decree right on merits. See PRACTICE—PLEADINGS—DEFECTS IN—REVERSAL OF DECREE ON GROUND OF.

(1884) 12 I. A. 47 (51) =

11 C. 379 (385).

—Error in—Objection based on—Maintainability—Parties not misled. See PRACTICE—PLEADINGS—ERROR IN.

(1867) 14 M. I. A. 487 (497).

—Evidence—Decision inconsistent with—Permissibility. See PRACTICE—PLEADINGS—EVIDENCE—DECISION INCONSISTENT WITH—APPEAL.

—Issues—Case different from that made in—Permissibility. See HINDU LAW—MINOR—PERSONAL LIABILITY OF.

(1892) 19 I. A. 90 (93) =

19 C. 507 (511-2).

—Issues—Evidence—Decision inconsistent with—Reversal of. See PRACTICE—PLEADINGS—ISSUES—EVIDENCE—DECISION INCONSISTENT WITH.

(1899) 27 I. A. 17 (28-9) = 23 M. 227 (234-5).

—Relief—Further relief—Relief that can be granted under prayer for. See PRACTICE—RELIEF—FURTHER RELIEF.

—Relief—Possession—Decree unconditional for—Claim in Court below of—Decree conditional on payment of binding debts—Grant of. See POSSESSION—DECREE UNCONDITIONAL FOR.

(1913) 40 I. A. 105 (111) =

35 A. 211 (220-1).

—Relief different from basis of—Grant of. See HINDU LAW—GIFT—DEED OF—SETTING ASIDE OF, FOR FRAUD.

(1912) 23 I. C. 332.

—Relief not prayed for in—Grant of—Ejectment suit—Partition decree in. See EJECTMENT SUIT—PARTITION IN—DECREE FOR.

(1898) 25 I. A. 195 (207-8) =

21 A. 53 (69-70).

Presentation in wrong Court.

—Limitation—Dismissal of appeal as barred by—Jurisdiction. See LIMITATION ACT OF 1908, S. 14—APPEAL FILED IN WRONG COURT.

(1920) 47 I. A. 255 (263) = 48 C. 110 (117-8).

APPEAL—(Contd.)

Remand in.

—Accounts —Re-opening of —Remand for. See ACCOUNTS —APPEAL —RE-OPENING OF ACCOUNTS —REMAND FOR. (1866) 10 M. I. A. 490 (508).

—Award—Decree in accordance with—Appeal against —Order in, reversing decree and remanding case—Scope of —Reconsideration and readjudication by arbitrators if intended. See ARBITRATION —AWARD —DECREE IN ACCORDANCE WITH—APPEAL AGAINST —ORDER IN, REVERSING DECREE AND REMANDING CASE.

(1875) 23 W. R. 429.

—C. P. C., O. 41, R. 25—Order under, or remand—Test. See CIVIL PROCEDURE CODE OF 1908, O. 41, R. 25—ISSUES—FRAMING OF—REFERENCE THEREOF TO COURT BELOW FOR TRIAL.

(1919) 47 I. A. 76 (83) = 43 M. 567 (575).

—Decree—Relief granted by—Omission to specify—Remand on ground of.

In a case in which the Court of First Instance dismissed the suit but its decree was reversed in appeals, the appellate decrees, however, omitting to specify by their decrees the relief to which the plaintiff was entitled, *held*, on appeal to the Privy Council by plaintiff that, though it was the duty of the plaintiff to raise the question as to the proper form of the decree before the High Court, the case ought to be remanded to that Court with directions to amend their decree in conformity with their judgment, by declaring affirmatively what the plaintiff was entitled to recover (300). (*Sir Montague Smith.*) LALA SHAM SOONDAR LAL v. SOORAJ LAL. (1876) 3 Suth. 298 = Bald. 20.

—Decree before—Finding of fact involved in—Finding express after remand—Conflict between—Which prevails.

In a suit by a Hindu son to set aside sales of joint family property made by his father and to recover the properties covered by the deeds, the first appellate Court at its first hearing found that the sales were fraudulent and made with a view to defraud the plaintiff or his family and that the transactions were void even if consideration passed. By its decree then made it declared that the plaintiff was entitled to recover possession of the properties conveyed on behalf of the family conditional, however, on payment of a specified amount to the alienee, which amount represented binding debts of the family which had been discharged by the alienee. In second appeal from its decree, the High Court, not being satisfied with its findings, remitted the case to it for findings on the questions—(1) whether the sales were supported by consideration, and (2) whether the sales effected a real transfer of the property which they purported to convey. On remand the first appellate Court found (1) that no consideration really passed, and (2) that the sale-deeds did not effect a real transfer of the properties which they purported to convey.

Held, that the finding of the first appellate Court that the alienee did discharge family debts, which might be said to arise from its original decree, must be considered to have been eradicated by its findings on remand that no consideration passed for the deeds, and that they did not effect a real transfer of properties. (*Sir Lancelot Sanderson.*) KRISHNA REDDI v. RAGHAVA REDDI.

(1927) 107 I. C. 449 = A. I. R. 1927 P. C. 257 (260) = I. L. T. 40 M. 1.

—Defendant—Joinder of, in appeal and remand of cause—Objection to order of remand by original defendant—Maintainability. See PRACTICE —PARTIES —NON-JOINDER OF—DISMISSAL OF SUIT FOR—PROPRIETY—DEFENDANT.

(1913) 26 M. L. J. 86.

APPEAL—(Contd.)

Remand in—(Contd.)

—Evidence—Further consideration of—Remand for —Jurisdiction—Order of remand without jurisdiction—Proceedings pursuant to—Legality of.

The power of the High Court to remand a case for further consideration of the evidence is limited to, and defined by, the Code of 1882, Ss. 562 to 567 thereof.

Where the High Court made an order in the following terms :—" Without expressing any opinion as to the weight to be attached to the evidence, we must ask the District Judge to take these documents " (the documents to which the appellant before the High Court drew its attention) " into his consideration and to submit a revised finding," *held*, that the order was not authorized by the Code, and that the revised judgment pronounced in pursuance of it was also one irregularly obtained. VENKATAVARATHA THATHACHARIAR v. ANANTHACHARIAR.

(1893) 16 M. 299 = 6 Sar. 364 = 3 M.L.J. 150.

—Evidence fresh—Remand for adducing—Evidence already adduced insufficient to prove case.

It is always dangerous to allow parties to make a new case, and to call fresh evidence upon an issue on which they have failed upon the evidence originally adduced in support of it, and more especially is it so in the Mofussil Courts in India (279). (*Sir Barnes Peacock.*) HURPERSHAD v. SHEODYAL.

(1876) 3 I. A. 259 = 26 W. R. 55 = 3 Sar. 611 = 3 Suth. 304 = Bald. 25 = R. & J.'s No. 41 (Oudh).

—Evidence fresh—Remand for adducing—Opportunity of adducing such evidence not availed of in court below.

The appellant has had at all events from the date of the settlement of the issues, clear notice of what he had to prove. He had been called upon to adduce further evidence on those issues if he had any to give. He advisedly declined to do so, and called for the judgment of the Court upon the evidence already given. And the suspicion, however probable of the Judge, that a party who has failed to prove his case, may be more successful on a second and fuller investigation, is no sufficient ground for directing a new trial (220). (*Lord Justice Turner.*) MAHARAJAH KOOWUR BABOO NITRASUR SINGH v. BABOO NUND LOLL SINGH. (1860) 8 M. I. A. 199 = 1 W. R. 51 = 1 Suth. 420 = 1 Sar. 744.

—Illegal order of—Proceedings pursuant to—Validity of. See APPEAL —REMAND —EVIDENCE —FURTHER CONSIDERATION OF. (1893) 16 M. 299.

—Issues—Framing of—Failure—Remand on ground of. See PRACTICE—ISSUES—FRAMING OF—FAILURE—REMAND ON GROUND OF. (1863) 10 M. I. A. 1 (13-4).

—Issue new—Framing of—Remand of cause for rehearing thereon—Jurisdiction—Validity.

Even if it be competent to the High Court to remit a case for rehearing on an issue not raised in the pleadings or even suggested in the Courts below, this ought only to be done in exceptional cases for good cause shown and on payment of all costs thrown away (178).

The appellant, a zemindar, sued for possession of jaghir lands formerly held by a paik whom he had dismissed. The Subordinate Judge and the District Judge on appeal decreed the suit, finding upon the issues that the paik was a private servant of the plaintiff and not a paik whom by his kabuliyat the plaintiff had no power to dismiss. In second appeal to the High Court, the defendant contended for the first time that the Courts below had entirely misconceived the issue which they had to try, and that that issue was whether the lands comprised in the jaghir in question were Chaukidari Chakaran lands, that is, lands which at or

APPEAL—(Contd.)**Remand in—(Contd.)**

before the settlement had been appropriated or assigned for the maintenance of the police force and by reason of such appropriation excluded from the zemindari assessment. There was no suggestion that the defendant had been in any way taken by surprise or had discovered fresh facts of which he had been unaware when the case was before the lower Courts. Nevertheless, the High Court held that the new issue was the real issue, and, as it had not been tried, discharged the order of the District Judge and remitted the action for rehearing. It not only did this, but it ordered all the costs already incurred to abide the result of the rehearing. In other words, it ordered the plaintiff, who failed on a new case set up for the first time on the second appeal, to pay the whole costs of the issues on which he had succeeded in the two Courts below.

Held, that the High Court was not justified in remitting the case for a re-hearing on the new issue, and that its order as to the costs thrown away was bad in any event (177-9).

(*Lord Parker.*) **RAM CHANDRA BHANJ DEO v. SECRETARY OF STATE FOR INDIA.** (1916) 43 I. A. 172 =

43 C. 1104 (1116) = 20 C. W. N. 245 =

(1916) 2 M. W. N. 175 = 20 M. L. T. 235 =

4 L. W. 251 = 14 A. L. J. 1009 = 18 Bom. L. R. 838 =

24 C. L. J. 296 = 31 M. L. J. 745.

———*Issues to be tried on—Settlement of—Necessity—Remand of whole case—Legality.*

On a petition for account and recovery of mesne profits directed by a decree to be ascertained in execution, the Subordinate Judge passed a judgment maintaining the report of the Amin which found a certain sum due for mesne profits. On appeal, the High Court, differing from the Subordinate Judge on several points both of principle and detail, set aside his order and remanded the case for the purpose of ascertaining the mesne profits which the plaintiff was entitled to in accordance with their foregoing observations. The order of the High Court in effect threw the whole account open again. *Held*, that the remand was incorrect, inasmuch as it did not state more specifically the issues which the Subordinate Judge was required to decide on remand (117). (*Lord Hobhouse.*) **GIRISH CHUNDER LAHIRI v. SHOSHI SHIKARESWAR ROY.**

(1900) 27 I. A. 110 = 27 C. 951 (960-1) = 4 C. W. N. 631.

———*Jurisdiction under S. 582 of C. P. C. of 1882—Condition—Preliminary point—Disposal of suit on.*

The remand contemplated by S. 562 of C. P. C. of 1882 is one made in a case where the first Court has disposed of the suit on a preliminary point so as to exclude evidence of essential facts. (*Lord Hobhouse.*) **SYED MUZHAR HUSAIN v. BODHA BIBI.**

(1894) 22 I. A. 1 =

17 A. 112 = 6 Sar. 580 = 5 M. L. J. 20.

———*Objection to, by original defendant—Maintainability—Addition of party-defendant in appeal—Objection based on. See PRACTICE—PARTIES—NON-JOINDER OF—DISMISSAL OF SUIT FOR—PROPRIETY—DEFENDANT.*

(1913) 26 M. L. J. 86.

———*Points concluded by original decree and not affected by order of—Re-opening of.*

Where in a case in which the suit was dismissed by the first court as barred by limitation, but, on appeal by some of the plaintiffs (who were entitled to distinct shares in the subject-matter of the litigation), the decree was reversed and the suit remanded for disposal on the merits, *held*, that, after remand, it was not competent to the first court to re-open the case against the non-appealing plaintiff or plaintiffs. (*Sir Barnes Peacock.*) **MUSSAMAT MULLEEKA v. MUSSAMAT JUMEELA.** (1872) Sup. I. A. 135 (141) =

11 B. L. R. 375 = 5 W. R. 23 = 3 Sar. 220 =

III C. G. Sup. Vol. 82 = 2 Suth. 766.

APPEAL—(Contd.)**Remand in—(Contd.)**

———*Points settled by order of—Re-opening of—Jurisdiction of Court below.*

The Collector of Masulipatam instituted the suit claiming the suit zemindary on behalf of the Government of Madras, as an escheat to which the Crown became entitled on the death of the widow of the last male zemindar, of whom there were no heirs in remainder to the widow; and he claimed to have it free and discharged from all incumbrances with which it had been charged by the widow during her enjoyment. That suit went up on appeal to the P. C., and their Lordships, by their judgment, declared the right of the Crown to take the suit zemindary by escheat, "unless it has been absolutely, or to the extent of a valid and subsisting charge, defeated by the acts of the widow in her lifetime." "In the latter case," the judgment continued, "the Government will, of course, be entitled to the property subject to the charge." But, as there were not sufficient materials before their Lordships to enable to finally decide those questions, they remitted the appeal to the Sudder Court for further hearing, with a declaration "that the general right of the government by escheat has been established."

At the further hearing on remand, the Sudder Court was of opinion that it was unnecessary to call for the additional evidence indicated as requisite by their Lordships' judgment, and decided against the appellant on the following, among other, grounds:—

(1) The suit was brought upon the erroneous assumption that the Crown had the power to challenge and defeat the act of the last incumbent, and it should therefore be dismissed.

(2) Even if the Crown could challenge the alienation of the widow in question, the plaint had not been properly framed for that purpose.

Held, that, in ruling the above-mentioned points, the Sudder Court had exceeded its powers, inasmuch as it came to conclusions inconsistent with those expressed in or implied by the judgment of their Lordships remanding the cause for further hearing (548).

The judgment of their Lordships remanding the cause which recommended, if it did not enjoin, the Court below to take additional evidence on the question whether the acts of the widow in her lifetime were valid against the Crown, must be taken to assume that the question was one fairly open to the parties upon the pleadings. Again the declaration that the general right of the Crown to take the property by escheat ought to prevail, unless it had been defeated by the acts of the widow in her lifetime, when followed by the direction to adjudicate upon those acts, seems to imply a decision that the Crown had established its right to maintain a suit of this nature (548-9). (*Lord Justice Turner.*) **COLLECTOR OF MASULIPATAM v. CAVALY VENCATA NARRAINAPAH.**

(1861) 8 M. I. A. 529 = 2 W. R. 61 = 1 Suth. 476 = 1 Sar. 820.

———The District Judge, on the first hearing of a suit, threw out the plaint on the ground that the plaintiff was legally debarred from bringing his suit. On appeal, the High Court reversed that judgment, and remitted the case for trial on its merits. In his judgment, after the remand, the District Judge again held, in direct opposition to the judgment of the High Court, that the plaintiff was legally debarred from bringing his suit.

Held, that there was great irregularity in the district Judge's so deciding (135-6). (*Sir Barnes Peacock.*) **MUTTAYAN CHETTIAR v. SANGILI VIRA PANDIA CHINNATAMBIAR.**

(1882) 9 I. A. 128 = 6 M. 1 (9) =

12 C. L. R. 169 = 4 Sar. 354.

APPEAL—(Contd.)**Remand in—(Contd.)**

—Preliminary point—Cardinal point not—Disposal of suit on, after taking whole evidence—Remand in case of—Legality.

The plaintiff sued, alleging that one A by his will gave the suit property to some of the defendants who conveyed it to the plaintiff. Another defendant, who was the principal defendant, contested the suit, on the grounds that there was a misjoinder, and that A never made any valid gift to the grantors of the plaintiff. The other defences raised by him were all of a subordinate character.

The trial Judge took the evidence, decided against the plaintiff on the question of A's will, and did not give judgment on the other issues. The High Court, on appeal, held, reversing the trial Judge, that A had made a valid gift, and remanded the case under S. 562 of C. P. C. of 1882, to be disposed of on the other issues according to law.

Held, that the High Court had miscarried in purporting to remand under S. 562 of C. P. C. of 1882, and that the case rather fell under S. 565 of that Code, which required the appellate Court to decide issues on which the evidence had been taken.

The suit was not disposed of by the trial Judge on a preliminary point within the meaning of S. 562 of C. P. C. of 1882. The only preliminary point in the case was the misjoinder. To establish the will of A was the first step in the plaintiff's case and on her failing in that her whole suit failed. But that does not make the point a preliminary point decided so as to exclude essential evidence. Nor does it appear that any such evidence was excluded. (*Lord Hobhouse.*) **SYED MUZHAR HUSEIN v. BODHA BIBI.** (1894) 22 I. A. 1 = 17 A. 112 = 6 Sar. 580 = 5 M. L. J. 20.

—Preliminary point—Test—Evidence of essential facts—Point excluding.

The plaintiff sued, alleging that one A made a will giving the suit property to some of the defendants who conveyed it to the plaintiff. Another defendant, who was the principal defendant, raised several defences to the suit. One was that there was a misjoinder. The next was a denial that A made any valid gift to the grantors of the plaintiff. The others were all of a subordinate character.

Held, that the only preliminary point in the suit was misjoinder, and that the validity of A's will was not a preliminary point.

To establish the will of A was no doubt the first step in the plaintiff's case, and on her failing in that her whole suit no doubt failed. But that does not make the point a preliminary point decided so as to exclude evidence of essential facts. (*Lord Hobhouse.*) **SYED MUZHAR HUSEIN v. BODHA BIBI.** (1894) 22 I. A. 1 = 17 A. 112 = 6 Sar. 580 = 5 M. L. J. 20.

—Suit improperly instituted and tried—Remand of, to enable plaintiff to amend plaint so as to make suit properly instituted—Propriety. See **BENGAL LAND REVENUE ASSESSMENT (RESUMED LANDS) REGN. II OF 1819, S. 30—RESUMPTION SUIT.**

(1871) 14 M. I. A. 152 (172).

—Whole case—Remand of—Validity. See **APPEAL—REMAND—ISSUES TO BE TRIED ON.**

(1900) 27 I. A. 110 (117) = 27 C. 951 (960-1).

Respondent.

—Addition of. See C. P. C. OF 1908, O. 41, R. 20.

—Cross-appeal not filed by—Point arising on—Entertainment of, at hearing of appeal—Irregularity or illegality—Leave to file cross-appeal and extension of time for purpose—Grant of—Procedure proper in such a case. See C. P. C. OF 1908, O. 41, R. 22—**CROSS-APPEAL NOT FILED.** (1919) 47 I. A. 33 (41) = 43 M. 550 (563).

APPEAL—(Concl'd.)**Respondent—(Contd.)**

—Decree favourable—Finding adverse in—Right to attack, without filing appeal. See C. P. C. OF 1908, O. 41, R. 22—**DECREE UNDER APPEAL—FINDING ADVERSE IN.** (1884) 12 I. A. 23 (34) = 11 C. 301 (306).

—Decree favourable—Issue—Decision adverse on, by Court below—Right to attack—No memo. of objections by respondent. See C. P. C. OF 1908, O. 41, R. 22—**ISSUE.** (1889) 17 I. A. 57 (61) = 17 C. 809 (813-4).

—Decree under appeal—Right to support—Error in procedure by Court below—Decree right on merits—Right to show. See C. P. C. OF 1908, O. 41, R. 22—**DECREE UNDER APPEAL—RESPONDENT'S RIGHT TO SUPPORT.**

(1867) 11 M. I. A. 487 (499-500).

—Defendant—Addition as respondent of, for purpose of passing a decree against him—Power of. See C. P. C. OF 1908, O. 41, R. 33—**DEFENDANT.**

(1927) 55 I. A. 7 = 6 R. 29.

—Non-appealing respondent—Reversal of decree in favour of—Power of. See C. P. C. OF 1908, O. 41, R. 33—**NON-APPEALING RESPONDENT.**

Right of.

—See also **CASES COLLECTED UNDER DECREE—APPEAL FROM—RIGHT OF.**

Suit.

COMPROMISE OF, BY SOME PARTIES ONLY—DECREE IN TERMS OF, AGAINST ALL—APPEAL FROM, BY PERSONS NOT PARTIES TO COMPROMISE.

—Right of. See **MORTGAGE—SUIT TO ENFORCE—COMPROMISE OF, ETC.** (1926) 52 M. L. J. 407.

PERSON NOT PARTY TO—APPEAL FROM DECREE PASSED THEREIN.

—Right of. See **DECREE—APPEAL FROM—RIGHT OF—SUIT—PERSON NOT PARTY TO.**

(1927) 54 I. A. 190 (195).

Undertaking to Court below not to appeal in certain events—Appeal in breach of.

—Maintainability. See **DECREE—APPEAL FROM—RIGHT OF—UNDERTAKING TO COURT BELOW, ETC.**

(1871) 14 M. I. A. 203 (206-7).

Valuation of, for purposes of jurisdiction.

—Mortgage suit—Decree in—Appeal against, by person claiming under title paramount. See **MORTGAGE—SUIT TO ENFORCE—DECREE IN—APPEAL AGAINST—VALUATION OF, FOR PURPOSES OF JURISDICTION.**

Witnesses.

—See **APPEAL—EVIDENCE—WITNESSES.**

APPEALS TO QUEEN IN COUNCIL ACT II OF 1863.

—S. 1—"Court of highest civil jurisdiction in any province"—Meaning of.

The words "Court of highest civil jurisdiction in any province" in Act II of 1863, had reference to the general jurisdiction of the Courts, and not to the finality of their decisions in particular cases. A particular Court is not the Court of highest civil jurisdiction in the province, within the meaning of S. 1 of that Act, merely because an appeal from its decision in the particular case did not lie to a higher Court in the province. Otherwise a Court of Small Causes would be equally a Court of highest civil jurisdiction in a case in which its decision is final; and, in that case, it might, under the provisions of the same section, admit an appeal to Her Majesty in Council, if it should declare the case a fit one for such appeal (183). (*Sir Barnes Peacock.*) **THAKOOR HARDEO BUX v. THAKOOR JAWAHIR SINGH.** (1877) 4 I. A. 178 = 3 C. 522 (527-8) = 3 Sar. 704 = Bald. 218 = R. & J.'s No. 45 = 3 Suth. 427.

APPOINTMENT.

—See OFFICE.

APPORTIONMENT.

—See CONTRACT ACT, SS. 59, 60 AND TRANSFER OF PROPERTY ACT, S. 36.

APPRAISER.

—See ARBITRATION—APPRAISERS.

APPROBATE AND REPROBATE (OR AFFIRM AND DISAFFIRM THE SAME TRANSACTION) —RULE AGAINST.

—The principle that a party shall not at the same time affirm and disaffirm the same transaction—affirm it as far as it is for his benefit, and disaffirm it as far as it is to his prejudice—is not peculiar to English Law, but common to all law which is based on the rules of justice (103). (*Mr. Pemberton Leigh.*) *RUNGAMMA v. ATCHAMA.*

(1846) 4 M. I. A. 1 = 7 W. R. 57 (P. C.) = 1 Suth. 197 = 1 Sar. 313.

—The respondent cannot both repudiate the obligations of the lease and claim the benefit of it (356). (*Sir James Colville.*) *FORBES v. AMEEROONISSA BEGUM.*

(1865) 10 M. I. A. 340 = 5 W. R. 47 = 1 Suth. 621 = 2 Sar. 153.

—Applicability of—Election—Absence of option of—Effect.

The doctrine of approve and reprobate assumes election, and is inapplicable to cases in which the person sought to be affected by it has no election (263). (*Viscount Dunedin.*) *KRISHNAMURTHI AYYAR v. KRISHNAMURTHI AYYAR.*

(1927) 54 I. A. 248 = 50 M. 508 = 39 M. L. T. 52 = 25 A. L. J. 945 = 1927 M. W. N. 469 = 4 O. W. N. 621 = 31 C. W. N. 910 = 45 C. L. J. 620 = 26 L. W. 186 = 8 Pat. L. T. 719 = 29 Bom. L. R. 969 = 101 I. C. 779 = A. I. R. 1927 P. C. 139 = 53 M. L. J. 57.

—Nature of—Applicability to India.

A man cannot both affirm and disaffirm the same transaction, show its true nature for his own relief, and insist on its apparent character to prejudice his adversary. This principle, so just and reasonable in itself, and often expressed in the terms, that you cannot both approve and reprobate the same transaction, has been applied by their Lordships in this Committee to the consideration of Indian appeals, as one applicable also in the Courts of that country, which are to administer justice according to equity and good conscience. The maxim is founded, not so much on any positive law, as on the broad and universally applicable principles of justice (185-6). (*Lord Chelmsford.*) *SHAH MUKHUN LALL v. BABOO SREE KISHEN SINGH.*

(1868) 12 M. I. A. 157 = 11 W. R. P. C. 19 = 2 B. L. R. P. C. 44 = 2 Suth. 190 = 2 Sar. 403.

ARBITRATION.

(N.B.—See also under C. P. C. of 1908, Sch. II.)

AGREEMENT—ORDER OF REFERENCE.

APPRAISERS.

ARBITRATOR.

AWARD.

BOUNDARY DISPUTE.

CONSENT TO.

CONTRACT.

COURT—ARBITRATION BY.

PROCEEDINGS FOR.

PROCEEDINGS IN NATURE OF.

REFERENCE TO.

SUBMISSION TO.

TRIBUNAL OF—SUBSTITUTION OF ANOTHER TRIBUNAL FOR.

UMPIRE.

ARBITRATION—(Contd.)**Agreement—Order of reference.**

—Arbitration partly under former and partly upon latter—Validity.

The High Court laid down that it was really impossible according to the Statute Law of India that one and the same arbitration should be held "as to matters within the jurisdiction of the Court and matters without the jurisdiction of the Court; between the parties to the suit and between them and other persons; under the Code provided by the Indian Arbitration Act and under the Code provided by the Second Schedule; under the superintendence and control of the Judge who has seisin of the suit and of the Judge disposing of business under the Indian Arbitration Act; partly upon an order of reference and partly under an agreement".

Quere.—Whether there may not be exceptions to that comprehensive statement (10-1). (*Lord Blanesburgh.*) *RAM PROTAP CHAWRIA v. DURGA PROSAD CHAWRIA.*

(1925) 53 I. A. 1 = 53 C. 258 = 24 A. L. J. 13 = 43 C. L. J. 14 = (1926) M. W. N. 96 = 27 Punj. L. R. 35 = 3 Pat. L. R. 330 = 92 I. C. 633 = 28 Bom. L. R. 217 = A. I. R. 1925 P. C. 293 = 3 O. W. N. 127 = 49 M. L. J. 812 (821).

Appraisers.

—Reference to two, and, in event of disagreement between them, to an Umpire. See also UNDER ARBITRATION—UMPIRE.

—Appraisers—Position and rights of, in such a case.

By a consent judgment certain matters were referred to two appraisers, appointed respectively by the plaintiff and the defendants, and in the event of the appraisers not being able to agree, such matters were referred to a third person, who was accepted as umpire by both parties. The judgment further provided that the report of the umpire should be final and conclusive between the parties, and that the judgment should be a final judgment for the amount shown in the said report.

Held, that, so far as the appraisers agreed, they occupied the position of arbitrators; but that, in the event of disagreement, their functions terminated, and an independent jurisdiction was conferred upon the umpire (239, 248-9). (*Lord Parmoor.*) *ATTORNEY-GENERAL OF MANITOBA v. KELLEY.*

(1922) 31 M. L. T. 238 (P. C.).

—In a case in which the parties to a pending suit referred the matters in dispute between them to two appraisers, and, in the event of the appraisers not being able to agree, such matters were referred to an umpire, whose judgment was to be final and conclusive between the parties, *held*, that neither of the appraisers had any right or claim to be informed of the evidence brought before the umpire, or of the weight which the umpire attached to any particular evidence, or of the extent to which the umpire acted on his own knowledge and inspection, that there was no duty on the umpire to give either of the appraisers that information, and that, apart from dishonesty, no breach of duty in withholding it from him, on which a charge of misconduct could be sustained (250).

The appraisers did not stand in the position of ordinary arbitrators. Their functions as appraisers were discharged as soon as they had expressed the terms on which agreement was possible. The terms of the submission did not impose any further duty upon them. In the discussion before the umpire they were in the position of volunteers, although the umpire was perfectly within his authority in inviting them, or any other person, whom he might desire to consult, to state their opinions, and in listening to the reasons which they adduced in support (250). (*Lord Parmoor.*) *ATTORNEY-GENERAL OF MANITOBA v. KELLEY.*

(1922) 31 M. L. T. 238 (P. C.).

ARBITRATION—(Contd.)**Appraisers—(Contd.)**

———*Umpire—Jurisdiction of—Issue as to—Evidence—Proceedings at meeting of appraisers and umpire before latter issued his report—Transcript of—Admissibility of.*

By a consent judgment certain matters were referred to two appraisers, appointed respectively by the plaintiff and the defendants, and in the event of the appraisers not being able to agree, such matters were referred to a third person, accepted as umpire by both parties. The judgment further provided that the report of the umpire should be final and conclusive between the parties, and that the judgment should be a final judgment for the amount shown in the said report.

On a motion to set aside or vary the report on the ground that the umpire had exceeded his power and purported to decide a matter not submitted to his jurisdiction, *held*, that the transcript of the proceedings, when the appraisers, and the umpire, met before the umpire issued his report, was not admissible unless it could be regarded as a document so closely connected with and incorporated in the report as to be considered part of the report and to be looked at in the same way as the report itself, and that as, in the case before their Lordships, it was not possible to accept that view, the transcript was not admissible in evidence (243-4).

These proceedings are nothing more than informal discussions which took place before the issue of the report, and they may, or may not, have influenced the umpire in making his report. If evidence of this character should be held to be generally admissible, there would be a serious risk of undermining the principle of finality, which is a settled principle in arbitration proceedings (244). (*Lord Parmoor.*) **ATTORNEY-GENERAL OF MANITOBA v. KELLEY.** (1922) 31 M. L. T. 238 (P. C.).

Arbitrator.

APPOINTMENT OF.

AUTHORITY OF.

AWARD.

CONSULTATION WITH THIRD PARTY.

DEATH OF ORIGINAL—SUBSTITUTE.

DECISION ON EACH OF THE POINTS REFERRED.

DECISION OF, ON MATTERS LEFT TO HIM FOR FINAL DECISION.

DECISION OF, ON MATTERS WITHIN HIS JURISDICTION.

ERROR OF LAW.

ERROR OF LAW ON FACE OF AWARD.

EVIDENCE AS WITNESS OF.

FACT—DECISION ON QUESTION OF.

INHERITANCE—DISPUTE AS TO.

INHERITANCE—RULE OF, APPLICABLE TO PARTIES.

IRREGULARITY ON PART OF.

JURISDICTION OF.

LAW OR FACT.

LEGAL DEFENCES.

LIMITATION—PLEA OF.

MINISTERIAL ACTS—DELEGATION OF.

MISCONDUCT OF.

ORIGINAL ARBITRATOR.

PARTIBLE PROPERTY—IMPARTIBLE PROPERTY.

PRIVATE ARBITRATOR.

PROCEDURE.

PROCEEDINGS BEFORE—NOTES OF.

REFUSAL TO ACT BY.

RESIGNATION OF.

RETIREMENT OF ORIGINAL—SUBSTITUTE.

SIGNING OF AWARD SEPARATELY FROM OTHER ARBITRATORS.

SUBSTITUTE—APPOINTMENT OF.

WILL—INTERPRETATION OF.

ARBITRATION—(Contd.)**Arbitrator—(Contd.)**

APPOINTMENT OF.

———Contract—Provision for appointment in—Scope of—Death or retirement of original arbitrator—Appointment of substitute—Power of. *See* CONTRACT—CONSTRUCTION—ARBITRATION CLAUSE—APPOINTMENT OF ARBITRATOR. (1922) 49 I. A. 366 (374) = 52 C. 1 (10-1).

———Court—Appointment by, against wishes of party—Invalidity of—Decree in accordance with award in case of—Setting aside of, on that ground.

Ss. 312 and 314 of Civil Procedure Code of 1859 clearly import that the parties must either name the arbitrators or consent to the nomination of them by the Court. The Code gives no authority to the Court to force upon a reluctant party the decision of any question in the cause by arbitrators selected at its discretion.

In an appeal, from a decree passed in accordance with an award, and affirmed in appeal, their Lordships set aside the decrees of the Courts below on the ground that the nomination of the particular arbitrators by the Judge, without the consent and against the repeated protests of the appellant, was altogether irregular, and that their award was, therefore, not binding upon him (424-5). (*Sir James Colville.*) **SHEONATH v. RAMANATH.** (1865) 10 M. I. A. 413 =

5 W. R. 21 = 1 Suth. 616 = 2 Sar. 134 =

1 I. J. (N. S.) 161 = R. & J.'s No. 4.

———Irregularity in—Objection to—Right of—Consent to their appointment in prior abortive agreement to refer—Effect.

If the appointment of the arbitrators in this case was irregular, the irregularity was in no degree cured by the fact that they were four out of five persons to whom the appellant had on a former occasion agreed to refer the matters then in dispute between him and the respondent. That agreement to refer had proved abortive; the respondent's suit was not brought to enforce it, but for the determination of the rights of the parties by the Court; and the question referred to the arbitrators was an entirely new question suggested by the Court (426). (*Sir James Colville.*) **SHEONATH v. RAMANATH.**

(1865) 10 M. I. A. 413 = 5 W. R. 21 = 1 Suth. 616 =

2 Sar. 134 = 1 I. J. (N. S.) 161 = R. & J.'s No. 4.

———Irregularity in—Setting aside of decree on award on ground of—Procedure on.

On setting aside a decree passed in accordance with an award on the ground that the appointment of the arbitrators was irregular because it was made by the Court without the consent and against the repeated protests of the appellants, their Lordships remitted the cause to the Courts below with directions, if both parties consented, to refer the dispute to arbitrators duly appointed under the Civil Procedure Code of 1859, and if they did not, to investigate into and dispose of the matters in dispute between them in the regular way (427-8). (*Sir James Colville.*) **SHEONATH v. RAMANATH.**

(1865) 10 M. I. A. 413 = 5 W. R. 21 = 1 Suth. 616 =

2 Sar. 134 = 1 I. J. (N. S.) 161 = R. & J.'s No. 4.

———Irregularity in—Waiver of—Appearance before arbitrators under continuing protest and in self-defence not amounting to.

Their Lordships have considered whether this case could be brought within the principle of those authorities, which establish that a defect in the nomination of arbitrators, may be cured by the waiver implied from the act of the party in going in before them, and taking his chance of a favourable decision. They are, however, of opinion that the appellant cannot be held to have forfeited in this manner his right to question the validity of these awards. His protests and appeals were frequent, and were repeatedly rejected as

ARBITRATION—(Contd.)**Arbitrator—(Contd.)****APPOINTMENT OF—(Contd.)**

inadmissible by the Judges. Whatever part he took in the proceedings before the arbitrators, he must be deemed to have taken under a continuing protest, and in self-defence (426). (*Sir James Colville.*) **SHEONATH v. RAMANATH.**

(1865) 10 M. I. A. 413 = 5 W. R. 21 =
1 Suth. 616 = 2 Sar. 134 = 1 I. J. (N. S.) 161 =
R. & J.'s No. 4.

—Irregularity in—Waiver of—Effect.

A defect in the nomination of arbitrators may be cured by the waiver implied from the act of the party in going in before them, and taking his chance of a favourable decision (426). (*Sir James W. Colville.*) **SHEONATH v. RAMANATH.**

(1865) 10 M. I. A. 413 =
5 W. R. 21 = 1 Suth. 616 = 2 Sar. 134 =
1 I. J. (N. S.) 161 = R. & J.'s No. 4.

—Objection to—Decree in accordance with award—Appeal from—Maintainability in—Omission to appeal from order appointing them—Effect.

In an appeal from a decree passed in accordance with an award, *held*, it was open to the appellant to insist that the nomination of the particular arbitrators by the Judge, without the consent and against the repeated protests of the appellant, was altogether irregular, and that their award was, therefore, not binding upon him.

The appeal is, in effect, to set aside an award which the appellant contends is not binding upon him. And in order to do this he was not bound to appeal against every interlocutory order which was a slip in the procedure that led up to the award (423). (*Sir James Colville.*) **SHEONATH v. RAMANATH.**

(1865) 10 M. I. A. 413 =
5 W. R. 21 = 1 Suth. 616 = 2 Sar. 134 =
1 I. J. (N. S.) 161 = R. & J.'s No. 4.

AUTHORITY OF.

—Inheritance—Dispute as to—Reference of—Decision according to arbitrator's notions of wishes and intentions of deceased—Power of. See ARBITRATION—ARBITRATOR—PRIVATE ARBITRATOR.

(1891) 18 I. A. 73 (77) =
18 C. 414 (419).

—Scope of—Will—Interpretation of—Disputes as to—Reference in regard to.

An Oudh talukdar possessed of talukas entered in lists 2 and 5 of the Lists of the Oudh Estates Act, 1869, died leaving a will by which he bequeathed the said talukas in the manner specified therein to his brother, widow, and daughter and her male issue. After his death disputes arose between his widow and his brother, and they referred their disputes with reference to the properties dealt with by the will and with reference to other properties of the deceased to the arbitration of certain persons, authorising them to settle the disputes after perusing the clauses given in the will and considering other matters. The arbitrators made an award which awarded some of the talukas to the widow, and divided the other properties of the deceased in a certain way.

Held, that the arbitrators must be deemed to have had full authority to put such interpretation on the clauses of the will as they thought proper. (*Lord Phillimore.*) **DEPUTY COMMISSIONER OF BARA BANKI v. RECEIVER IN BANKRUPTCY OF THE ESTATE OF CHAUDHRI SHALIQUZ-ZAMAN.**

(1928) 3 Luck. 372 = 5 O. W. N. 565 =
32 C. W. N. 1120 = 48 C. L. J. 418 =
A. I. R. 1928 P. C. 202 = 56 M. L. J. 601.

AWARD.**—Addition to, or alteration of, subsequent to making it—Jurisdiction.**

An arbitrator is *functus officio* when he has made the award, and a subsequent addition to, or alteration of the

ARBITRATION—(Contd.)**Arbitrator—(Contd.)****AWARD—(Contd.)**

award is not valid or binding upon the parties (119). (*Lord Lindley.*) **JAFI BEGUM v. SYED ALI RAZA.**

(1901) 28 I. A. 111 = 23 A. 383 (392) = 5 C. W. N. 585 =
3 Bom. L. R. 311 = 8 Sar. 27 = 11 M. L. J. 149.

—Schedule of property to—Annexing of, after making award—Jurisdiction.

An award declaring that two persons were equally entitled to the properties of a deceased person was presented for registration. The award did not contain a specification of the properties dealt with by it, and on such specification being required, the arbitrator furnished a schedule in which he mentioned some items as having been gifted to one of the parties during the lifetime of the owner, and as not being subject to the equal rights declared by the award.

Held, that the annexation of the schedule was *ultra vires* of the arbitrator and that the schedule was not binding on the parties to the arbitration.

An entry made by the arbitrator in the schedule of property after he had made his award is no part of his award, and cannot confer any title upon either of the parties to the submission. (*Lord Lindley.*) **JAFRI BEGUM v. SYED ALI RAZA.**

(1901) 28 I. A. 111 (119) = 23 A. 383 (392) =
5 C. W. N. 585 = 3 Bom. L. R. 311 = 8 Sar. 27 =
11 M. L. J. 149.

CONSULTATION WITH THIRD PARTY.**—Validity of award in case of.**

The mere fact that the arbitrators consulted a person supposed to be learned in the law is not a valid objection to their award (214). (*Sir James W. Colville.*) **CHOWDHRI MURTAZA HOSSEIN v. MT. BIBI BECHUNNISA.**

(1876) 3 I. A. 209 = 26 W. R. P. C. 10 = 3 Sar. 663 =
3 Suth. 342 = Bald. 86 = R. & J.'s No. 43 (Oudh).

—It would be prudent and discreet for arbitrators, when they desire to put themselves on the best footing of information as to matters of law, to ask all the parties to be present when they communicate with any gentlemen whom they may see upon that subject. But if they cannot be shewn to have acted with improper partiality or for any other purpose than that of being correctly informed about the law, and avoiding mistakes of law, and if they cannot be shown to have been misled as to the law, it seems an extraordinary thing...if they, having been rightly advised as to the law, and having taken all the steps which they did take for the sole purpose of getting correct information as to law, that should be a ground for setting aside the award.

Where one of the acts of misconduct charged against the arbitrators was that they had not communicated to the plaintiff until the award was made the fact that they had consulted a third party as to the meaning of certain words in the agreement of reference bearing upon the scope of the reference, and their Lordships were satisfied that, though there might have been an error of judgment on the part of the arbitrators, there was no ground for impeaching the good faith of any of the parties concerned, or the correctness of the opinion given by the party consulted, *held*, there was no misconduct on the part of the arbitrators such as to vitiate their award. (*Sir Andrew Scoble.*) **BUTA v. LAHORE MUNICIPAL COMMITTEE.**

(1902) 29 I. A. 168 (174-5) = 29 C. 854 (866-7) =
7 C. W. N. 82 = 4 Bom. L. R. 673 = 8 Sar. 327 =
87 P. R. 1902.

DEATH OF ORIGINAL—SUBSTITUTE.

—Appointment of—Power of. *See CONTRACT—CONSTRUCTION—ARBITRATION CLAUSE.*

(1922) 49 I. A. 366 (374) = 52 C. 1 (10-1).

ARBITRATION—(Contd.)**Arbitrator—(Contd.)****DECISION ON EACH OF THE POINTS REFERRED.**

———*Not necessary.*

Arbitrators are not bound to give an award on each of the points referred to them. They have to give their award on the whole case. (*Lord Macnaghten.*) GHULAM JILANI *v.* MUHAMMAD HUSSAN. (1901) 29 I. A. 51 (60) = 29 C. 167 (186) = 6 C. W. N. 226 = 4 Bom. L. R. 161 = 25 P. R. 1902 = 8 Sar. 154 = 12 M. L. J. 77.

DECISION OF, ON MATTERS LEFT TO HIM FOR FINAL DECISION.

———Challenge of—Grounds—Evidence—Expert evidence—Admissibility. See ARBITRATION—UMPIRE—AWARD OF—MATTERS SUBMITTED TO HIM FOR FINAL DECISION. (1922) 31 M. L. T. 238 (244) (P. C.).

DECISION OF, ON MATTERS WITHIN HIS JURISDICTION.

———Scrutiny of—Evidence as witness of arbitrator admitted on charge of corruption—Use of—Propriety. See ARBITRATION—ARBITRATOR—EVIDENCE AS WITNESS OF, ADMITTED ON CHARGE OF CORRUPTION. (1914) 36 A. 336 (344-5).

ERROR OF LAW.

———Effect of, on validity of award. See ARBITRATION—AWARD—ERROR OF LAW.

ERROR OF LAW ON FACE OF AWARD.

———Effect. See ARBITRATION—AWARD—ERROR OF LAW ON FACE OF.

EVIDENCE AS WITNESS OF.

———*Duty to give.*

An arbitrator, selected by the parties, comes within the general obligation of being bound to give evidence. (*Lord Parmoor.*) AMIR BEGAM *v.* BADR-UD-DIN HUSAIN. (1914) 36 A. 336 (344-5) = 18 C. W. N. 755 =

19 C. L. J. 484 = 1 L. W. 1015 = 17 O. C. 120 = 16 M. L. T. 35 = (1914) M. W. N. 472 = 21 A. L. J. 537 = 16 Bom. L. R. 413 = 23 I. C. 625 = 27 M. L. J. 181.

———Admissibility—Dishonesty or partiality—Charge of—Inquiry into.

Where a charge of dishonesty or partiality is made, any relevant evidence which an arbitrator can give is without doubt properly admissible. The Court would, in such a case, reject no evidence of an arbitrator which could be of assistance in informing itself whether such charges were established. (*Lord Parmoor.*) AMIR BEGAM *v.* BADR-UD-DIN HUSAIN. (1914) 36 A. 336 (344-5) = 18 C. W. N. 755 = 19 C. L. J. 484 = 1 L. W. 1015 = 17 O. C. 120 = 16 M. L. T. 35 = (1914) M. W. N. 472 = 21 A. L. J. 537 = 16 Bom. L. R. 413 = 23 I. C. 625 = 27 M. L. J. 181.

———Admitted on charge of corruption—Use of, to scrutinize decision of arbitrator on matters within his jurisdiction—Propriety.

Evidence as witness of an arbitrator admitted as relevant on a charge of dishonesty or partiality ought not to be used for a different purpose; namely, to scrutinise his decision on matters within his jurisdiction, and on which his decision is final.

Held, that the Sub-Judge had not, in the case before the P. C., taken sufficient care in the discrimination of the purpose for which the evidence of the arbitrator was admissible, and that he had utilised evidence relevant on the charge of corruption to criticise methods adopted by the arbitrator in determining the quantum of his valuation, a matter which was in the discretion of the arbitrator and beyond the competency of the Sub-Judge to scrutinise. (*Lord Parmoor.*) AMIR BEGAM *v.* BADR-UD-DIN HUSAIN. (1914) 36 A. 336 (344-5) = 18 C. W. N. 755 =

19 C. L. J. 484 = 1 L. W. 1015 = 17 O. C. 120 = 16 M. L. T. 35 = (1914) M. W. N. 472 = 21 A. L. J. 537 = 16 Bom. L. R. 413 = 23 I. C. 625 = 27 M. L. J. 181.

ARBITRATION—(Contd.)**Arbitrator—(Contd.)****EVIDENCE AS WITNESS OF—(Contd.)**

———*In legal proceeding to enforce his award—Limitations applicable to.*

The limitations are stated in the case of *Buccleuch v. Metropolitan Board of Works*, (1871) L. R. 5 H. L. 418. (*Lord Parmoor.*) AMIR BEGAM *v.* BADR-UD-DIN HUSAIN. (1914) 36 A. 336 (344-5) = 18 C. W. N. 755 = 19 C. L. J. 484 = 1 L. W. 1015 = 17 O. C. 120 = 16 M. L. T. 35 = (1914) M. W. N. 472 = 21 A. L. J. 537 = 16 Bom. L. R. 413 = 23 I. C. 625 = 27 M. L. J. 181.

FACT—DECISION ON QUESTION OF.

———Binding nature of. See ARBITRATION—ARBITRATOR—LAW OR FACT.

INHERITANCE—DISPUTE AS TO.

———Reference to private arbitrator of—Decision by him according to his notion of wishes and intentions of deceased—Propriety. See ARBITRATION—ARBITRATOR—PRIVATE ARBITRATOR. (1891) 18 I. A. 73 (77) = 18 C. 414 (419).

INHERITANCE—RULE OF, APPLICABLE TO PARTIES.

———Alteration of—Power of—Partible property—Conversion of, into impartible property.

An arbitrator has no power to alter the course of legal devolution in a mode at variance with the ordinary principles of the law by which the parties are governed in the absence of special custom prevailing in the family. He has no power to make property which was divisible by law indivisible for ever. (*Lord Lindley.*) JAFRI BEGUM *v.* SYED ALI RAZA. (1901) 28 I. A. 111 (118) = 23 A. 383 (392) = 5 C. W. N. 585 = 3 Bom. L. R. 311 = 8 Sar. 27 = 11 M. L. J. 149.

IRREGULARITY ON PART OF.

———Defence of—Suit to enforce award—Maintainability in. See ARBITRATION—AWARD—SUIT TO ENFORCE—DEFENCES OPEN IN.

———Setting aside of award on ground of—Jurisdiction.

An Indian Court cannot set aside an English award on the ground of irregularity on the part of the arbitrator (180). (*Viscount Cave.*) OPPENHEIM & CO. *v.* MAHOMED HANEEF. (1922) 49 I. A. 174 = 45 M. 496 (503) = 26 C. W. N. 642 = 30 M. L. T. 291 = 16 L. W. 33 = (1922) M. W. N. 396 = 24 Bom. L. R. 1245 = 36 C. L. J. 444 = A. I. R. 1922 P. C. 36 = 74 I. C. 616 = 43 M. L. J. 422

JURISDICTION OF.

———Absence of—Proceedings for arbitration becoming infructuous by reason of—Time spent in—Deduction of, in subsequent proceedings before arbitrator with jurisdiction See LIMITATION ACT OF 1908, S. 14—ARBITRATION. (1929) 56 M. L. J. 614.

———Misconduct of—Issue as to—Evidence extrinsic—Admissibility.

On an issue of jurisdiction, or of misconduct of an umpire, extrinsic evidence is no doubt admissible; but it is admissible only subject to the ordinary principles which apply to the admissibility of all evidence (244). (*Lord Parmoor.*) ATTORNEY-GENERAL OF MANITOBA *v.* KELLEY. (1922) 31 M. L. T. 238 (P. C.).

———Question of—Decision as to—Court's power of—Limit to.

The question of whether an arbitrator acts within his jurisdiction is, of course, for the Court to decide, but whether the arbitrator acts within his jurisdiction or not depends solely upon the clause of reference. It is, therefore, for the Court to decide in any particular case whether the dispute which has arisen is a dispute covered by the clause

ARBITRATION—(Contd.)**Arbitrator—(Contd.)****JURISDICTION OF—(Contd.)**

of reference. But where that clause refers to the arbitrator the whole question whether it depends on law or on fact, with the exception only of dispute as to quality, it is for the arbitrator and not for the Court to decide what is the effect of a rejection based on an award as to quality. (*Lord Dunedin.*) **CHAMPSEY BHARA & CO. v. JIVRAJ BALLOO SPINNING AND WEAVING CO.**

(1923) 50 I. A. 324 (332) = 47 B. 578 =
25 Bom. L. R. 588 = A. I. R. 1923 P. C. 65 =
38 C. L. J. 130 = (1923) M. W. N. 596 =
33 M. L. T. 419 = 28 C. W. N. 397 = 73 I. C. 436 =
44 M. L. J. 706.

—*Terms of reference—Limit imposed by—Confinement within—Necessity.*

Their Lordships feel the necessity of not allowing arbitrators to act without jurisdiction by doing that which the terms of the submission to arbitration do not entitle them to do (216-7). (*Sir James W. Colville.*) **CHOWDHRI MURTAZA HOSSAIN v. MUSSUMAT BIBI BECHUNNISSA.**

(1876) 3 I. A. 209 = 26 W. R. P. C. 10 =
3 Sar. 663 = 3 Suth. 342 = Bald. 86 =
R. & J.'s No. 43 (Oudh).

LAW OR FACT.

—*Decision on questions of—Finality of.*

Where a cause or matter in difference is referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final Judge of all questions both of law and of fact. The only exceptions to that rule, are, cases where the award is the result of corruption or fraud, and cases where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award. (*Lord Dunedin.*) **CHAMPSEY BHARA & CO. v. JIVRAJ BALLOO SPINNING & WEAVING CO.**

(1923) 50 I. A. 324 (330-1) = 47 B. 578 =
25 Bom. L. R. 588 = A. I. R. 1923 P. C. 66 =
38 C. L. J. 130 = (1923) M. W. N. 596 =
33 M. L. T. 419 = 28 C. W. N. 397 = 73 I. C. 436 =
44 M. L. J. 706.

—Parties who submit their disputes to arbitration are bound by the arbitrators' conclusions in point of law or of fact. (*Viscount Sumner.*) **SALEH MAHOMED UMAR DOSSAL v. NATHOOMAL KESSAMAL.**

(1927) 54 I. A. 427 = 21 S. L. R. 101 =
104 I. C. 476 = 31 C. W. N. 1027 =
29 Bom. L. R. 1150 = 46 C. L. J. 9 = 39 M. L. T. 6 =
A. I. R. 1927 P. C. 164 = 53 M. L. J. 18.

LEGAL DEFENCES.

—Duty to give effect to. *See* LIMITATION ACT OF 1908—ARBITRATION PROCEEDINGS.

(1929) 56 M. L. J. 614.

LIMITATION—PLEA OF.

—Duty to give effect to. *See* LIMITATION ACT OF 1908—ARBITRATION PROCEEDINGS.

(1929) 56 M. L. J. 614.

—Entertaining of—Power of—Plea not raised in pleadings or issues—Appointment of arbitrator by consent. *See* COMMISSIONER—LIMITATION—PLEA OF.

(1874) 1 I. A. 346 (359).

MINISTERIAL ACTS—DELEGATION OF.

—*Power of.*

An arbitrator may delegate to a third party the performance of acts of a ministerial character, so long as he exercises his own judgment on the matters referred. (*Sir Andrew Scoble.*) **BUTA v. MUNICIPAL COMMITTEE OF LAHORE.**

(1902) 29 I. A. 168 (175) =
29 C. 854 (867-8) = 7 C. W. N. 82 = 4 Bom. L. R. 673 =
8 Sar. 327 = 87 P. R. 1902.

ARBITRATION—(Contd.)**Arbitrator—(Contd.)****MISCONDUCT OF.**

—*What amounts to.*

A dispute between the two widows of a deceased Hindu with respect to their respective rights to the estate of the deceased was referred to arbitration. One of the questions for the decision of the arbitrators was whether the younger widow was, by reason of her unchastity, disentitled to succeed to any portion of the estate of her deceased husband. The arbitrators held that she was and awarded her only maintenance. There was no ground for saying that, in deciding against the younger widow, the arbitrators misconducted themselves, or made any mistake in conducting the inquiry. The only thing apparently that could be suggested arose from the evidence which one of the arbitrators gave, in which, when he was cross-examined, he said, in reply to some question which was not given, "How could we give her" (the younger widow) "half. When the Sirkar had not done so in the Dakil Kharij?"—that is, in certain mutation proceedings which had been taken immediately upon the death of the deceased.

Held, that that was not a sufficient ground for saying that there was anything like misconduct on the part of the arbitrator in question (71). (*Sir Richard Couch.*) **RANI BHAGOTI v. RANI CHANDAN.** (1885) 12 I. A. 67 =

11 C. 386 (392-3) = 4 Sar. 624.

—Charge of—Evidence as witness of arbitrator admitted on—Use of, to scrutinise his decision on matters within his jurisdiction—Propriety. *See* ARBITRATION—ARBITRATOR—EVIDENCE AS WITNESS OF, ADMITTED ON CHARGE OF CORRUPTION.

(1914) 36 A. 336 (344-5).

—Charge of—Evidence extrinsic—Admissibility. *See* ARBITRATION—ARBITRATOR—JURISDICTION OF—MISCONDUCT OF—ISSUE AS TO.

(1922) 31 M. L. T. 238 (244) (P. C.).

—Charge of—Inquiry into—Evidence as witness of arbitrator—Admissibility. *See* ARBITRATION—ARBITRATOR—EVIDENCE AS WITNESS OF—ADMISSIBILITY.

(1914) 36 A. 336 (344-5).

—*Collusion with one of parties—Validity of award in case of.*

The dispute between the appellant, the Keittima adopted daughter of K, and the respondent, one of the wives of K, was referred by the parties to the arbitration of four *lugys*, or elders, each party nominating two elders. On the same day the *lugys* made and delivered, what purported to be an award, finding that, under the Buddhist Dhammathats, the Keittima daughter, the appellant, was entitled to a fourth share of the estate of K, or Rs. 30,000, and that in accordance with that award the respondent should, at the time of registration, in the Registration Office, pay the said sum in full into the hands of the appellant. On the following day a sum of Rs. 30,000 was paid to the appellant by the respondent, and a deed of release was executed by the parties in the presence of witnesses.

In a suit by the appellant claiming to enforce as against the respondent her rights as the Keittima adopted daughter of K, the question arose as to what was the effect of the award and release. The trial Judge found, and their Lordships concurred in his finding, that the arbitrators had acted collusively with the respondent, and the trial Judge held that, by reason of such collusion, the award was invalid.

Held, affirming the trial Judge, that the award was wholly invalid owing to the misconduct of the arbitrators, and that the finding in the award, that the appellant was the Keittima daughter of K, was not a finding on which the appellant could rely, and that the payment of Rs. 30,000 under the terms of the award could not be regarded as a

ARBITRATION—(Contd.)**Arbitrator—(Contd.)****MISCONDUCT OF—(Contd.)**

valid release of the claims of the appellant against the estate of K. (*Lord Parmoor.*) **MA THAN THAN v. MA PWA THIT.** (1923) 1 R. 451 = A. I. R. 1923 P. C. 156 = 33 M. L. T. 361 (P. C.) = 2 Bur. L. J. 260 = (1923) M. W. N. 711 = 29 C. W. N. 610 = 77 I. C. 63 = 46 M. L. J. 334 (339).

——Consultation with third party if amounts to. *See* **ARBITRATION—ARBITRATOR—CONSULTATION WITH THIRD PARTY.**

——Defence of—Suit to enforce award—Maintainability in. *See* **ARBITRATION—AWARD—SUIT TO ENFORCE—DEFENCES OPEN IN.**

——Error of law on face of award if amounts to. *See* **ARBITRATION—AWARD—ERROR OF LAW ON FACE OF—WHAT AMOUNTS TO.** (1927) 54 I. A. 427.

——Finding of—Evidence required to support.

In a case in which the appellant disputed the validity of an award on the ground that the arbitrator had acted corruptly and dishonestly in his capacity of Judge, it was argued for the appellant that, although in each instance the evidence of dishonesty might not amount to more than a case of suspicion, the aggregate effect would support the charge of corruption, since in every instance the decision was given in favour of the 1st respondent, and to the detriment of the appellant.

Held, that that was not an accurate summary, but that in any case there would be no sufficient ground to infer such a grave charge as dishonesty and partiality against an arbitrator unless much stronger evidence was adduced in support of the particular instances relied upon than was forthcoming in the case. (*Lord Parmoor.*) **AMIR BEGAM v. BADR-UD-DIN HUSAIN.**

(1914) 36 A. 336 (349) = 18 C. W. N. 755 = 19 C. L. J. 484 = 1 L. W. 1015 = 17 O. C. 120 = 16 M. L. T. 35 = (1914) M. W. N. 472 = 21 A. L. J. 537 = 16 Bom. L. R. 413 = 23 I. C. 625 = 27 M. L. J. 181.

——Procedure—Irregularity in, amounting to no proper hearing. *See* **ARBITRATION—ARBITRATOR—PROCEDURE.** (1914) 36 A. 336 (343).

——Proof of—Quantum.

On an application filed by the 1st respondent under paragraph 20 of Schedule II of the C. P. C. of 1908, praying that the award (which was made without the intervention of the Court) might be filed and a decree passed in accordance therewith, the appellant objected to the validity of the award on the ground that the arbitrator had acted corruptly and dishonestly in his capacity of Judge.

Held, affirming the Court below, that the charges of dishonesty and partiality had entirely failed. (*Lord Parmoor.*) **AMIR BEGAM v. BADR-UD-DIN HUSAIN.**

(1914) 36 A. 336 = 18 C. W. N. 755 = 19 C. L. J. 484 = 1 L. W. 1015 = 17 O. C. 120 = 16 M. L. T. 35 = (1914) M. W. N. 472 = 21 A. L. J. 537 = 16 Bom. L. R. 413 = 23 I. C. 625 = 27 M. L. J. 181.

——Setting aside of award on ground of. *See* **AWARD—SETTING ASIDE OF—JURISDICTION OF ARBITRATOR.** (1928) 110 I. C. 251.

ORIGINAL ARBITRATOR.

——Death or retirement of—Substitute—Appointment of—Power of. *See* **CONTRACT—CONSTRUCTION—ARBITRATION CLAUSE.** (1922) 49 I. A. 366 (374) = 52 C. 1 (10-1).

PARTIBLE PROPERTY—IMPARTIBLE PROPERTY.

——Conversion into—Power of. *See* **ARBITRATION—ARBITRATOR—INHERITANCE.**

(1901) 28 I. A. 111 (118) = 23 A. 383 (392).

ARBITRATION—(Contd.)**Arbitrator—(Contd.)****PRIVATE ARBITRATOR.**

——Inheritance—Dispute as to—Reference of—Decision according to arbitrator's notion of wishes and intentions of deceased—Propriety.

After the death of M, a Mahomedan, disputes arose between his sons relating to their father's lands and the office of lambardar. They entered into an agreement, whereby it was agreed to appoint a private arbitrator for a decision of the said disputes. A, who was intimately connected with the circumstances of the family and was their pir, was appointed private arbitrator, and the parties agreed to accept whatever the said A might decide in respect of the disputes between them. The arbitrator decided according to what he conceived was the wish and intention of the deceased M. He acted on the broad view of giving effect to the deceased's intentions.

Held, that the arbitrator was within his right in so doing (77).

The agreement to arbitrate was not an agreement that the arbitrator was to be controlled in his decision by any custom or Mahomedan law, or otherwise. It was an agreement to refer the matter in dispute generally to his decision. He was selected by reason of his knowledge of the circumstances of the family (77). (*Lord Morris.*) **MUHAMMED NAWAZ KHAN v. ALAM KHAN.**

(1891) 18 I. A. 73 = 18 C. 414 (419) = 6 Sar. 26 = 70 P. R. 1891.

PROCEDURE.

——Irregularity in, amounting to no proper hearing.

If irregularities in procedure can be proved which would amount to no proper hearing of the matters in dispute there would be misconduct sufficient to vitiate the award without any imputation on the honesty or impartiality of the arbitrator. (*Lord Parmoor.*) **AMIR BEGAM v. BADR-UD-DIN HUSAIN.** (1914) 36 A. 336 (343) = 18 C. W. N. 755 = 1 L. W. 1015 = 17 O. C. 120 = 19 C. L. J. 484 = 16 M. L. T. 35 = (1914) M. W. N. 472 = 21 A. L. J. 537 = 16 Bom. L. R. 413 = 23 I. C. 625 = 27 M. L. J. 181.

PROCEEDINGS BEFORE—NOTES OF.

——Preservation of—Duty as to—Failure to preserve—Effect.

No doubt it is generally desirable that an arbitrator should make and retain for subsequent use, if necessary, notes of the proceedings before him; but there is no warrant for holding that in the absence of such notes an award should be set aside at the instance of one of the parties, who must be held to have known the general course of procedure, and who did not make any protest until after the making of the award with the terms of which he was not satisfied. (*Lord Parmoor.*) **AMIR BEGAM v. BADR-UD-DIN HUSAIN.** (1914) 36 A. 336 (343) = 18 C. W. N. 755 = 19 C. L. J. 484 = 1 L. W. 1015 = 17 O. C. 120 = 16 M. L. T. 35 = (1914) M. W. N. 472 = 21 A. L. J. 537 = 16 Bom. L. R. 413 = 23 I. C. 625 = 27 M. L. J. 181.

REFUSAL TO ACT BY.

——Refusal to accept nomination if included in. *See* C. P. C. OF 1908, SCH. II, PARA. 5 (1) (b) (ii)—**REFUSAL TO ACT.** (1911) 38 I. A. 181 (186-7) = 33 A. 743 (750-1).

RESIGNATION OF.

——What amounts to.

A decree passed in conformity with an award was set aside on appeal on the ground that the award was informal, inasmuch as it had been signed by the arbitrators separately; and the case was remanded in order that the Court below

ARBITRATION—(Contd.)**Arbitrator - (Contd.)****RESIGNATION OF—(Contd.)**

might take steps to have the award formally signed by the arbitrators at the same time, and not on different dates. On the case going back, the Judge in the Court below proposed to have the award signed by both the arbitrators in his presence. One of the arbitrators, however, taking exception to some things that had been done, wrote a letter to the Judge, in which, after stating those objections, he said no other alternative was left to him than therewith to submit his resignation. The Judge was very unwilling to accept that resignation, and induced that arbitrator to withdraw it. The result was that the two arbitrators came before the Judge, they signed the award, the award was then regularly placed upon the file of the Court, and a decree was passed in accordance with the award.

On objection taken to the validity of the award, and of the decree passed in accordance therewith on the ground that the particular arbitrator referred to above was *functus officio* at the time when he signed the award, *held*, looking to the mode in which he merely tendered his resignation to the Judge in a letter addressed to him, and afterwards withdrew it at the request of the Judge, that he never formally divested himself of his character of arbitrator, and that the award was a formal award (147). **MAHARAJAH JOYMUNGAL SINGH BAHADUR v. MOHUN RAM MAR-WAREE.**

(1875) 3 **Suth.** 145 =

23 **W. R.** 429 = 3 **Sar.** 493.

RETIREMENT OF ORIGINAL—SUBSTITUTE.

—Appointment of—Power of. *See* **CONTRACT—CONSTRUCTION—ARBITRATION CLAUSE.**

(1922) 49 **I. A.** 366 (374) = 52 **C.** 1 (10-1).

SIGNING OF AWARD SEPARATELY FROM OTHER ARBITRATORS.

—Effect. *See* **ARBITRATION—AWARD—SIGNING OF, BY ARBITRATORS SEPARATELY.** (1875) 23 **W. R.** 429.

SUBSTITUTE—APPOINTMENT OF.

—On death or retirement of original arbitrator—Power of. *See* **CONTRACT—CONSTRUCTION—ARBITRATION CLAUSE.** (1922) 49 **I. A.** 366 (374) =

52 **C.** 1 (10-1).

WILL.—INTERPRETATION OF.

—Disputes as to—Reference in regard to—Authority in case of—Scope of. *See* **ARBITRATION—ARBITRATOR—AUTHORITY OF—SCOPE OF.** (1928) 3 **Luck.** 372.

Award.**WHAT AMOUNTS TO AN.**

ACCOUNTS—ADJUSTMENT OF, AMONG MEMBERS OF JOINT HINDU FAMILY.

ADDITION TO, OR ALTERATION OF, AFTER MAKING IT. APPLICATION TO FILE, UNDER PARA. 20 OF SCH. II OF C. P. C. OF 1908.

BENEFIT OF.**BINDING NATURE OF.****BOUNDARY DISPUTE.**

CASH—DIVISION OF, AMONG MEMBERS OF JOINT HINDU FAMILY.

CLAIMS MUTUAL UNDER—EQUITABLE SET-OFF IN RESPECT OF.

DECISION ON EACH OF THE POINTS REFERRED.

DECISION ON MATTERS LEFT TO ARBITRATOR FOR FINAL DECISION.

DECLARATION OF INVALIDITY OF—SUIT FOR.

DECREE IN ACCORDANCE WITH.

ENFORCEABILITY OF—APPLICATION TO FILE AWARD.

ERROR OF LAW.

ERROR OF LAW ON FACE OF.

ARBITRATION—(Contd.)**Award—(Contd.)**

ERROR ON PART OF ARBITRATOR.

ESTATE CONVEYED UNDER—WORDS “ALWAYS OR FOR EVER.”

EVIDENCE—AWARD AGAINST WEIGHT OF.

EVIDENCE INADMISSIBLE—REFERENCE TO.

FUTURE AWARD—CLAIM UNDER.

HINDU LAW—JOINT FAMILY — PARTITION—AWARD EFFECTING.

HINDU LAW—JOINT FAMILY PROPERTY—PARTIAL PARTITION OF—AWARD EFFECTING.

INVALID AWARD—RELEASE GIVEN IN PURSUANCE OF.

INVALIDITY OF—DECLARATION OF.

INVALIDITY OF, AS REGARDS PORTION.

JUDGMENT ON—MERGER OF AWARD IN.

LAW—ERROR OF, ON FACE OF AWARD.

MAHOMEDAN—WIDOW AND BROTHER OF DECEASED.

MAHOMEDAN LAW—INHERITANCE.

MAKING OF—DOUBT AS TO.

MATTERS DEALT WITH BY—SUIT IN RESPECT OF.

MATTERS LEFT FOR FINAL DECISION OF ARBITRATOR —AWARD ON—CHALLENGE OF—GROUNDS—EVIDENCE.

PARTY TO REFERENCE — WISHES OF — AWARD ACCORDING TO.

PARTIES BOUND BY.

PARTIES TO SUBMISSION AND THEIR REPRESENTATIVES.

PERSON NOT PARTY TO REFERENCE.

PERSON NOT PROPERLY REPRESENTED.

PORTION OF, INVALID—EFFECT OF.

PROCEEDINGS TO ENFORCE, IN SUMMARY WAY—SUIT FOUNDED ON ORIGINAL TITLE, AWARD AND PROCEEDINGS LEADING TO IT BEING USED ONLY AS EVIDENCE—LIMITATION.

SCHEDULE OF PROPERTY TO—ANNEXING OF, AFTER MAKING AWARD.

SEPARABLE AWARD—PORTION OF—INVALIDITY OF AWARD AS REGARDS.

SETTING ASIDE OF—GROUNDS.

SUIT FOR.

SETTING ASIDE OF ARBITRATION AND OF—BENEFIT OF.

SETTLEMENT OF ACCOUNT—DISTINCTION.

SIGNING OF, BY ARBITRATORS SEPARATELY—VALIDITY OF AWARD IN CASE OF.

STRANGER TO REFERENCE.

SUIT DISMISSED IN ACCORDANCE WITH—REVERSAL IN REVISION OF, AND SETTING ASIDE OF ARBITRATION AND OF AWARD IN REVISION—BENEFIT OF—RIGHT TO.

SUIT TO ENFORCE—

DEFENCES OPEN IN.

EVIDENCE AS WITNESS OF ARBITRATOR IN.

SUMS FOUND DUE UNDER—

PORTION OF—SUIT FOR—SUBSEQUENT SUIT FOR THE REMAINDER.

PRO-NOTE EXECUTED FOR—SUIT UPON—DISMISSAL OF—SUIT SUBSEQUENT FOR AMOUNT DUE UNDER AWARD.

UMPIRE.

VALIDITY OF.

WILL—DECISION ACCORDING TO TERMS OF—SUBMISSION TO.

WHAT AMOUNTS TO AN.

—What amounts to an—Receipt signed by party found to be indebted witnessed by arbitrators and accepted by opposite party if an. *See* **ARBITRATION—PROCEEDINGS IN NATURE OF—AWARD.** (1913) 41 **I. A.** 142 (145).

ARBITRATION—(Contd.)**Award—(Contd.)****ACCOUNTS—ADJUSTMENT OF, AMONG MEMBERS OF JOINT HINDU FAMILY.**

——Mortgage with possession—Receipts under—Adjustment as to, if included. *See* ARBITRATION—AWARD—HINDU LAW—JOINT FAMILY. (1914) 27 M. L. J. 128.

ADDITION TO, OR ALTERATION OF, AFTER MAKING IT.

——Validity. *See* ARBITRATION — ARBITRATOR—AWARD. (1901) 28 I. A. 111 (119) = 23 A. 383 (392).

APPLICATION TO FILE, UNDER PARA. 20 OF SCH. II OF C. P. C. OF 1908.

——Dismissal of—Subject-matter of award—Suit subsequent in respect of—Maintainability—*Res judicata*. *See* ARBITRATION—AWARD—APPLICATION TO FILE, UNDER PARA. 20 OF SCH. II OF C. P. C. OF 1908—NATURE OF. (1891) 18 I. A. 73 (76) = 18 C. 414 (418-9).

——Dismissal of — Validity and enforceability of award—Effect on.

The dismissal of an application under S. 525 of C. P. C. of 1882 to file an award merely leaves the award to have its ordinary legal validity. All that is decided on such an application is that the award ought not to be filed. The validity of the award as an award is not directly and substantially at issue in that application (76). (*Lord Morris*.) MUHAMMAD NAWAZ KHAN *v.* ALAM KHAN. (1891) 18 I. A. 73 = 18 C. 414 (418) = 6 Sar. 26 = 70 P. R. 1891.

——The dismissal of an application to file an award on the ground that certain parties to the reference who were minors was not properly represented may *per se* deprive the adult parties to the award of the power of enforcing it by certain effective statutory methods, but it does not render the award void or otherwise unenforceable as against those parties. (*Lord Atkinson*.) KIRKWOOD *alias* MA THEIN *v.* MAUNG SIN. (1925) 52 I. A. 265 (274) = 6 L. R. P. C. 160 = 89 I. C. 773 = A. I. R. 1925 P. C. 216.

——Jurisdiction to entertain—Subject-matter of award in part not within jurisdiction of Court.

It was contended that if an award relates to more than one subject-matter and only one is within the jurisdiction of the Court, it cannot be filed in that Court, in fact, that it can be filed in no Court, because no one Court would have jurisdiction over the whole subject-matter. Their Lordships deem it unnecessary to rest their judgment on any such general proposition. (*Lord Phillimore*.) RAMLAL HARGOPAL *v.* KISHANCHAND. (1923) 51 I. A. 72 (81) = 51 C. 361 = A. I. R. 1924 P. C. 95 = (1924) M. W. N. 79 = 7 N. L. J. 62 = 19 L. W. 549 = 34 M. L. T. 62 = 20 N. L. R. 33 = 22 A. L. J. 386 = 26 Bom. L. R. 586 = 28 C. W. N. 977 = 83 I. C. 531 = 46 M. L. J. 628.

——Jurisdiction to entertain—Subject-matter of award not within jurisdiction of Court.

P died, having founded two temples within the dominions of the Nizam, and a third in British India not, however, within the District of Berar. Three jagir villages, one within the Nizam's dominions, and two within British India and the District of Berar, were subsequently granted by Government for the support of the worship in these temples. On the death of P, disputes having arisen between his descendants, they were referred to the award of their family priest who made his award. On an application by the respondents, parties to the reference, under S. 525 of C. P. C. of 1882, that the award should be filed in Court, the appellant, also a party to the reference, raised the objection at the outset that the District Court of Berar, to which the application was made, had no jurisdiction over the subject-matter of the award, as required by S. 20 of C. P. C. of 1908.

ARBITRATION—(Contd.)**Award—(Contd.)****APPLICATION TO FILE, UNDER PARA. 20 OF SCH. II OF C. P. C. OF 1908—(Contd.)**

It appeared that there was no substantial question decided by the award which affected property within the jurisdiction of the Berar Court; that a large part of the award related to family questions and money payments to be made by members of the family, who were all within the Nizam's dominions; and that, though two of the villages which formed the principal endowments were situated in Berar, there was no dispute concerning the ownership or management of the villages nor any denial that the revenues must be appropriated to the temples.

Held, that the objection to the jurisdiction was good, and must be sustained.

It is the duty of the Court in which an award has been filed to proceed to pronounce judgment according to the award, and upon that a decree is to follow. Their Lordships cannot see that any decree could be framed upon this award which would affect any person or property within the jurisdiction. (*Lord Phillimore*.) RAMLAL HARGOPAL *v.* KISHANCHAND. (1923) 51 I. A. 72 (81-2) = 51 C. 361 = A. I. R. 1924 P. C. 95 = (1924) M. W. N. 79 = 7 N. L. J. 62 = 19 L. W. 549 = 34 M. L. T. 62 = 20 N. L. R. 33 = 22 A. L. J. 386 = 26 Bom. L. R. 586 = 28 C. W. N. 977 = 83 I. C. 531 = 46 M. L. J. 628.

——Nature of—Suit under S. 11 of C. P. C. of 1908 if a—Dismissal of—Suit subsequent in respect of subject-matter of award—Maintainability—*Res judicata*.

S. 525 of C. P. C. of 1882 says that the application to file the award is to be registered as a suit. Assuming that such an application is a suit such as is contemplated in S. 13 of C. P. C. of 1882, the only point that is decided in it is that the award ought not to be filed. The validity of the award as an award is not directly and substantially at issue in that application, and the refusal of an application to file the award has not the effect that the award can never be relied upon in any suit relating to the subject-matter dealt with by the award. It has not the effect under S. 13 of C. P. C. of 1882 of a *res judicata*. (*Lord Morris*.) MD. NEWAZ KHAN *v.* ALAM KHAN. (1891) 18 I. A. 73 (76) = 18 C. 414 (418-9) = 6 Sar. 26 = 70 P. R. 1891.

——Objection to—Objection not urged before arbitrator—Permissibility.

Plaintiff, the widow, and defendant, the brother, of an Oudh talookdar, submitted their disputes with reference to their rights in the property of the deceased to arbitration, the effect of which submission was to make the rights of the parties determinable according to the terms of a certain will of the deceased, the said will being regarded as sufficient for the purposes at all events of that arbitration. On an application by the plaintiff to have the award made pursuant to the submission filed, the defendant opposed the application on the ground that the said will referred to another will of the deceased, which was not produced before the arbitrators, and that the award made by them without having that other will also before them was not valid.

It appeared that the defendant did not object to the arbitrators proceeding to make an award at all because they had not had that other will also before them, that the parties had, with full knowledge of the absence of the missing will, expressed their willingness to allow the case to be dealt with by the arbitrators in its absence, and that the defendant allowed the arbitrators to deal with the case as it stood before them, taking his chance of the decision being more or less favourable to himself.

Held, that it was too late for the defendant to object to

ARBITRATION—(Contd.)**Award—(Contd.)**

APPLICATION TO FILE, UNDER PARA. 20 OF SCH. II OF C. P. C. OF 1908—(Contd.)

the filing of the award on the ground alleged and to have it set aside on that ground (217, 220). (*Sir James W. Colville.*) CHOWDHRI MURTAZA HOSSEIN v. MUSSUMAT BIBI BECHUNNISSA. (1876) 3 I. A. 209 =

26 W. R. P. C. 10 = 3 Sar. 663 = 3 Suth. 342 = Bald. 86 = R. & J.'s No. 43 (Oudh).

—Objection to—One of two matters referred beyond control of arbitrator if an.

Quære, whether the circumstance that one of the two matters referred was beyond the control of the arbitrator constitutes an objection to filing the award under S. 525 of C. P. C. of 1882 (76). (*Lord Morris.*) MUHAMMED NAWAZ KHAN v. ALAM KHAN. (1891) 18 I. A. 73 = 18 C. 414 (419) = 6 Sar. 26 = 70 P. R. 1891.

BENEFIT OF.

—Right to—Parties to submission and their representatives—Right of. See ARBITRATION—AWARD—PARTIES TO SUBMISSION AND THEIR REPRESENTATIVES.

(1928) 3 Luck. 372.

—Stranger to reference—Right of. See ARBITRATION—AWARD—STRANGER TO REFERENCE.

(1883) 11 I. A. 20 (25) = 6 A. 322 (328).

BINDING NATURE OF.

—See ARBITRATION—AWARD—PARTIES BOUND BY.

BOUNDARY DISPUTE.

—Award settling—Binding nature of, as to title and possession—Arbitrators appointed by settlement officer of District on application of parties—Award by.

A dispute having arisen between two neighbouring zemindars as to the boundary of their estates, they jointly petitioned the then Settlement Officer of the districts in which their estates lay to appoint arbitrators for the purpose of settling the boundary between the estates. In pursuance of that request the Settlement Officer appointed arbitrators who made an award fixing the boundary. The decision of the arbitrators was confirmed by the Deputy Collector.

Held, on the evidence, (1) that both parties accepted and adopted the award, and that it was confirmed by the Settlement Officer; (2) that the award was not, upon the face of it, so ambiguous that it could not be enforced; and that the arbitration was intended by both parties, not merely to determine possession at the time, but to determine the right to the land between the parties. (*Sir R. P. Collier.*) RAM-RUNJUN CHUCKERBUTTY v. RAMPROSAD DOSS. (1883) 13 C. L. R. 26 = Bald. 467.

CASH—DIVISION OF, AMONG MEMBERS OF JOINT HINDU FAMILY.

—Mortgage with possession—Receipts under—Decision of, if included. See ARBITRATION—AWARD—HINDU LAW—JOINT FAMILY. (1914) 27 M. L. J. 128.

CLAIMS MUTUAL UNDER—EQUITABLE SET-OFF IN RESPECT OF.

—Right of. See C. P. C. OF 1908, O. 8, R. 6—AWARD. (1914) 27 M. L. J. 128.

DECISION ON EACH OF THE POINTS REFERRED.

—Necessity. See ARBITRATION—ARBITRATOR—DECISION ON EACH, ETC. (1901) 29 I. A. 51 (60) = 29 C. 167 (186).

DECISION ON MATTERS LEFT TO ARBITRATOR FOR FINAL DECISION.

—Challenge of—Grounds—Evidence—Expert evidence—Admissibility. See ARBITRATION—UMPIRE—AWARD OF—MATTERS SUBMITTED TO HIM FOR FINAL DECISION. (1922) 31 M. L. T. 238 (244) (P. C.).

ARBITRATION—(Contd.)**Award—(Contd.)****DECLARATION OF INVALIDITY OF—SUIT FOR.**

—Maintainability. See SPECIFIC RELIEF ACT, S. 42—DECLARATORY SUIT—AWARD.

(1925) 52 I. A. 265 (277).

—Injunction restraining opposite party from withdrawing amount realised in execution of award—Suit also for—Maintainability. See SPECIFIC RELIEF ACT, SS. 42, 56—DECLARATORY SUIT.

(1922) 49 I. A. 366 (373) = 50 C. 1 (9-10).

DECREE IN ACCORDANCE WITH.

—Appeal from—Appointment of arbitrator—Objection to—Maintainability—No appeal from order appointing him. See ARBITRATION—ARBITRATOR—APPOINTMENT OF—OBJECTION TO. (1865) 10 M. I. A. 413 (423).

—Appeal from—Order in, reversing decree and remanding case—Scope of—Re-consideration and re-adjudication by arbitrators if intended.

All matters in dispute between the parties to a suit were with their consent referred to the arbitration of two arbitrators. Those gentlemen entered upon the enquiry, and in the course of it certain books of account which had been produced by the plaintiff were, on his application, given back to him, and were never produced again by him. The arbitrators, however, made their award, and the Court passed a decree in conformity with the award. On appeal that decree was, however, set aside by the High Court on two grounds—(1) that the decree was made without allowing the parties time to file objections to the award, and (2) that the award was altogether informal, inasmuch as it had been signed by the arbitrators separately, and not together. The case was remanded by the High Court in order (1) that the Court below might take steps to have the award formally signed by the arbitrators at the same time, and not on different dates, and (2) that it might allow the parties time for filing objections to the award.

It was contended that the intention of the High Court in making that remand was that the case should go back again to the arbitrators for re-consideration and re-adjudication before it came at all before the Court below in the shape of an award, and that it was an essential part of that proceeding that the missing books should be produced and considered by the arbitrators, or that, if they could not be produced, their loss should in some manner be enquired into and accounted for.

Held, that that was not the intention of the order of remand (146).

It seems clear, upon the face of the judgments of the learned judges, that their intention was that the case should go back to the Court below; that it should in the first instance have the award put into a formal shape by getting it signed by both the arbitrators together; that when so signed it should be regularly filed; that the parties should have ten days within which to take their objections, whether founded on the abstraction of the books, or any other legal ground, to the validity of the award; and that the Court below should then proceed to adjudicate upon those objections (146-7). MAHARAJAH JOYMUNGUL SINGH BAHADUR v. MOHUN RAM MARWAREE.

(1875) 3 Suth. 145 = 23 W. R. 429 = 3 Sar. 493.

—Appeal from—Right of.

Where the Court passed a decree in conformity with an award, going neither beyond it, nor altering it in any way, *held*, that the judgment, being in accordance with the award, was, under S. 325 of C. P. C. of 1859, final, and that no appeal lay from it to the High Court. An appeal to the P. C. from the decree of the High Court dismissing

ARBITRATION—(Contd.)**Award—(Contd.)****DECREE IN ACCORDANCE WITH—(Contd.)**

such an appeal was a *fortiori* incompetent (147). MAHARAJAH JOYMUNGUL SINGH BAHADUR v. MOHUN RAM MARWAREE. (1875) 3 Suth. 145 = 23 W. R. 429 = 3 Sar. 493.

—No appeal lies from a decree pronounced under S. 522 of C. P. C. of 1882 except in so far as the decree may be in excess of or not in accordance with the award.

The principle of finality which finds expression in the Code is quite in accordance with the tendency of modern decisions in this country. The time has long gone by since the Courts of this country showed any disposition to sit as a Court of appeal on awards in respect of matters of fact or in respect of matters of law. (*Lord Macnaghten.*) GHULAM JILANI v. MUHAMMAD HUSSAIN. (1901) 29 I. A. 51 (58) = 29 C. 167 (183) = 6 C. W. N. 226 = 4 Bom. L. R. 161 = 25 P. R. 1902 = 8 Sar. 154 = 12 M. L. J. 77.

—The parties to a pending suit referred the matters in dispute in the suit to an arbitrator, whose appointment was duly confirmed by the Court. The arbitrator submitted his award, and the Court passed a decree in accordance therewith, there being no misconduct on the part of the arbitrators within the meaning of that expression in the chapter on arbitration in the C. P. C., nor anything that could justify the Court in setting aside or remitting the award. An appeal from that decree was dismissed by the Chief Court of the Punjab on the ground that the appeal was incompetent, inasmuch as it did not appear that the decree was in excess of, or not in accordance with, the award.

Held, that the decision of the Chief Court was perfectly right. (*Lord Macnaghten.*) HANSRAJ v. SUNDAR LAL. (1908) 35 I. A. 88 = 35 C. 648 = 4 M. L. T. 25 = 12 C. W. N. 585 = 7 C. L. J. 520 = 10 Bom. L. R. 581 = 138 P. L. R. 1908 = 99 P. W. R. 1908 = 14 Bur. L. R. 146 = 80 P. R. 1908 = 18 M. L. J. 266.

—Appointment of arbitrator—Invalidity of—Setting aside of decree on ground of. See ARBITRATION—ARBITRATOR—APPOINTMENT OF—COURT. (1865) 10 M. I. A. 413 (424-5).

—Appointment of arbitrator—Irregularity in—Setting aside of decree on ground of—Procedure on. See ARBITRATION—ARBITRATOR—APPOINTMENT OF—IRREGULARITY IN—SETTING ASIDE OF DECREE ON AWARD ON GROUND OF. (1865) 10 M. I. A. 413 (427-8).

—Invalidity of award—Procedure in case of. In a case in which a decree was made upon an award which was found to be invalid, their Lordships declared the award invalid, and directed the suit to be proceeded with (58). (*Lord Morris.*) RAJA HAR NARAIN SINGH v. CHAUDHRAIN BHAGWANT KUAR. (1891) 18 I. A. 55 = 13 A. 300 = 6 Sar. 14.

—Properties allotted by award—Recovery of—Mode of—Execution of decree—Fresh suit.

A disputed claim to lands being submitted by the plaintiff and the defendant to arbitrators, they made an award allotting certain specific properties to each of the parties. The award was filed in Court and a decree was passed in the terms of the award. The plaintiff did not execute the decree which he got and allowed it to become null by reason of limitation. He instituted a fresh suit for possession of the properties decreed to him.

Held, that the suit was not maintainable, the plaintiff's remedy being to have executed the decree. (*Lord Dunedin.*) SASI SEKHARESWAR ROY v. LALIT MOHAN MAITRA. (1924) 52 I. A. 79 = 52 C. 314 = 6 L. R. P. C. 23 = 27 Bom. L. R. 166 = 21 L. W. 286 =

ARBITRATION—(Contd.)**Award—(Contd.)****DECREE IN ACCORDANCE WITH—(Contd.)**

29 C. W. N. 633 = 23 A. L. J. 717 = A. I. R. 1925 P. C. 34 = 86 I. C. 245 = 48 M. L. J. 20.

—Revision against.

In the case of an award revision would be more objectionable than an appeal. If an application for revision were admissible in such a case the finality of any award would be open to question. Such an application is incompetent (60). (*Lord Macnaghten.*) GHULAM JILANI v. MUHAMMAD HASSAN. (1901) 29 I. A. 51 = 29 C. 167 (185) = 6 C. W. N. 226 = 4 Bom. L. R. 161 = 25 P. R. 1902 = 8 Sar. 154 = 12 M. L. J. 77.

—Setting aside of—Grounds—Appointment of arbitrator—Invalidity of. See ARBITRATION—ARBITRATOR—APPOINTMENT OF—COURT. (1865) 10 M. I. A. 413 (424-5).

—Setting aside of—Grounds—Appointment of arbitrator—Irregularity in. See ARBITRATION—ARBITRATOR—APPOINTMENT OF—IRREGULARITY IN. (1865) 10 M. I. A. 413 (427-8).

—Setting aside of, on ground of irregularity in appointment of arbitrator—Procedure on. See ARBITRATION—ARBITRATOR—APPOINTMENT OF—IRREGULARITY IN—SETTING ASIDE OF DECREE ON AWARD ON GROUND OF. (1865) 10 M. I. A. 413 (427-8).

—Validity of—Award made after expiry of period allowed—Objection to its validity on ground of—P. C. appeal—Permissibility for first time in.

An award, which must have been delivered at the latest on 20—3—1885, was in fact delivered only on 24—3—1885. There was no enlargement of the time made by the Court after 20—3—1885. A decree was made upon the award by the Sub-Judge, which was confirmed by the High Court.

Held, that the award having been delivered by arbitrators who no longer had any lawful authority to make it was invalid, and that no decree could be validly made upon it (58).

Held further, that the objection to the validity of the award could be taken for the first time before the P. C.

The Statute is there, and the Judges were bound to take judicial notice of it (58). (*Lord Morris.*) RAJA HAR NARAIN SINGH v. CHAUDHRAIN BHAGWANT KUAR. (1891) 18 I. A. 55 = 13 A. 300 = 6 Sar. 14.

—Validity of—Objection to award—Time for filing, allowed by law—Failure to give—Effect.

All matters in dispute between the parties to a suit were with their consent referred to arbitration. The arbitrators made their award, and the Court passed a decree in conformity with it, without allowing the parties the ten days for bringing in objections to the award which the C. P. C. of 1859 allowed them.

Held, that the Court acted irregularly in passing the decree, and that it was rightly set aside on appeal by the High Court (146). MAHARAJAH JOYMUNGUL SINGH BAHADOOR v. MOHUN RAM MARWAREE. (1875) 3 Suth. 145 = 23 W. R. 429 = 3 Sar. 493.

ENFORCEABILITY OF—APPLICATION TO FILE AWARD.

—Dismissal of—Effect of. See ARBITRATION—AWARD—APPLICATION TO FILE—DISMISSAL OF. (1925) 52 I. A. 265 (274).

ERROR OF LAW.

—Effect of, on validity of award.

Arbitrators may be judges of law as well as judges of fact, and an error in law certainly does not vitiate an award. (*Lord Macnaghten.*) GHULAM JILANEE v. MD. HASSAN. (1901) 29 I. A. 51 (60) = 29 C. 167 (186) = 6 C. W. N. 226 = 4 Bom. L. R. 161 = 25 P. R. 1902 = 8 Sar. 154 = 12 M. L. J. 77.

ARBITRATION—(Contd.)**Award—(Contd.)****ERROR OF LAW ON FACE OF.****—What amounts to.**

An arbitrator is guilty of judicial misconduct if he makes a mistake of law visible on the face of the award. But the error in law must be distinctly collected from the face of the award or from some document incorporated into the award. (*Viscount Sumner.*) **SALEH MAHOMED UMER DOSSAL v. NATHOOMAL KESSAMAL.** (1927) 54 I. A. 427 =

21 S. L. R. 101 = 104 I. C. 476 = 31 C. W. N. 1027 =

29 Bom. L. R. 1150 = 46 C. L. J. 9 = 39 M. L. T. 6 =

A. I. R. 1927 P. C. 164 = 53 M. L. J. 18.

—Contract recited in award only for earmarking disputes referred—Reference to terms of, for finding out error of law—Permissibility.

Where an award recites a contract but only for the purpose of earmarking the disputes referred to arbitration, the contract is not thereby so incorporated into the award and become a document forming part thereof as to entitle the Court to refer to its terms and by so doing to find that there is an error of law. (*Viscount Sumner.*) **SALEH MAHOMED UMER DOSSAL v. NATHOOMAL KESSAMAL.**

(1927) 54 I. A. 427 = 21 S. L. R. 101 = 104 I. C. 476 =

31 C. W. N. 1027 = 29 Bom. L. R. 1150 = 46 C. L. J. 9 =

39 M. L. T. 6 = A. I. R. 1927 P. C. 164 = 53 M. L. J. 18.

—Invalidity of award in case of—Principle of—Extension of—Propriety.

It is certainly not to be denied that the exception as to the invalidity of an award in cases where there is an error of law apparent on the face of the award should be in any way extended. (*Lord Dunedin.*) **CHAMPSEE BHARA & CO. v. JIVRAJ BALLOO SPINNING & WEAVING CO.**

(1923) 50 I. A. 324 (330-1) = 47 B. 578 =

25 Bom. L. R. 588 = A. I. R. 1923 P. C. 66 =

38 C. L. J. 130 = (1923) M. W. N. 596 =

33 M. L. T. 419 = 28 C. W. N. 397 = 73 I. C. 436 =

44 M. L. J. 706.

—Law—Question of, not specifically referred, but material to decision of matters referred—Decision of—Error in—Effect.

Where a question of law has not been specifically referred to an umpire, but is material in the decision of matters which have been referred to him, and he makes a mistake, apparent on the face of the award, an award can be set aside on the ground that it contains an error of law apparent on the face of the award (252). (*Lord Parmoor.*) **ATTORNEY-GENERAL OF MANITOBA v. KELLEY.**

(1922) 31 M. L. T. 238 (P. C.).

—Law—Specific question of, referred—Decision of—Error in—Effect.

If a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside. Otherwise it would be futile ever to submit a question of law to an arbitrator (252). (*Lord Parmoor.*) **ATTORNEY-GENERAL OF MANITOBA v. KELLEY.**

(1922) 31 M. L. T. 238 (P. C.).

—Meaning of.

An error in law on the face of the award means that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reason for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party, that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound. (*Lord Dunedin.*) **CHAMPSEE**

ARBITRATION—(Contd.)**Award—(Contd.)****ERROR OF LAW ON FACE OF—(Contd.)**

BHARA & CO. v. JIVRAJ BALLOO SPINNING & WEAVING CO. (1923) 50 I. A. 324 (330-1) = 47 B. 578 =

25 Bom. L. R. 588 = A. I. R. 1923 P. C. 66 =

38 C. L. J. 130 = (1923) M. W. N. 596 = 33 M. L. T. 419 =

28 C. W. N. 397 = 73 I. C. 436 = 44 M. L. J. 706.

—Reference—Clause of—Interpretation of—Error as to—Effect.

The appellants as sellers entered into two contracts with the respondents as buyers of certain bales of cotton. The contracts were made subject to the rules and regulations of the Bombay Cotton Trade Association, Ltd. Rule 12 of the said Association contained a submission to arbitration of disputes as to quality; and Rule 13 provided for a submission to arbitration of all other disputes arising out of the contract.

The cotton was delivered but objected to by the respondents as being not up to contract. Upon this an arbitration was entered into between the parties, and the arbitrators under R. 12 made an award as to quality. Thereupon, the respondents rejected the cotton. The appellants retorted by claiming damages. That dispute was referred to arbitrators under R. 13, and an award was made awarding damages to the appellants. The award recited that the contract (the date and subject of which were stated) was subject to the rules of the Bombay Cotton Trade Association, which were not further referred to, and that the respondents had rejected the cotton delivered on the grounds contained in a letter of a certain date. That letter stated merely that as the arbitrators had made an allowance of a certain amount the respondents rejected the cotton.

On a petition presented by the respondents asking that the award should be set aside, the High Court set aside the award on the ground that there was an error in law on the face of the award.

Held, reversing the High Court, that, as no legal proposition at all was stated as a ground of the award, and the reference to the letters was only in the narrative, and even when the letters were looked at they only contained the view of one party, it was impossible to say, from what was shown on the face of the award, what mistake the arbitrators made, and that the award could not therefore be set aside on the ground relied upon by the High Court.

The only way that the learned Judges of the High Court have arrived at finding what the mistake was is by saying: "Inasmuch as the arbitrators awarded so-and-so, and inasmuch as the letter shows that the buyer rejected the cotton, the arbitrators can only have arrived at that result by totally misinterpreting R. 52." But they were entitled to give their own interpretation to R. 52 or any other article, and the award will stand unless, on the face of it, they have tied themselves down to some special legal proposition which then, when examined, appears to be unsound. (*Lord Dunedin.*) **CHAMPSEE BHARA & CO. v. JIVRAJ BALLOO SPINNING AND WEAVING CO.**

(1923) 50 I. A. 324 (331-2) = 47 B. 578 =

25 Bom. L. R. 588 = A. I. R. 1923 P. C. 66 =

38 C. L. J. 130 = (1923) M. W. N. 596 = 33 M. L. T. 419 =

28 C. W. N. 397 = 73 I. C. 436 = 44 M. L. J. 706.

ERROR ON PART OF ARBITRATOR.**—Setting aside of award on ground of—Propriety.**

Where there are real arbitrations, and where the parties have selected their judge; in such cases a great deal more must be shown than mere error on the part of the arbitrator in the conclusion at which he has arrived before the Court can interfere with his award (552). (*Lord Parmoor.*) **ATTORNEY-GENERAL OF MANITOBA v. KELLEY.**

(1922) 31 M. L. T. 238 (P. C.).

ARBITRATION—(Contd.)**Award—(Contd.)**

ESTATE CONVEYED UNDER—WORDS "ALWAYS OR FOR EVER."

———*Effect.*

As in a will so in an award, the words "always or for ever" do not *per se* extend the interest given beyond the life of the person who is named. They are not inconsistent with limiting the interest given; but the circumstances under which the instrument is made or the subsequent conduct of the parties may show the intention with sufficient certainty to enable the Courts to presume that the grant was perpetual. (*Sir Richard Couch.*) *AZIZ-UN-NISSA v. TAS-SADDUK HUSSAIN KHAN.* (1901) 28 I. A. 65 (70) = 23 A. 324 (330) = 5 C. W. N. 569 = 3 Bom. L. R. 307 = 11 M. L. J. 160.

EVIDENCE—AWARD AGAINST WEIGHT OF.

———Setting aside of—Power of. *See* AWARD—SETTING ASIDE OF—JURISDICTION OF ARBITRATOR. (1928) 110 I. C. 251.

EVIDENCE INADMISSIBLE—REFERENCE TO.

———Award not based upon—Other evidence ample to support award.

The second legal objection to the award is founded in the circumstances that C, one of the arbitrators, in his reasons for the award relied upon certain inadmissible evidence. But there was other admissible evidence to the same effect and that was before the arbitrators. The award was made by the majority of the arbitrators, and the other arbitrator, who constituted the majority, arrived at the same conclusion as that reached by C, upon admissible evidence and without reference to the inadmissible evidence in question. It is plain that, if no reference had been made to the evidence whose admissibility is objected to, the majority of the arbitrators would have arrived at the same conclusion and upon the same materials. If the award were set aside and remitted to the arbitrators on the ground of the reference by C to the inadmissible evidence in question the only result would be to cause great expense and delay to all parties without any reasonable prospect that the arbitrators would arrive at a determination different from that which they have already decided. Under the circumstances their Lordships have arrived at the conclusion that they ought not to set aside the award on the ground of C's action (256). (*Viscount Birkenhead.*) *GRAND TRUNK RAILWAY COMPANY OF CANADA v. KING.*

(1922) 33 M. L. T. 246 (P. C.).

FUTURE AWARD—CLAIM UNDER.

———Attachment and sale in execution of—Validity. *See* C. P. C. OF 1908, S. 60—AWARD. (1871) 14 M. I. A. 40 (51).

HINDU LAW—JOINT FAMILY—PARTITION—AWARD EFFECTING.

———Cash—Division of—Accounts—Adjustment of—Agreement between parties as to—Mortgage with possession—Receipts under—If included in agreement.

Where in an award by which the plaintiffs and defendants, who were members of an undivided family, became divided, it was stated that the parties had put in written statements saying that they had divided the cash, etc., that they had adjusted the accounts among themselves and that they had no right to demand accounts from one another, *held*, in a suit by the plaintiffs for their share of the receipts under a certain usufructuary mortgage by some of the defendants previously to the award alleging that the award had omitted to deal with them, that the term "cash" clearly referred to those receipts, that in any event the stipulation in the award, *viz.*, that "no co-sharer had any right to demand

ARBITRATION—(Contd.)**Award—(Contd.)**

HINDU LAW — JOINT FAMILY — PARTITION—AWARD EFFECTING—(Contd.)

accounts" covered the claim and excluded it. (*Mr. Ameer Ali.*) *THAKUR SHEO NARAIN SINGH v. THAKUR BISHUNATH SINGH.* (1914) 18 C. W. N. 426 = 17 O. C. 33 = 1 O. L. J. 159 = 22 I. C. 315 = 27 M. L. J. 128.

HINDU LAW—JOINT FAMILY PROPERTY—PARTIAL PARTITION OF—AWARD EFFECTING.

———Validity. *See* HINDU LAW—JOINT FAMILY—PARTITION—PARTIAL PARTITION—AWARD EFFECTING. (1894) 21 I. A. 47 (54) = 21 C. 590 (599-600).

INVALID AWARD—RELEASE GIVEN IN PURSUANCE OF.

———Binding character of. *See* ARBITRATION—ARBITRATOR—MISCONDUCT—COLLUSION WITH ONE OF THE PARTIES. (1923) 1 R. 451 = 46 M. L. J. 334 (339).

INVALIDITY OF—DECLARATION OF.

———Suit for. *See* ARBITRATION—AWARD—DECLARATION OF INVALIDITY OF.

INVALIDITY OF, AS REGARDS PORTION.

———Effect of, on other portion—Portions separable. *See* ARBITRATION—AWARD—PORTION OF, INVALID.

JUDGMENT ON—MERGER OF AWARD IN.

Quære whether where a judgment is obtained in England upon an award, the award is merged in the English judgment. (*Viscount Cave.*) *OPPENHIEM & CO. v. MAHOM-ED HANEEF.* (1922) 49 I. A. 174 (180) = 45 M. 496 (503) = 26 C. W. N. 642 = 30 M. L. T. 291 = 16 L. W. 33 = (1922) M. W. N. 396 = 24 Bom. L. R. 1245 = 36 C. L. J. 444 = A. I. R. 1922 P. C. 120 = 4 U. P. L. R. (P. C.) 36 = 74 I. C. 616 = 43 M. L. J. 422.

LAW—ERROR OF, ON FACE OF AWARD.

———What amounts to—Effect. *See* ARBITRATION—AWARD—(1) ERROR OF LAW—(2) ERROR OF LAW ON FACE OF.

MAHOMEDAN—WIDOW AND BROTHER OF DECEASED.

———Will of deceased—Disputes as to construction and effect of—Award settling, and dividing properties between them—Estate taken by widow under.

An Oudh talukdar possessed of talukas entered in Lists 2 and 5 of the Lists of the Oudh Estates Act, 1869, died leaving a will by which he bequeathed the said talukas in the manner stated therein to his brother, widow, and daughter and her male issue. After his death disputes arose between his brother and his widow, and they referred their disputes with reference to the properties dealt with by the will and with reference to other properties of the deceased to the arbitration of certain persons, authorising them to settle the disputes after perusing the clauses given in the will and considering other matters. The arbitrators ultimately made an award which awarded some of the talukas to the widow, and divided the other properties of the deceased in a certain way.

Held, that, upon the true construction of the award, the brother was entirely excluded from any interest in the property awarded to the widow, and that at any rate as far as he was concerned, the widow must be taken to have got the absolute ownership of the property awarded to her. (*Lord Phillimore.*) *DEPUTY COMMISSIONER OF BARA BANKI v. RECEIVER IN BANKRUPTCY OF THE ESTATE OF CHAUDHRI SHALIQ-UZ-ZAMAN.* (1928) 3 Luck. 372 = 5 O. W. N. 565 = 32 C. W. N. 1120 = 48 C. L. J. 418 = A. I. R. 1928 P. C. 202 = 56 M. L. J. 601.

ARBITRATION—(Contd.)

Award—(Contd.)

MAHOMEDAN LAW—INHERITANCE.

—Division of—Award effecting—Missing heir and his children—Reservation of share to—Finding that he was alive at the time—Effect—Admission by other heirs of his being so alive if amounts to. *See* MAHOMEDAN LAW—INHERITANCE—DIVISION OF—AWARD EFFECTING.

(1905) 32 I. A. 177 (180) = 33 C. 173 (178-9).

MAKING OF—DOUBT AS TO.

—Grounds for—Delay in making award if one.

With respect to the award, the Judges of the Sudder Court state, that it is open to great suspicion on the ground that the award was not made for more than 12 months after the submission to arbitration. Their Lordships cannot think that that is a sufficient ground for doubting the fact of the award having been made (99-100). (*Mr. Pemberton Leigh.*) DWARKA DOSS v. BABOO JANKEE DOSS.

(1855) 6 M. I. A. 88.

MATTERS DEALT WITH BY—SUIT IN RESPECT OF.

—Maintainability.

The suit was brought by the younger widow of one D to recover half of the property which had been left by D. The defendant was the elder widow of the deceased. The defendant pleaded, *inter alia*, that the matters between the parties had been referred to arbitration by an agreement in writing, that there was an award of the arbitrators which decided that the plaintiff was not entitled to recover half of the property, and that the suit was barred by the said award.

The submission was made by two agreements, one signed by the plaintiff, and the other by the defendant; by the said agreements there was a general reference to the arbitrators to decide between the two widows upon their respective rights, and particularly with respect to the plaintiff, the younger widow, what was the limit of her rights, raising the entire question not merely whether she was entitled to maintenance, but whether there were facts which would disentitle her to succeed to any portion of the estate of her deceased husband. The arbitrators were gentlemen of some position in the neighbourhood, and must have been well competent to decide such a question as the one referred to between the two widows. They held that the plaintiff was, by reason of her unchastity, disentitled to inherit the property of her husband, and awarded her Rs. 600 per annum for maintenance. Upon the face of the award, they appeared to have inquired into the matters which had to be inquired into to see what the rights of the two widows were, and especially the right of the plaintiff. There was no ground for saying that, in deciding against her, they misconducted themselves, or made any mistake in conducting the inquiry.

Held, reversing the court below, that the award was binding upon the plaintiff, and that the suit was barred (71). (*Sir Richard Couch.*) RANI BHAGOTI v. RANI CHANDAR. (1885) 12 I. A. 67 = 11 C. 386 (392-3) = 4 Sar. 624.

MATTERS LEFT FOR FINAL DECISION OF ARBITRATOR—AWARD ON—CHALLENGE OF—GROUNDS—EVIDENCE.

—Expert evidence—Admissibility. *See* ARBITRATION—UMPIRE—AWARD OF—MATTERS LEFT TO HIM FOR FINAL DECISION.

(1922) 31 M. L. T. 238 (244) (P. C.).

PARTY TO REFERENCE—WISHES OF—AWARD ACCORDING TO.

—Validity of.

U, a Hindu, left behind him a widow, his mother, and the widow of his predeceased brother. In a so-called award of arbitration, the arbitrators recited that the three widows had appointed them "for the settlement of their respective

ARBITRATION—(Contd.)

Award—(Contd.)

PARTY TO REFERENCE—WISHES OF—AWARD ACCORDING TO—(Contd.)

contentions in respect of the right of ownership" over U's property.

The agreement to refer was not proved. Neither of the arbitrators who gave evidence in the suit mentioned what the point of dispute was. According to both, the award originated with the mother of the deceased. Neither of them had any communication with the two younger widows about the award, either before it or after. Their evidence was to the effect that the award was not made according to their own judgment, but that they made the award as asked by the mother of the deceased U.

Held, that such a proceeding was not an award at all, but was entirely devoid of legal effect (154-5). (*Lord Hobhouse.*) DEO KUAR v. MAN KUAR.

(1894) 21 I. A. 148 = 17 A. 1 (10-1) = 6 Sar. 489 = 4 M. L. J. 272.

PARTIES BOUND BY.

—Parties to submission and their representatives. *See* ARBITRATION—AWARD—PARTIES TO SUBMISSION AND THEIR REPRESENTATIVES. (1928) 3 Luck. 372.

—Person not properly represented. *See* ARBITRATION—AWARD—PERSON NOT PROPERLY REPRESENTED. (1909) 36 I. A. 168 = 31 A. 572 (581).

—Stranger to reference. *See* ARBITRATION—AWARD—STRANGER TO REFERENCE. (1883) 11 I. A. 20 (25) = 6 A. 322 (328).

PARTIES TO SUBMISSION AND THEIR REPRESENTATIVES.

—Binding nature of award on—Benefit of award—Right to.

However much an award may be complained of by a stranger to the submission or his representatives, it cannot be rejected by a party to the submission or those representing him; and the representatives of a party to the submission are equally entitled to avail themselves of the benefit conferred upon him by the award. (*Lord Phillimore.*) DEPUTY COMMISSIONER OF BARA BANKI v. RECEIVER IN BANKRUPTCY OF THE ESTATE OF CHAUDHRI SHALIQ-UZ-ZAMAN. (1928) 3 Luck. 372 =

5 O. W. N. 565 = 32 C. W. N. 1120 = 48 C. L. J. 418 = A. I. R. 1928 P. C. 202 = 56 M. L. J. 601.

PERSON NOT PARTY TO REFERENCE.

—If bound by or entitled to benefit of award. *See* ARBITRATION—AWARD—STRANGER TO REFERENCE. (1883) 11 I. A. 20 (25) = 6 A. 322 (328).

PERSON NOT PROPERLY REPRESENTED.

—Effect of award against—Nullity.

The appellant was a minor at the time of certain arbitration proceedings. In the award her sister was described as acting as guardian of the appellant. That statement was unjustified because, though at that date an application by the sister for a certificate of guardianship of the appellant was pending, it was ultimately rejected. And the appellant never ratified the arbitration proceedings.

Held, that the award was inoperative against the appellant's interest, and she was entitled to a declaration that it was a nullity, so far as she was concerned. (*Sir Andrew Scoble.*) MUSSUMAT RASHID-UN-NISSA v. MUHAMMAD ISMAIL KHAN. (1909) 36 I. A. 168 =

31 A. 572 (581) = 6 M. L. T. 279 = 10 C. L. J. 318 = 13 C. W. N. 1182 =

11 Bom. L. R. 1225 = 3 I. C. 864 = 19 M. L. J. 631.

ARBITRATION—(Contd.)**Award—(Contd.)****PORTION OF, INVALID—EFFECT OF, ON REMAINING PORTION.****—Portions separable.**

A dispute between the sons of a deceased Mahomedan relating to the succession to their father's lands and the office of lambardar was referred by them generally to the decision of a private arbitrator. The arbitrator made an award which related both to the lands and to the office of lambardari. On an application by the defendant, one of the parties to the reference, to have the award filed, pursuant to S. 525 of C. P. C. of 1882, the plaintiffs, the other parties to the reference, objected on the ground that the lambardari was a matter over which the arbitrator could have no jurisdiction. The application to have the award filed was dismissed.

The plaintiffs then brought the suit out of which the appeal arose to recover their shares of their father's lands adjudged to the defendant by the said award. The defendant relied upon the award and pleaded it as a bar to the action.

Held, that in the suit respecting the land alone, the award could be separated as to it from the office of lambardar (76-7). (*Lord Morris.*) MUHAMMED NAWAZ KHAN *v.* ALAM KHAN. (1891) 18 I. A. 73 = 18 C. 414 (419) = 6 Sar. 26 = 70 P. R. 1891.

—Where one portion of the award related to the matters referred, and another portion went beyond the strict terms of the reference but the two portions were clearly separable so that any direction given by the arbitrators in excess of their authority could be treated as null and void without affecting the rest of the award, *held*, that the whole award was not invalid as being in excess of the jurisdiction of the arbitrators. (*Sir Andrew Scoble.*) BUTA *v.* MUNICIPAL COMMITTEE OF LAHORE. (1902) 29 I. A. 168 (176) = 29 C. 854 (869) = 7 C. W. N. 82 = 4 Bom. L. R. 673 = 8 Sar. 327 = 87 P. R. 1902.

—When a separable portion of an award is bad, the remainder of the award, if good, can be maintained. (*Lord Parmoor.*) AMIR BEGAM *v.* BADR-UD-DIN HUSAIN. (1914) 36 A. 336 (342) = 18 C. W. N. 755 = 19 C. L. J. 484 = 1 L. W. 1015 = 17 O. C. 120 = 16 M. L. T. 35 = (1914) M. W. N. 472 = 21 A. L. J. 537 = 16 Bom. L. R. 413 = 23 I. C. 625 = 27 M. L. J. 181.

PROCEEDINGS TO ENFORCE, IN SUMMARY WAY—SUIT FOUNDED ON ORIGINAL TITLE, AWARD AND PROCEEDINGS LEADING TO IT BEING USED ONLY AS EVIDENCE—LIMITATION.**—Regulation VI of 1813—Applicability.**

No question of time arises under Regulation VI of 1813, for this is not a proceeding to enforce the award in a summary way, but it is a regular suit founded upon the original joint title and the subsequent partition; and the award and the proceedings which led to it, are used only as evidence in proof of that title (861). RUNJEET RAM PANDEY *v.* GOBINDHAN RAM PANDEY. (1873) 2 Suth. 857 = 20 W. R. 25.

SCHEDULE OF PROPERTY TO—ANNEXING OF, AFTER MAKING AWARD.

—Validity. See ARBITRATION—ARBITRATOR—AWARD. (1901) 28 I. A. 111 (119) = 23 A. 383 (392).

SEPARABLE AWARD—PORTION OF—INVALIDITY OF AWARD AS REGARDS.

—Effect of, on remaining portion. See ARBITRATION—AWARD—PORTION OF, INVALID.

ARBITRATION—(Contd.)**Award—(Contd.)****SETTING ASIDE OF—GROUNDS.**

—Error on part of arbitrator. See ARBITRATION—AWARD—ERROR ON PART OF ARBITRATOR.

(1922) 31 M. L. T. 238 (252) (P. C.).

—Evidence inadmissible—Reference to—Award not based upon—Other evidence ample to support award. See ARBITRATION—AWARD—EVIDENCE INADMISSIBLE.

(1922) 33 M. L. T. 246 (256) (P. C.).

—Irregularity on part of arbitrator. See ARBITRATION—ARBITRATOR—IRREGULARITY ON PART OF.

(1922) 49 I. A. 174 (180) = 45 M. 496 (503).

—Jurisdiction of arbitrator—Award on matters within—Setting aside of—Grounds—Evidence—Award against weight of.

An award of an arbitrator acting within his jurisdiction is not in general set aside unless it is shown that the arbitrator proceeded on an erroneous view of the law, or that there was no evidence on which the award could properly be arrived at, or that there was some manifest error leading to the result. There might also, of course, be some other matter in the conduct of the proceedings such as the wrongful admission or rejection of evidence which might vitiate the result. But as a general rule the Court does not set aside an award merely on the ground that it is against the weight of evidence. Of course, an award may also be set aside on the ground of misconduct, in the popular sense of the word, on the part of the arbitrator (257). (*Lord Warrington of Clyffe.*) ALEXANDRE LACOSTE *v.* CEDARS RAPIDS MANUFACTURING AND POWER CO.

(1928) 110 I. C. 251 = A. I. R. 1928 P. C. 267.

—Justice—First principles of—Flagrant violation of.

A court of justice will set aside an award in a case in which there was a flagrant violation of the first principles of justice (473). (*Dr. Lushington.*) ZEMINDAR OF RAMNAD *v.* ZEMINDAR OF YETTIAPPOORAM.

(1859) 7 M. I. A. 441 = 1 Suth. 360 = 1 Sar. 701.

—Objection not urged before arbitrator—Objector taking chance of favourable decision. See ARBITRATION—AWARD—APPLICATION TO FILE—OBJECTION TO.

(1876) 3 I. A. 209 (217, 220).

SETTING ASIDE OF—SUIT FOR.

—Maintainability—Misconduct or irregularity of arbitrator—Want of jurisdiction in him—Suit on ground of—Distinction. See ARBITRATION ACT OF 1899, SS. 14, 15—AWARD—SETTING ASIDE OF.

(1922) 49 I. A. 366 (373) = 50 C. 1 (9).

—Party acquiescing in proceedings and taking chance of favourable decision—Suit by.

We think that it is satisfactorily proved that the Zemindar gave, in adequate terms, and in a sufficiently formal manner, his assent to the decision by arbitration; that during the whole proceedings he never retracted nor expressed dissatisfaction with the proposed arbitration (indeed, it is stated that he was sometimes personally present); and we deem it contrary to all justice, that if he entertained the objections now urged, he did not declare them at the proper time, but allowed the investigation to proceed, prepared to take advantage if the result was in his favour, and to dispute the arbitration if the decision was against him (475). (*Dr. Lushington.*) ZEMINDAR OF RAMNAD *v.* ZEMINDAR OF YETTIAPPOORAM.

(1859) 7 M. I. A. 441 = 1 Suth. 360 = 1 Sar. 701.

ARBITRATION—(Contd.)**Award—(Contd.)****SETTING ASIDE OF ARBITRATION AND OF—BENEFIT OF.**

——Right to—Suit dismissed in accordance with award
 —Revision by plaintiffs against—Setting aside of arbitration and of award in—Benefit of—Plaintiff who had withdrawn revision petition as regards himself if can claim—Estoppel. *See* ARBITRATION—AWARD—SUIT DISMISSED IN ACCORDANCE WITH.

(1915) 29 M. L. J. 307 (312-3).

SETTLEMENT OF ACCOUNT—DISTINCTION.

——Test. *See* PARTNERSHIP—PARTNER—DISPUTES BETWEEN ONE, AND ANOTHER—TRANSACTION SETTLING.

(1924) 27 Bom. L. R. 746.

SIGNING OF, BY ARBITRATORS SEPARATELY—VALIDITY OF AWARD IN CASE OF.

——All matters in dispute between the parties to a suit were with their consent referred to the arbitration of two arbitrators. The arbitrators made their award, but they did not sign that award together. In an appeal against the decree passed in conformity with that award, the High Court set aside the decree on the ground that the award was altogether informal, inasmuch as it had been signed by the arbitrators separately.

Their Lordships were of opinion that the High Court acted rightly in so doing (146). MAHARAJAH JOYMUNGUL SINGH BAHADUR *v.* MOHUN RAM MARWAREE.

(1875) 3 Suth. 145 = 23 W. R. 429 = 3 Sar. 493.

STRANGER TO REFERENCE.

——If bound by or entitled to benefit of award.

In this case the majority of the Judges constituting the Full Bench of the Allahabad High Court held that an award could only bind the parties to the arbitration, and that the plaintiff-appellant not being a party thereto was not bound by it, and not being bound by it could not claim to take any advantage from it, and that it could not confer on him, who was not a party to the arbitration, a right which he did not possess by law.

Their Lordships affirmed the decision of the majority of the F. B.

The plaintiff-appellant was a stranger to the submission, and was under no obligation to abide by the award, and consequently he could not avail himself of it (25). (*Sir Richard Couch.*) CHAUDHRI HIRA SINGH *v.* CHAUDHRI GUNGA SAHAI.

(1883) 11 I. A. 20 =

6 A. 322 (328) = 4 Sar. 491.

SUIT DISMISSED IN ACCORDANCE WITH—REVERSAL IN REVISION OF, AND SETTING ASIDE OF ARBITRATION AND OF AWARD IN REVISION—BENEFIT OF—RIGHT TO.

——Plaintiff who had withdrawn revision petition as regards himself—Right of—Estoppel.

Parties to a pending suit agreed to refer the dispute to arbitration. An award was made, and the suit was dismissed in accordance with the award. The plaintiffs then preferred a revision petition to the Chief Court. During the pendency of the revision proceedings, S, one of the petitioners, was permitted to withdraw the application so far as he was concerned. That very day the Chief Court set aside *in toto* the reference to arbitration and all subsequent proceedings as altogether bad. *Held*, that the effect of such setting aside was to relegate the parties to their original rights and that S was not estopped by the said withdrawal from getting his share of the property as one of the plaintiffs in the suit. (*Mr. Ameer Ali.*) PADMAN *v.* HANWANTA. (1915) 18 M. L. T. 54 = 19 C. W. N. 929 =

13 A. L. J. 801 = 17 Bom. L. R. 609 = 2 L. W. 645 =

(1915) M. W. N. 500 = 22 C. L. J. 172 =

110 P. W. R. 1915 = 93 P. R. 1915 = 11 P. L. R. 1916 =

29 I. C. 807 = 29 M. L. J. 307 (312-3).

ARBITRATION—(Contd.)**Award—(Contd.)****SUIT TO ENFORCE—DEFENCES OPEN IN.**

——Irregularity not appearing on face of award—Defence going to root of award—Distinction—English law.

Under the English law, an objection to an award on the ground of misconduct or irregularity on the part of the arbitrator must be taken by motion to set aside or remit the award, and if not so taken cannot be pleaded in answer to an action on the award. Where no such motion is made within the time limited by Order LXIV, R. 14, of the Rules of the Supreme Court, England, or at all, the award becomes fully binding on both parties. No doubt, any defence going to the root of the award—for instance, that the arbitrator had no jurisdiction or that the matter was tainted with fraud—could be pleaded in answer to a suit upon the award (179-80). (*Viscount Cave.*) OPPENHEIM & CO. MAHOMED HANEEF. (1922) 49 I. A. 174 = 45 M. 496 (503) =

26 C. W. N. 642 = 30 M. L. T. 291 = 16 L. W. 33 =

(1922) M. W. N. 396 = 24 Bom. L. R. 1245 =

36 C. L. J. 444 = A. I. R. 1922 P. C. 120 =

4 U. P. L. R. (P. C.) 36 = 74 I. C. 616 = 43 M. L. J. 422.

——Irregularity of arbitrator—Defence of—English award—Suit in India upon.

The suit, which gave rise to the appeal to the P. C., was brought in the High Court of Madras by the appellants upon an award in their favour made under a submission to "arbitration in London in the usual manner" contained in a contract of sale made between the appellants and the respondent. The respondent pleaded that the award was not binding upon him, as no notice had been given him by the arbitrator that he was proceeding to arbitrate.

The trial Judge held that the plea of want of notice could not be raised by defence in the suit. He referred to *Thorburn v. Barnes* (L. R. 2 C. P. 384) as a complete authority for the proposition that according to the English law any objection relating to an irregularity in bringing an award into existence must be taken by motion under the Arbitration Act, 1889, to set aside or remit the award, and if not so taken could not be raised by way of defence to an action on the award. His decree was reversed on appeal, the appellate Court holding that the rule in *Thorburn v. Barnes* did not apply in India.

Held, reversing the appellate Court, that the trial Judge came to the right decision (179).

The contract between the parties was made and was to be performed in England; and the arbitration clause provided for an arbitration which was to take place in London and in accordance with English law and procedure. Both parties agreed to be bound by that law, and under it any objection to an award on the ground of misconduct or irregularity on the part of the arbitrator must be taken by motion to set aside or remit the award within the time limited by O. LXIV, R. 14, and if it is not so taken the award becomes as fully binding on both parties as if it had been incorporated in the contract (179-80). (*Viscount Cave.*) OPPENHEIM & CO. *v.* MAHOMED HANEEF.

(1922) 49 I. A. 174 = 45 M. 496 (502-3) =

26 C. W. N. 642 = 30 M. L. T. 291 =

16 L. W. 33 = (1922) M. W. N. 396 =

24 Bom. L. R. 1245 = 36 C. L. J. 444 =

A. I. R. 1922 P. C. 120 = 4 U. P. L. R. (P. C.) 36 =

74 I. C. 616 = 43 M. L. J. 422.

——Irregularity of arbitrator—Defence of—Indian arbitration.

Quaere whether, in the case of an arbitration taking place in India, the defence on the ground of irregularity on the part of the arbitrator is open in an action on the award (180). (*Viscount Cave.*) OPPENHEIM & CO. *v.* MAHOMED HANEEF. (1922) 49 I. A. 174 = 45 M. 496 (503) =

ARBITRATION—(Contd.)**Award—(Contd.)****SUIT TO ENFORCE—DEFENCES OPEN IN—(Contd.)**

26 C. W. N. 642 = 30 M. L. T. 291 = 16 L. W. 33 =
 (1922) M. W. N. 396 = 24 Bom. L. R. 1245 =
 36 C. L. J. 444 = A. I. R. 1922 P. C. 120 =
 4 U. P. L. R. (P. C.) 36 = 74 I. C. 616 = 43 M. L. J. 422.

SUIT TO ENFORCE—EVIDENCE AS WITNESS OF ARBITRATOR IN.

—Limitations applicable to. *See* ARBITRATION—ARBITRATOR—EVIDENCE AS WITNESS OF, IN LEGAL PROCEEDING TO ENFORCE HIS AWARD.

(1914) 36 A. 336 (344-5).

SUMS FOUND DUE UNDER—PORTION OF—SUIT FOR—SUBSEQUENT SUIT FOR THE REMAINDER.

—Maintainability.

Where a person sues for a portion only of the sum found due to him under an award and recovers the same, a fresh action by him for the remainder will be barred under O. 2, R. 2 of C. P. C. of 1908 (149). (*Lora Moulton.*) *PAYANA KEENA SAMINATHAN v. PANA LANA PALANIAPPA.*

(1913) 41 I. A. 142 = 26 I. C. 228 = 18 C. W. N. 617.

SUMS FOUND DUE UNDER—PRO-NOTE EXECUTED FOR—SUIT UPON—DISMISSAL OF—SUIT SUBSEQUENT FOR AMOUNT DUE UNDER AWARD.

—Maintainability. *See* CEYLON CIVIL PROCEDURE CODE, 1889, S. 34—AWARD.

(1913) 41 I. A. 142 (148).

UMPIRE.

—*See* UNDER ARBITRATION—UMPIRE.

VALIDITY OF.

—*See also* ARBITRATION—AWARD—SETTING ASIDE OF.

—Application to file award—Dismissal of—Effect. *See* ARBITRATION—AWARD—APPLICATION TO FILE, UNDER PARA. 20 OF SCH. II OF C. P. C. OF 1908—DISMISSAL OF—VALIDITY AND ENFORCEABILITY OF AWARD.

—Arbitrator's consultation with third party—Effect. *See* ARBITRATION—ARBITRATOR—CONSULTATION WITH THIRD PARTY.

—Error of law—Error of law on face of award—Error on part of arbitrator—Effect. *See* ARBITRATION—AWARD.

(1) ERROR OF LAW.

(2) ERROR OF LAW ON FACE OF.

(3) ERROR ON PART OF ARBITRATOR.

—Hindu Law—Joint family property—Partial partition of—Award effecting. *See* HINDU LAW—JOINT FAMILY—PARTITION—PARTIAL PARTITION—AWARD EFFECTING.

(1894) 21 I. A. 47 (54) =
 21 C. 590 (599-600).

—Inheritance—Dispute as to—Reference to private arbitrator of—Decision by him according to his notion of wishes and intentions of deceased. *See* ARBITRATION—ARBITRATOR—PRIVATE ARBITRATOR.

(1891) 18 I. A. 73 (77) = 18 C. 414 (419).

—Inquiry proper—Absence of—Objection to validity on ground of—Onus of proof in case of.

Where the appellant objected to the validity of an award alleging that there had been no proper inquiry, since the parties had not been properly summoned to appear before the arbitrator, and the appellant had not had an opportunity of meeting the case set up by the respondent No. 1, held, that the burden of proving that allegation was upon the appellant. (*Lord Parmoor.*) *AMIR BEGAM v. BADR-UD-DIN HUSAIN.*

(1914) 36 A. 336 (343) =

18 C. W. N. 755 = 19 C. L. J. 484 = 1 L. W. 1015 =

17 O. C. 120 = 16 M. L. T. 35 = (1914) M. W. N. 472 =

21 A. L. J. 537 = 16 Bom. L. R. 413 =

23 I. C. 625 = 27 M. L. J. 181.

ARBITRATION—(Contd.)**Award—(Contd.)****VALIDITY OF—(Contd.)**

—Law—Error of—Error of, on face of award—Effect. *See* ARBITRATION—AWARD.

(1) ERROR OF LAW.

(2) ERROR OF LAW ON FACE OF.

—Misconduct of arbitrator—Effect. *See* ARBITRATION—ARBITRATOR—MISCONDUCT OF.

(1) COLLUSION WITH ONE OF PARTIES.

(2) SETTING ASIDE OF AWARD ON GROUND OF.

—Objection to, not affecting substantial justice of the case—Maintainability.

Their Lordships are sensible of the extreme impolicy of allowing parties to get out of awards upon objections which really do not affect the substantial justice of the case (216). (*Sir James W. Colville.*) *CHOWDHURI MURTAZA HOS SAIN v. MUSSUMMAT BIBI BECHUNNISSA.*

(1876) 3 I. A. 209 = 26 W. R. P. C. 10 = 3 Sar. 663 =

3 Suth. 342 = Bald. 86 = R. and J.'s No. 43 (Oudh).

—Party to reference—Wishes of—Award according to. *See* ARBITRATION—AWARD—PARTY TO REFERENCE.

(1894) 21 I. A. 148 (154-5) = 17 A. 1 (10 1).

—Proceedings before arbitrator—Notes of—Failure to preserve—Effect. *See* ARBITRATION—ARBITRATOR—PROCEEDINGS BEFORE.

(1914) 36 A. 336 (343).

—Procedure—Irregularity of, amounting to no proper hearing—Effect. *See* ARBITRATION—ARBITRATOR—PROCEDURE.

(1914) 36 A. 336 (343).

—Question as to—Technical objections—Broad principles of justice and equity—Regard for—New grounds of objection—Permissibility.

In the examination of questions like these (the validity and binding nature of an award upon the parties thereto), it is their Lordships' duty to look to the broad principles of justice and equity; and, whilst they are always willing to pay due deference to the Regulations which in part constitute the law of India, to discourage in proceedings of this description mere technical objections which affect not the merits of the case, and more especially to discountenance the invention of new grounds of dispute which have occurred in the course of the litigation, and which were not even mentioned at the commencement of it, as the cause for promoting the suit (475). (*Dr. Lushington.*) *ZEMINDAR OF RAMNAD v. ZEMINDAR OF YETTIAPPOORAM.*

(1859) 7 M. I. A. 441 = 1 Suth. 360 = 1 Sar. 701.

—Question as to, between plaintiff and defendant—Evidence—Decree obtained on foot of award by third party against plaintiff and defendant—Admissibility.

A so-called award relied upon by the defendant to defeat the plaintiff's claim was urged by the latter to be not valid and binding on the ground that it did not represent the judgment of the arbitrators but merely represented the wishes of another party to the reference. The defendant attempted to support the award by showing that a daughter of that third party, who was awarded an annuity, sued the plaintiff and defendant for it, and got a decree for it.

Quære, whether those proceedings were evidence in the suit between the plaintiff and the defendant (158). (*Lord Hobhouse.*) *DEO KUAR v. MAN KUAR.*

(1894) 21 I. A. 148 = 17 A. 1 (14) =

6 Sar. 489 = 4 M. L. J. 272.

—Separable award—Portion of—Invalidity of—Effect of, on remaining portion. *See* ARBITRATION—AWARD—PORTION OF, INVALID.

—Signing of award by arbitrators separately—Effect. *See* ARBITRATION—AWARD—SIGNING OF, BY ARBITRATORS SEPARATELY.

ARBITRATION—(Contd.)**Award—(Contd.)****VALIDITY OF—(Contd.)**

—Time fixed for making of award—Award not made within—Objection to validity on ground of—Causes beyond control—Delay due to—Objector enjoying fruits of award—Restoration of status quo impossible.

Where no time is originally fixed within which the award was to be made, it is open to either party to hasten the proceedings by giving notice to the arbitrators that the award must be made, and an umpire appointed within a reasonable time; but where the time elapsing after the notice has been actively employed by the arbitrators, and the delay has been owing to necessity which they could not control, the parties cannot recede from their submission by reason of the notice (134).

A & B, two partners, agreed to submit certain differences to arbitration. The arbitrators entered into consideration of the matters referred to them, and gave a preliminary decision, which the parties to the arbitration submitted to and acted on. As, however, the arbitrators could not agree upon all the points referred to them, they were requested by A to make their award within ten days, or to appoint an umpire. Some delay took place in the appointment of the umpire, when A sent notice to withdraw from the arbitration and cancel the agreement, upon which B applied by petition to the Court, under the 326th section of the Civil Procedure Code, to make the submission to arbitration a rule of Court, which was ordered. *Held*, that it was not in the power of A at his mere will and pleasure to revoke the authority of the arbitrators, in whose appointment he had concurred (131).

He (A) cannot recede from the submission by reason of his notice, when, in fact, he has for over a year enjoyed the fruits of the award on various points, and when it is impossible to restore the parties to the position they were in, if all the acts of the arbitrators were to be considered null and void (134-5). (*Lord Romilly*.) **PESTONJEE NUSSURWANJEE v. MANECKJEE & CO.** (1868) 12 M. I. A. 112 = 10 W. R. 51 = 1 Ind. Jur. N. S. 69 = 2 Suth. 164 = 2 Sar. 390.

WILL.

—Decision according to terms of—Submission to—Award based on—Validity—Will different referred to in that will—Non-production of—Effect. *See* ARBITRATION—AWARD—WILL. (1876) 3 I. A. 209 (217).

—Decision according to terms of—Submission to—Award based on—Validity—Will different referred to in that will—Non-production of—Effect.

Where, in a case in which arbitrators are appointed to determine the dispute between the parties according to the terms of the will of a deceased talookdar, that will refers to another will of the same testator which is not produced before the arbitrators, and one of the parties objects to the arbitrators proceeding to make an award on the ground that they had not before them the whole will of the testator, but the arbitrators nevertheless go on to make their award upon the terms of the will before them, *Semle* the objection might be sufficient (217). (*Sir James W. Colvile*.) **CHOWDHRI MURTAZA HOSSAIN v. MUSSUMAT BIBI BECHUN-NISSA.** (1876) 3 I. A. 209 = 26 W. R. P. C. 10 = 3 Sar. 665 = 3 Suth. 342 = Bald. 86 = R. and J.'s No. 43 (Oudh).

Boundary dispute.

—Arbitration in respect of, and award settling—Binding nature of, as regards title and possession—Arbitrators appointed by settlement officer of district on application of parties—Award of. *See* ARBITRATION—AWARD—BOUNDARY DISPUTE. (1883) 13 C. L. R. 26.

ARBITRATION—(Contd.)**Consent to.**

—Legal Practitioner—Consent of—Binding nature of, on client—Practitioner duly authorised by him to give consent.

The Sudder Court state that they agree in setting aside the award, because the Collector, who made the award, did not obtain an agreement in writing from the zemindar himself, binding himself to abide by the award. So that they were of opinion that a consent in writing signed by the vakil, who had been duly authorized by a power of attorney executed by the zemindar himself, was not a sufficient authority. They cite no law, no custom, and no principle for this conclusion. It is, we believe, not orious that persons in the position of this zemindar were in the habit of transacting business through their vakils, so that there does not appear anything unusual in the consent being given by a vakil. And, in the absence of all positive law to the contrary, we are of opinion that the zemindar was just as competent to bind himself by a duly authorized agent, as he was to sign the consent with his own hand (473-4). (*Dr. Lushington*.) **ZEMINDAR OF RAMNAD v. ZEMINDAR OF YETTIAPPOORAM.** (1859) 7 M. I. A. 441 = 1 Suth. 360 = 1 Sar. 701.

—Threats and undue influence in procuring—Plea of—Onus of proof.

It has been said that if the zemindar did give his consent to the arbitration, it was not a willing consent, but was obtained by threats, and through undue influence exerted by persons in authority. The *onus probandi* of an averment of this description must necessarily fall on those who make it (470). (*Dr. Lushington*.) **ZEMINDAR OF RAMNAD v. ZEMINDAR OF YETTIAPPOORAM.**

(1859) 7 M. I. A. 441 = 1 Suth. 360 = 1 Sar. 701.

Contract.

—Appointment of arbitrator—Provision for—Scope of—Death or retirement of original arbitrator—Appointment of substitute in case of. *See* CONTRACT—CONSTRUCTION—ARBITRATION CLAUSE.

(1922) 49 I. A. 366 (374) = 52 C. 1 (10-1).

—Arbitration clause in—Appeal to named body—Provision for—Departure from, by application of S. 9 of Arbitration Act—Effect of, on right of appeal. *See* ARBITRATION ACT OF 1899, S. 9 (b)—APPLICABILITY.

(1922) 49 I. A. 366 (374) = 50 C. 1 (10-1).

Court—Arbitration by.

—Agreement for—Local visit—Court's suggestion of—Consent to—Effect. *See* APPEAL—LOCAL VISIT.

(1907) 34 I. A. 115 (124) = 31 B. 381 (392).

Proceedings for.

—Finality of.

The principle of finality, subject to certain recognized exceptions, has long been established as a settled principle in arbitration proceedings, and it is on that principle that their value largely depends (244). (*Lord Parmoor*.) **ATTORNEY-GENERAL OF MANITOBA v. KELLEY.**

(1922) 31 M. L. T. 238 (P.C.).

—Limitation Act of 1908—Applicability of. *See* LIMITATION ACT OF 1908—ARBITRATION PROCEEDINGS.

(1929) 56 M. L. J. 614

—Prior and subsequent proceedings in respect of same subject-matter and between same parties—Latter if continuation of former or fresh proceedings—Former becoming infructuous for want of jurisdiction of arbitrator appointed.

Under an arbitration clause contained in a mercantile contract, arbitration proceedings were started in 1915 and they resulted in an award. That award was, however, ultimately set aside by the P. C. on the ground of want of

ARBITRATION—(Contd.)**Proceedings for—(Contd.)**

jurisdiction of the arbitrator appointed. In 1922, arbitration proceedings were again started in respect of the same subject-matter before an arbitrator duly appointed.

Held, that the subsequent proceedings were not a mere continuation of the prior arbitration proceedings.

The prior proceedings came to an end with the decision of the single arbitrator whose award was ultimately set aside and the proceedings instituted at a later date after the decision in the P. C. had been announced cannot be regarded as a mere continuation of the first proceedings. It is quite clear that where a suit has been instituted in a Court which is found to have no jurisdiction and it is found necessary to raise a second suit in a Court of proper jurisdiction, the second suit cannot be regarded as a continuation of the first, even though the subject-matter and the parties to the suits were identical. (*Lord Salvesen.*) **RAMDUTT RAMKISAN DASS v. SASSOON & CO. (1929) 33 C. W. N. 485 = 29 L. W. 682 = 27 A. L. J. 254 = A. I. R. 1929 P. C. 103 = 56 M. L. J. 614.**

—Prior infructuous proceedings—Time spent in—Deduction of, in subsequent proceedings in respect of same claim and between same parties—Prior proceedings infructuous for want of jurisdiction in arbitrator appointed. See **LIMITATION ACT OF 1908, S. 14—ARBITRATION.**

(1929) 56 M. L. J. 614.

Proceedings in nature of.

—Award—“Receipt” signed by party found to be indebted, witnessed by arbitrators, and accepted by other party if an.

Disputes between the respondents and the appellants were referred to certain persons, who, after the completion of the investigation, drew up what was termed “a receipt,” which the appellants signed, the arbitrators witnessed, and the respondent accepted and acted upon. That document dealt seriatim with the items in dispute between the parties, and stated the amount which was to be paid by the appellants to the respondent and the mode in which it was to be paid.

Held, that, although informally conducted, the proceeding was in the nature of an arbitration, and that the so-called “receipt” expressed the finding of the arbitrators, and the mode in which it was to be performed (145). (*Lord Moulton.*) **PAYANA REENA SAMINATHAN v. PANA LANA PALANIAPPA. (1913) 41 I. A. 142 = 26 I. C. 228 = 18 C. W. N. 617.**

Reference to.

—Agreement of—Interpretation of—Evidence—Pleadings in suit—Value of—Reference pending suit.

Where, pending a suit, the parties to it refer the matters in dispute between them to arbitration, the pleadings in the suit are of assistance in the interpretation of the written agreement of reference, by showing the surrounding conditions when the reference was made (245). (*Lord Parmoor.*) **ATTORNEY-GENERAL OF MANITOBA v. KELLEY.**

(1922) 31 M. L. T. 238 (P. C.).

—Amount to which a party is entitled—Determination of, by arbitrator—Agreement for—Binding nature of.

The lease provides that the purchase is to take place on valuation, and that if the parties cannot agree on the valuation all matters in difference thereto are to be referred to arbitration, the arbitration to be subject to the provisions of the Common Law Procedure Act, 1854. Their Lordships interpret this as meaning that the amount of the valuation is to be such as may be determined in an arbitration. For then and not until then does a sum, which has to be ascertained in that fashion, become due and capable of affording a right of action. The determination of this sum is not a matter of independent right for which a claimant can go to the Courts. He is entitled only to what the arbitrators

ARBITRATION—(Contd.)**Reference to—(Contd.)**

award. If this construction be the true one it brings the case within the principle of *Scott v. Avery*, which decided that while by the Common Law parties could not contract validly to oust the Courts of their jurisdiction, they could contract that no rights of action should accrue until a third person had decided the amount to which there was to be a right. This is a principle from which there is no derogation in the Common Law Procedure Act (436). **HERBERT HALLEN v. BENJAMIN SPAETH.**

(1923) 33 M. L. T. 433 (P. C.).

—C. P. C.—Sections of—Reference under, and subject to—Test.

Certain differences having arisen between the appellant and the respondent, two partners, they agreed that arbitrators should be appointed to settle those differences. This was done by an agreement in writing for submission to arbitration, which ran as follows:—

“Know all men by these presents, that we, the undersigned, do appoint P & B as arbitrators, chosen by our mutual consent, to inquire into certain differences existing between us in regard to our partnership transactions, and by these presents granting, unto the said P & B full power to substitute or appoint one or more arbitrator or arbitrators, as well as, if necessary, an umpire; and further, to call for and examine the books and papers of the said partnership, as also any party or parties, and otherwise to take all and every lawful means to arrive at a fair and impartial decision, to which we hereby mutually agree and bind ourselves to abide fully and entirely.”

The agreement contained the following memorandum at the foot:—“*N.B.*—We, the undersigned, have executed this power under and in conformity with the provisions of S. 327 of Act VIII of 1859; and we do hereby accordingly agree and bind ourselves to abide by the decision which the within mentioned duly empowered arbitrators may give under the aforesaid Act.”

Held, that, although S. 326 of the Code of 1859 was not expressly referred to in the submission to arbitration, the submission was under and subject to the sections contained in the Code relative to that subject.

Their Lordships are of opinion, that this submission to arbitration was entered into subject to the provisions of this Code, and that the memorandum at the foot thereof is introduced for that purpose, and that unless the provisions of the Code were expressly excepted by the parties to the agreement, it must be taken as having been agreed by them, that it was to be subject to the Act, and that this special notice of S. 327, as to the enforcement of the decision of the arbitrators, was introduced only *ex majore cautela* for the purpose of expressing what, without such expression, would nevertheless have been implied (129-30). (*Lord Romilly.*) **PESTONJEE NUSSURWANJEE v. MANECKJEE & CO.**

(1868) 12 M. I. A. 112 = 10 W. R. 51 =

1 Ind. Jur. N. S. 69 = 2 Suth. 164 = 2 Sar. 390.

—Compulsory reference—Right of—If a vested right within meaning of statute saving “any right in reference to procedure of suit.” See **STATUTE—INTERPRETATION—PENDING SUIT.** **(1865) 10 M. I. A. 413 (424-5).**

—Court’s order of—Explanation or variation of—Evidence—Subsequent facts or events—Extrinsic evidence of—Admissibility.

The consent judgment referring the matters in dispute in suit to arbitration, being a written document, cannot be explained, and much less varied, by extrinsic evidence of subsequent facts or events (245). (*Lord Parmoor.*) **ATTORNEY-GENERAL OF MANITOBA v. KELLEY.**

(1922) 31 M. L. T. 238 (P. C.).

ARBITRATION—(Contd.)**Reference to—(Contd.)**

—Revocation of—Grounds for—Time for making award—Failure to fix, originally—Notice subsequent by a party fixing time—Award not made within time—Revocation on ground of. *See* **ARBITRATION—AWARD—VALIDITY—TIME FIXED FOR MAKING OF AWARD.**

(1868) 12 M. I. A. 112 (134-5).

—Revocation of—Right of, of party to reference—Legislation as regards—Tendency of.

According to the proper construction of the Code of Civil Procedure (that is to say, construing it with reference to the constitution of the Civil Courts of India and the abiding direction to them to proceed in all cases according to equity and good conscience), when persons have agreed to submit the matter in difference between them to the arbitration of one or more specified persons, no party to the agreement can revoke the submission to the arbitration unless for good cause, and a mere arbitrary revocation of the authority is not permitted (130).

The direction of recent legislation, both by English Acts and the Acts of the Indian Legislature, has been to put an end to the distinction between the agreement to refer, and the authority thereby conferred, which formally enabled a person who was a party to a binding agreement to revoke the authority thereby conferred, and by so doing to put an end to the agreement for submission to arbitration; and to put such agreement for arbitration on the same footing as all other lawful agreements by which the parties are bound to the terms of what they have agreed to, and from which they cannot retire unless the scope and object of the agreement cannot be executed, or unless it be shown that some manifest injustice will be the consequence of binding the parties to the contract (130-1). It was not, therefore, in the power of the appellant simply, at his own mere will and pleasure, to revoke the authority of the arbitrators in whose appointment he had concurred (131). (*Lord Romilly.*) **PESTONJEE NUSSURWANJEE v. MANECKJEE & CO.**

(1868) 12 M. I. A. 112 = 10 W. R. 51 = 1 Ind. Jur. N. S. 69 = 2 Suth. 164 = 2 Sar. 390.

—Scope of—Boundary dispute—Reference of—Title and possession—Questions as to, if included. *See* **ARBITRATION—AWARD—BOUNDARY DISPUTE.**

(1883) 13 C. L. R. 26.

—Scope of—Hindu Law—Co-widows—Husband's property—Disputes as to—Reference of—Unchastity of one of widows—Disability to inherit on her part as a result of—Question as to, if included. *See* **HINDU LAW—WIDOW—CO-WIDOWS—HUSBAND'S PROPERTY—DISPUTES AS TO.**

(1885) 12 I. A. 67 (69) = 11 C. 386 (390-1).

—Scope of—Private arbitrator—Succession dispute referred to—Decision by arbitrator according to his notion of wishes and intention of deceased—Validity. *See* **ARBITRATION—ARBITRATOR—PRIVATE ARBITRATOR.**

(1891) 18 I. A. 73 (77) = 18 C. 414 (419).

—Scope of—Will—Interpretation of—Reference of. *See* **ARBITRATION—ARBITRATOR—AUTHORITY OF—SCOPE OF.**

(1928) 3 Luck. 372.

—Validity of—Agreement—Order of reference—Arbitration partly under former and partly under latter. *See* **ARBITRATION—AGREEMENT—ORDER OF REFERENCE.**

(1925) 53 I. A. 1 (10-1) = 53 C. 258.

Submission to.

—*See* **ARBITRATION—REFERENCE TO.**

Tribunal of—Substitution of another tribunal for.

—Obligation upon parties submitting.

Parties who agree to set up a tribunal of arbitration are not bound to submit the case referred to another tribunal,

ARBITRATION—(Contd.)**Tribunal of—Substitution of another tribunal for—(Contd.)**

such as a District or other Judge. (*Lord Shaw.*) **MIRZA SADIK HUSSAIN v. MUSSAMMAT KANIZ ZARAH.**

(1911) 10 M. L. T. 173 = (1911) 2 M. W. N. 132 = 21 M. L. J. 1151 (1155).

Umpire.**AWARD OF.**

—Correctness of—Jurisdiction of Court to inquire into—Decision on matters referred to him agreed to be final—Effect.

In a submission, in which the parties have agreed that the decision of the umpire, on the matters referred to him, shall be final, the Courts will not enquire whether the conclusion of the umpire on the matters referred to him is right or wrong, unless an error appears on the face of the award, or on some document so closely connected with it that it must be regarded as part of his award or unless the umpire himself states that he has made a mistake of law or fact, leaving it to the Court to review his decision (251).

This principle is approved on the ground that, although, possibly, injustice may be done in particular cases, it is better to adhere to the principle of not allowing awards to be set aside for mistakes, and not to open a door for enquiry into the merits, as this might lead to such an enquiry in almost every case (251). (*Lord Parmoor.*) **ATTORNEY-GENERAL OF MANITOBA v. KELLEY.**

(1922) 31 M. L. T. 238 (P. C.).

—Error in—Interference with report on ground of—Propriety.

The umpire is, under the submission, entitled to form his own opinion in respect of all matters submitted, from his own knowledge, inspection or examination, or from such other source as he may deem proper. The effect of this provision is that it is not possible for the Court to have before it all the material on which the umpire based his decision, and that even if the Court should remit the report on the ground of error in the conclusions reached by the umpire it could have no effective control over the ultimate decision (251-2). (*Lord Parmoor.*) **ATTORNEY-GENERAL OF MANITOBA v. KELLEY.** (1922) 31 M. L. T. 238 (P. C.).

—Interpretation, variance or contradiction of—Evidence for purpose of—Admissibility—Jurisdiction—Exceeding of—Issue as to—Evidence admissible on.

The report of the umpire is a written document which speaks for itself and which cannot be interpreted, or varied, or contradicted, by extrinsic evidence. If there is any doubt as to the subject-matter over which the umpire was purporting to exercise jurisdiction, evidence may be given showing what was the subject-matter into which he was enquiring, in order to enable the Court to determine whether he has exceeded the limits of his jurisdiction. Such evidence may be given by the umpire himself or by any other competent witness; but it should be limited to the issue of fact, and is not admissible to explain or to aid, much less to attempt to contradict (if any such attempt should be made), what is to be found on the face of the written instrument (247-8). (*Lord Parmoor.*) **ATTORNEY-GENERAL OF MANITOBA v. KELLEY.** (1922) 31 M. L. T. 238 (P. C.).

—Matters submitted to him for final decision—Award on—Challenge of—Grounds—Evidence—Expert evidence—Admissibility.

In a case in which the parties to a suit referred the matters in dispute to the decision of an umpire, providing that the report of the umpire should be final and conclusive between the parties, and that the judgment should be a final judgment for the amount shown in the said report, held, on a motion to set aside the report, on the ground of excess of jurisdiction or of misconduct, that evidence giving the opinion of experts on the method in which the inquiry was

ARBITRATION—(Contd.)**Umpire—(Contd.)****AWARD OF—(Contd.)**

conducted, and traversing the conclusions of the umpire, as stated in the report was inadmissible (244).

In effect, the Court on this evidence was asked to review the decision of the umpire on questions submitted to him, by the parties for final decision. Such evidence would not be admissible in the case of an award under arbitration proceedings conducted according to ordinary practice. In the present submission, the umpire is entitled under the terms of the submission, to form his own opinion as to the fair value and proper charge or allowance to be made in respect of all matters submitted to him from his own knowledge, inspection or examination, or from such other source as he may deem proper. Unless, therefore, the umpire has been guilty of misconduct, it is within his discretion and authority either to act on his own knowledge, inspection or examination, or to obtain information from any other source, which in his opinion he may deem proper. It is not incumbent on him to state how he has acted, and it is impossible for the Court to ascertain what considerations have affected his judgment. The matter is one which the parties have intended to withdraw from the Courts in order that the issue in the litigation may be finally determined by their chosen nominee, and all extrinsic evidence that other experts would have proceeded in a different manner, or reached a different conclusion should have been rejected as inadmissible (244). (*Lord Parmoor.*) ATTORNEY-GENERAL OF MANITOBA *v.* KELLEY. (1922) 31 M. L. T. 238 (P. C.).

——Setting aside of—Grounds—Appraiser—Omission to consult. See ARBITRATION—APPRAISERS, ETC.—APPRAISERS—POSITION AND RIGHTS OF.

(1922) 31 M. L. T. 238 (250) (P. C.).

——Validity of—Appraiser—Attempt to influence umpire by—Effect.

In a case in which the parties to a pending suit referred the matters in dispute to two appraisers, and, in the event of the appraisers not being able to agree, such matters were referred to an umpire, whose judgment was to be final and conclusive between the parties, the allegation was that one of the appraisers acted improperly in attempting to influence the umpire after his duties as an appraiser had come to an end, and when the decision on such matters, as had not been agreed upon between the appraisers, stood referred to the umpire.

Held, that the only way in which the alleged misconduct of the appraiser at that stage of the enquiry, could affect the validity of the report of the umpire, was if it could be proved that such misconduct influenced in any way the decision of the umpire (248-9). (*Lord Parmoor.*) ATTORNEY-GENERAL OF MANITOBA *v.* KELLEY.

(1922) 31 M. L. T. 238 (P. C.).

——Validity of—Misconduct—Effect of. See ARBITRATION—UMPIRE—MISCONDUCT OF—VALIDITY OF AWARD.

(1922) 31 M. L. T. 238 (251) (P. C.).

JURISDICTION OF.

——Basis and limit of.

The jurisdiction of the umpire is derived solely from the agreement of the parties contained in the consent judgment referring the matter to arbitration (244-5). (*Lord Parmoor.*) ATTORNEY-GENERAL OF MANITOBA *v.* KELLEY.

(1922) 31 M. L. T. 238 (P. C.).

——Exceeding of—Question as to—Evidence admissible on. See ARBITRATION—UMPIRE—AWARD OF—INTERPRETATION, ETC. (1922) 31 M. L. T. 238 (247-8) (P. C.).

——Question as to—Decision of, rests with Court, and not with umpire.

Whenever there is a difference of opinion between the parties as to the authority conferred on an umpire under an

ARBITRATION—(Contd.)**Umpire—(Contd.)****JURISDICTION OF—(Contd.)**

agreed submission, the decision rests ultimately with the Court and not with the umpire. It would be impossible to allow an umpire to arrogate to himself jurisdiction over a question which, on the true construction of the submission, was not referred to him. An umpire cannot widen the area of his jurisdiction by holding, contrary to the fact, that the matter which he affects to decide, is within the submission of the parties (245). (*Lord Parmoor.*) ATTORNEY-GENERAL OF MANITOBA *v.* KELLEY.

(1922) 31 M. L. T. 238 (P. C.).

——Question as to—Evidence—Proceedings at meeting of appraisers and umpire before latter issued his report—Transcript of—Admissibility.

The transcript of the proceedings is not admissible unless it can be regarded as a document so closely connected with and incorporated in the report as to be considered part of the report, and to be looked at in the same way as the report itself. (*Lord Parmoor.*) ATTORNEY-GENERAL OF MANITOBA *v.* KELLEY.

(1922) 31 M. L. T. 238 (243-4) (P. C.).

MISCONDUCT OF.

——Appraiser—Omission to consult. See ARBITRATION—APPRAISERS, ETC.—APPRAISERS—POSITION AND RIGHTS OF.

(1922) 31 M. L. T. 238 (250) (P. C.).

——Appraiser—Pamphlets sent by—Consulting and considering by umpire of—If amounts to misconduct.

Where, under the terms of the submission the umpire, in case of the disagreement of the appraisers, was constituted the sole judge as to whether or not the work done under the contract in question was defective and to what extent, *held*, that the umpire was entitled to form his own opinion as to the fair value, and proper charge or allowance, to be made in respect of all matters submitted to him, from his own knowledge, inspection or examination, or from such other source as he might deem proper, and that it was therefore within the competence of the umpire to consult and consider at any time some pamphlets sent to him by one of the appraisers (249). (*Lord Parmoor.*) ATTORNEY-GENERAL OF MANITOBA *v.* KELLEY. (1922) 31 M. L. T. 238 (P. C.).

——Validity of award—Effect on—Whole award to be set aside.

If a charge of misconduct on the part of the umpire could have been established, it would be difficult not to set aside the whole award, as infected in all its findings (251). (*Lord Parmoor.*) ATTORNEY-GENERAL OF MANITOBA *v.* KELLEY.

(1922) 31 M. L. T. 238 (P. C.).

——Procedure to be followed by—Arbitrators—Points of difference between—Umpire asked to give award on—Procedure to be adopted by—Hearing of counsel—Taking of evidence—Necessity.

Complaint is made that the umpire appointed by the arbitrators did not open up the whole matter from the beginning, and that he appointed no meeting, heard no counsel, and took no evidence. Their Lordships are of opinion that it was not necessary for him to do so. The umpire was to give his award on points where the arbitrators differed. The arbitrators expressed their difference in writing and the umpire gave his award after weighing and considering the facts and arguments adduced by both the arbitrators in the documents laid before him. The award is therefore not open to any objection. (*Lord Romilly.*) PESTONJEE NUSSURWANJEE *v.* MANECKJEE & CO.

(1868) 12 M. I. A. 112 (133) = 10 W. R. 51 = 1 Ind. Jur. N. S. 69 = 2 Suth. 164 = 2 Sar. 390.

REPORT OF.

——See ARBITRATION—UMPIRE—AWARD OF.

ARBITRATION ACT (IX OF 1899).**ARBITRATION PROCEEDINGS UNDER.**

——Arbitrator in—Legal defences—Duty to give effect to. *See* LIMITATION ACT OF 1908—ARBITRATION PROCEEDINGS. (1929) 56 M. L. J. 614.

——Arbitrator in—Limitation—Defence of—Duty to give effect to. *See* LIMITATION ACT OF 1908—ARBITRATION PROCEEDINGS. (1929) 56 M. L. J. 614.

——Prior and subsequent proceedings for—Latter if continuation of former or fresh proceedings—Former becoming infructuous by reason of absence of jurisdiction of arbitrator appointed. *See* ARBITRATION—PROCEEDINGS FOR—PRIOR AND SUBSEQUENT PROCEEDINGS. (1929) 56 M. L. J. 614.

——Prior infructuous proceedings for—Time spent in—Deduction of—Jurisdiction of arbitrator appointed—Absence of—Prior proceedings infructuous by reason of. *See* LIMITATION ACT OF 1908, S. 14—ARBITRATION. (1929) 56 M. L. J. 614.

——**S. 9 (b)**—*Applicability of—Intention to exclude—What amounts to—Contract—Construction—Appeal provided by contract to named committee in event of award by named arbitrators—Right of, in case of departure from scheme provided by contract by application of S. 9 (b).*

The appellants and respondents were merchants in Calcutta. By contracts in writing the appellants agreed to buy from the respondents a number of bales of jute. The contracts were all in a form approved by the Calcutta Baled Jute Trade Association, most of them containing what was called a "home guarantee" (that is to say, a guarantee as to quality, condition and weight on terms contained in the London Jute Association contract), and all of them containing an arbitration clause in the following terms:—

"15. In the event of any dispute whatever arising out of, or in any way relating to, this contract or its construction or fulfilment between the parties hereto, and whether arising before or after the date of expiration of this contract, the dispute shall be referred to arbitration in accordance with the Rules and By-Laws endorsed on this contract. Each party to the dispute shall appoint one arbitrator, and such arbitrators shall have the power to appoint an umpire. Both arbitrators and umpire must be persons engaged in the baled jute trade, and their award shall be final, subject only to right of appeal to the Committee. The Association's Rules and By-Laws as printed on the reverse, form part of this contract."

The Rules and By-Laws referred to in the above clause included the following:—

"Rule 27. The Committee may, at their discretion, and upon payment of the prescribed fees, hear appeals against arbitration awards, provided they proceed in conformity with the By-Laws of the Association." By-Law 15. "Where one of the parties to a dispute shall fail to appoint an arbitrator within 48 hours after having been called upon to do so, the Chairman of the Association shall appoint an arbitrator whose appointment shall be as lawful and binding upon the defaulting party as though he himself had appointed such arbitrator."

The Association referred to in the contract, Rules and By-Laws was the Calcutta Baled Jute Trade Association, and the Committee referred to was the Committee of that Association.

Held, that the submission to arbitration provided for by the contracts contained an expression of a "different intention" which had the effect of excluding the operation of S. 9 (b) of the Arbitration Act (373).

The effect of the provisions of each of the contracts is that on a failure by either party to appoint an arbitrator—which includes (in their Lordships' opinion) a failure to appoint a substituted arbitrator on the death or retirement

ARBITRATION ACT (IX OF 1899)—(Contd.)**S. 9 (b)—(Contd.)**

of an arbitrator originally appointed—the appointment is to be made by the Chairman on behalf of the defaulting party, so that in every such case there are to be two arbitrators, one appointed by one of the parties, and the other by the Chairman on behalf of the other party. Both are to be men engaged in the trade, and the decision of these skilled men or their umpire is subject to an appeal to the Committee of the Association. It is to such a domestic tribunal, so constituted, that the parties have agreed to submit their differences; and this agreement appears to their Lordships to be quite inconsistent with S. 9 (b) of the Act, under which, if it comes into operation, the decision will be made by a single arbitrator chosen by one party only (373-4).

Quaere whether, if the scheme of the By-Laws were departed from by the application of S. 9 (b), the right of appeal to the Committee would continue to be effective (374).

Held further, that the respondent's letter of the 31st July, 1916 (quoted on p. 761 of the report in 44 M. L. J.), had not the effect of excluding an appointment by the Chairman and evidencing a new agreement to which the Arbitration Act, including S. 9 (b), would apply (374).

By the letter the respondents contended that the time for making the award had expired, and that the Chairman had no authority to override the provisions of the Arbitration Act in that respect; and also that the dispute did not come under the terms of the contract at all. They may have been mistaken in both these contentions; but there was clearly no intention on their part to set up any new form of arbitration different from that to which they had agreed (374-5). (*Viscount Cave.*) **SASSOON & CO. v. RAMDUTT RAM-KISSEN DAS.**

(1922) 49 I. A. 366=

50 C. 1 (10-1) = 32 M. L. T. 19 = 37 C.L. J. 336 =

27 C. W. N. 660 = (1923) M. W. N. 372 =

18 L. W. 537 = A. I. R. 1922 P. C. 374 =

70 I. C. 777 = 44 M. L. J. 758.

——*Appointment of one arbitrator by each party—Refusal of one arbitrator to act—Appointment of the other as sole arbitrator—Award by him—Validity.*

A policy of insurance contained an arbitration clause to the following effect:—

"If any difference arises as to the amount of any loss or damage, such difference shall independently of all other questions be referred to the decision of an arbitrator, to be appointed in writing by the parties in difference, or, if they cannot agree upon a single arbitrator, to decision of two disinterested persons, of whom one shall be appointed in writing by each of the parties within two calendar months after having been required so to do in writing by the other party. In case either party shall refuse or fail to appoint an arbitrator within two calendar months after receipt of notice in writing requiring an appointment the other party shall be at liberty to appoint a sole arbitrator; and in case of disagreement between the two arbitrators, the difference shall be referred to the decision of an umpire, who shall have been appointed by them in writing before entering on the reference and who shall sit with the arbitrators and preside at their meetings."

Pursuant to the above clause one of the parties appointed his arbitrator and called upon the other party to appoint his arbitrator. The latter did so, and the two arbitrators appointed an umpire. Subsequently the arbitrator appointed by the other party declined to act. The first party then called upon him to nominate another arbitrator but the latter did not do so. Thereupon the first party appointed his arbitrator as sole arbitrator and notified the same to the other party. That arbitrator published his award.

In an action to recover the amount adjudged by the award, *held*, that S. 6 of the English Arbitration Act

ARBITRATION ACT (IX OF 1899)—(Concl'd.)**S. 9 (b)—(Concl'd.)**

(corresponding to S. 9 of the Indian Arbitration Act of 1899) was inapplicable to the case, and that the award was invalid. (*Lord Buckmaster.*) **SOUTH BRITISH INSURANCE CO., LTD. v. GAUCI BROS. & CO.** (1928) 110 I. C. 290.

—**Ss. 14, 15—Award—Setting aside—Suit for—Maintainability—Misconduct or irregularity of arbitrator—Want of jurisdiction in arbitrator—Suit on ground of—Distinction—Execution of award—Effect on maintainability of suit on ground of want of jurisdiction.**

Any objection to an award on the ground of misconduct or irregularity on the part of the arbitrator ought, no doubt, to be taken by motion to set aside the award; but where it is alleged that an arbitrator has acted wholly without jurisdiction, his award can be questioned in a suit brought for that purpose. Nor is the fact that the award has been enforced by execution under S. 15 of the Arbitration Act of 1899 a bar to a suit to have it declared void and for consequential relief.

S. 15 does not enact that the award, when filed, is to be deemed to be a decree of the Court, but only that it is to be enforceable as if it were a decree. (*Viscount Cave.*) **SASSOON & CO. v. RAMDUTT RAMKISSEN DAS.**

(1922) 49 I. A. 366 (372-3) = 50 C. 1 (9) = 32 M. L. T. 19 = 37 C. L. J. 336 = 27 C. W. N. 660 =

1923 M. W. N. 372 = 18 L. W. 537 =

A. I. R. 1922 P. C. 374 = 70 I. C. 777 = 44 M. L. J. 758.

—**S. 19—Stay of proceedings under—Order refusing—Appeal to P. C. from—S. 109 (c), C. P. C.—Certificate under—Necessity.** See C. P. C. OF 1908, S. 109—**ARBITRATION ACT OF 1899.** (1920) 47 I. A. 124 = 47 C. 918.

AREA.

—**Boundary—Conflict between—Which prevails.** See **DEED—CONSTRUCTION—AREA—BOUNDARY.**

ARGUMENTUM AB INCONVENIENTI.

—**Applicability and force of.**

It may be true that on some occasions it is not very desirable to argue simply from consequences alone; but the consequences of granting an appeal in cases of this description (criminal matter) are so exceedingly strong, they are so entirely destructive of the administration of all criminal jurisprudence, that their Lordships cannot for a single moment doubt that they are of the greatest importance in guiding them to form a judgment (193). (*Dr. Lushington.*) **THE QUEEN v. JOYKISSEN MOOKERJEE.**

(1862) 9 M. I. A. 168 = 1 W. R. 13 (P. C.) =

1 Moo. P. C. (N. S.) 272 = 1 Sar. 860 = 1 Suth. 481.

—**Inconvenience would not be a ground for deciding a case like the present (in which the question was whether, under the Bengal School of Hindu Law, a widow who had once inherited the estate of her deceased husband was liable to forfeit that estate by reason of unchastity) if the law were clear upon the subject; but it is an argument which may be fairly adduced when the authorities in favour of the opposite view are merely the expressions of opinion by Hindu Law officers, or by European or modern text-writers, however eminent, or even decisions of a Court of Justice, when they are in conflict with the decisions of other Courts of equal weight (156). (Sir Barnes Peacock.)** **MONIRAM KOLITA v. KERRY KOLITANY.**

(1880) 7 I. A. 115 = 5 C. 776 (791) = 6 C. L. R. 322 = 4 Sar. 103 = 3 Suth. 765.

ARMS ACT (XI OF 1878).

—**S. 25—Search under—Validity—Record of grounds of belief—Necessity.**

In order that a Magistrate may plead S. 25 of the Arms Act in defence to an action for damages for trespass of

ARMS ACT (XI OF 1878)—(Concl'd.)**S. 25—(Concl'd.)**

plaintiff's house the preliminary conditions prescribed by the Act should have been complied with. (*Lord Macnaughten.*) **CLARKE v. BROJENDRA KISHORE CHOWDHURY.** (1912) 39 I. A. 163 (176) = 39 C. 953 (967) =

16 C. W. N. 865 = 16 C. L. J. 231 =

(1912) M. W. N. 760 = 12 M. L. T. 171 =

10 A. L. J. 193 = 14 Bom. L. R. 717 =

13 Cr. L. J. 693 = 16 I. C. 501 = 23 M. L. J. 32.

ARMY.

—**Aliens lawfully enlisted in His Majesty's, along with British subjects—Protection to—Jurisdiction over.**

When the Crown lawfully enlists in its forces aliens along with British subjects and requires of them the same service, loyalty and allegiance as are the duties of British enlisted subjects, it extends to them the same protection in a foreign country, where all are serving together in the armed forces of His Majesty (994). (*Lord Sumner.*) **IBRAHIM v. EMPEROR.** (1914) 1 L. W. 989 = 18 C. W. N. 705 =

23 I. C. 678 = 15 Cr. L. J. 326 = (1914) A. C. 599 =

4 Cr. L. R. 225 = 3 Con. L. R. 187.

ARRANGEMENT.

—**Consent to a mode of—Meaning and effect of.** See **CONSENT—ARRANGEMENT.**

(1859) 7 M. I. A. 441 (464-5).

ASSESSMENT.

—**Annual value of houses, buildings and grounds—Ascertainment of—Principle of—Profits made—Assessment based on—Validity—Statute 33 Geo. III, c. 52, S. 158—Construction.**

Under S. 158 of the Statute 33 Geo. III, c. 52, assessments were directed to be made on the owners or occupiers of houses, buildings and grounds, "according to the true and real annual values thereof".

Held, the test or definition afforded by S. 1 of the Statute 6 and 7 Will. IV, c. 96 in the words—"The net annual value of the several hereditaments rated thereunto, that is to say, of the rent at which the same might reasonably be expected to let, from year to year, free from all usual tenant's rates and taxes, and to the commutation rent-charge, if any, and deducting therefrom the probable average annual costs of the repairs, insurance, and other expenses, if any, necessary, to maintain them in a state to command such rent,"—was substantially a correct test or definition to be applied under the Statute 33 Geo. III, c. 52.

The judgment of the Court below reversed because the assessment was not made upon the above principle.

If of two manufacturers in the same street, carrying on precisely the same kind of business, by means of fixed machinery, one makes an annual profit of £2,000 per annum, the other an annual profit of only £1,000 per annum, that circumstance, if the respective buildings and machinery do not materially differ in size, description, extent or quality, cannot render the one liable to be assessed at a higher rate than the other. The greater or less degree of success, with which a trade or manufacture is conducted, in a warehouse, or manufactory, or other building, having or not having fixed machinery, depends on many and various contingencies and circumstances, of a nature foreign to the mere capabilities of the warehouse, manufactory, or building, and cannot form a just ingredient, in any calculation, of its true and real annual value. (*Knight Bruce, V. C.*) **FAWCETT v. THE TRUSTEES OF BOMBAY.**

(1845) 3 M. I. A. 408 = 5 Moo. P. C. 143 = 1 Sar. 296.

ASSETS.

—**Pilgrim-tax leviable by Zemindar—Compensation payable to him by Government on abolition of tax—Divisibility of, amongst his heirs.**

ASSETS—(Contd.)

The late Maharajah Mitterjeet Sing was entitled to the levy of a tax upon pilgrims resorting to the temple of Gaya. On the abolition of the tax by the Government, a compensation was awarded to the Maharajah in lieu of it, in the shape of a perpetual annual payment which sum, it was settled by an agreement and a decree of the Sudder Court during the Maharajah's lifetime, was, on his death, to be divided in certain proportions between his two sons through whom the present appellant and respondent claimed as their heirs respectively.

Held, that in whatever mode the Government might think proper to deal with this sum with reference to the jumma, the rights of the parties could not be affected thereby without their consent, but would continue to be adjusted according to the proportions originally established (unless they acquiesced in the course adopted by the Government—which was to reduce the amount of the jumma by the amount, payable by Government, instead of making cash payment as heretofore,—and acted upon it in such a way as to indicate a fresh agreement between them.

Government compensation for abolition of Pilgrims' tax held to be assets, and to be divided among the grantee's heirs. (*Lord Chelmsford.*) **MAHARAJEET SING v. MUSUMMAT ISMUDH KOONWAR.**

(1865) 10 M. I. A. 329 = 5 W. R. P. C. 14 = 1 Suth. 605 = 2 Sar. 142 = 1 I. J. N. S. 141.

ASSIGNMENT.

—Action at law—Fruits of—Assignment of—Agreement for—Validity—Decree of Court—Compromise—Fruits under—No distinction between.

An agreement to assign to others part of the fruits that may be acquired in an action at law is perfectly legal. There is no distinction, and can be no distinction on this point, between the fruits of an action which the plaintiff gets by compromise and the fruits he would receive by a decree or verdict in his favour (19). (*Lord Atkinson.*) **VATSAVAYA VENKATA JAGAPATI v. POOSAPATI VENKATAPATI.**

(1924) 52 I. A. 1 = 48 M. 230 = 20 L. W. 298 =

A. I. R. 1924 P. C. 162 = 35 M. L. T. 210 =

(1924) M. W. N. 607 = 26 Bom. L. R. 786 =

29 C. W. N. 57 = 80 I. C. 807 = 47 M. L. J. 93 (125-6).

—Construction of deed of—Claims "now due owing or payable"—Assignment of—Right to payment accruing after date of deed if passes under.

A lessor, in whose favour the lessee had executed a collateral agreement, dated 9th July 1895, undertaking to pay the lessor a sum of Rs. 500 a month for a period of ten years from July, 1895, executed a trust deed on 12-7-1895 in favour of V. The question was whether the benefit of the lessee's agreement to pay Rs. 500 a month to the lessor passed to the trustee V under the trust deed. It was contended that the right was conveyed by the general words by which the settlor assigned "the outstanding debts, arrears of rent, mesne profits, claims, demands, and sums of money of whatsoever kind or description, now due owing or payable to the settlor on any account whatsoever and all rights to prosecute any suit or other proceeding existing in favour of the settlor at the date of these presents."

Held, that, on the right construction of the trust deed the benefit of the lessee's agreement to pay Rs. 500 a month to the lessor (settlor) did not pass to the trustee V.

The use in an Indian document of the words "now due owing or payable" in defining the claims transferred, coupled with the words which follow restricting the transfer of rights of suit in respect of such claims to those existing at the date of the deed, shew that rights of the nature of that now under consideration, accruing after the date of the deed, were not intended to pass—a view which is somewhat strengthened by the employment of the phrase "demands payable and to become payable" in the exception and reser-

ASSIGNMENT—(Contd.)

vation which follows. (*Sir Arthur Wilson.*) **SUBRAMANIAM CHETTIAR v. ARUNACHELLAM CHETTIAR.**

(1902) 29 I. A. 138 (146-7) =

25 M. 603 (612) = 6 C. W. N. 865 = 4 Bom. L. R. 839 = 8 Sar. 316 = 12 M. L. J. 479.

—Crown—Assignment of lands by—Cancellation of, on breach of certain conditions by grantee—Provision as to—Cancellation on ground of breach of those conditions—Inquiry judicial or quasi-judicial prior to—Necessity. *See* CROWN—ASSIGNMENT OF LAND BY.

A. I. R. 1927 P. C. 275.

—Genuineness of deed of—Proof of.

The Raja of Basti sued for the recovery of possession of a number of villages forming part of his Raj. The Raja rested his case on a custom, by which a portion of the property was given to the brothers of the ruling Raja who were called "Babus" as "Hak Babuni" or maintenance and by which on failure of male issues of such brothers the property reverted to the Raj. Plaintiff also claimed to be entitled to the properties by virtue of a Sipurdnama (or deed of assignment) executed by C, a nephew of a former Raja, in favour of the then ruling Raja, and also by virtue of a Warasatnama or will executed by the widow of C, in favour of plaintiff's father. *Held*, that the Sipurdnama and Warasatnama were genuine documents and that the whole of the property in question passed to the plaintiff. (*Lord Collins.*) **IMDAD AHMAD v. PATESHRI NARAIN SINGH.**

(1910) 37 I. A. 60 = 32 A. 241 = 14 C. W. N. 842 =

12 Bom. L. R. 419 = 6 I. C. 981 = 7 M. L. T. 414.

—Goods described as being in certain warehouses of assignor—Assignment of, to secure loan—Validity—Goods not all in warehouses specified at date of assignment—Loan not advanced on that date, but advanced subsequently in instalments—Effect. *See* INSOLVENCY—INSOLVENT—ASSIGNMENT BY, OF GOODS DESCRIBED AS BEING IN CERTAIN WAREHOUSES TO SECURE LOAN.

(1848) 4 M. I. A. 382.

—Non-existing thing—Assignment of—Agreement for—Validity—Effect.

In the case of an agreement to assign a thing not existing at the date thereof, as soon as the thing comes into existence, the agreement attaches to the thing so coming into existence subsequently (19-20). (*Lord Atkinson.*) **VATSAVAYA VENKATA JAGAPATI v. POOSAPATI VENKATAPATI.**

(1924) 52 I. A. 1 = 48 M. 230 =

20 L. W. 298 = A. I. R. 1924 P. C. 162 =

35 M. L. T. 210 = (1924) M. W. N. 607 =

26 Bom. L. R. 786 = 29 C. W. N. 57 = 80 I. C. 807 =

47 M. L. J. 93 (125-6).

—Property or interest that can be assigned. *See* CASES UNDER C. P. C. OF 1908, S. 60 AND TRANSFER OF PROPERTY ACT, S. 6.

—Stranger to—Unfair and unconscionable nature of bargain—Plea of—Right to urge.

The question of an assignment being unfair and unconscionable is purely a question between the assignor and the assignee. A third party who is sued by the assignee on the title derived from the assignment cannot raise the issue of the unfairness or unconscionableness of the assignment. (*Sir Arthur Wilson.*) **BHAGWAT DAYAL SINGH v. DEBI DAYAL SAHU.**

(1908) 35 I. A. 48 (56) = 35 C. 420 (427) = 7 C. L. J. 335 = 12 C. W. N. 393 =

5 A. L. J. 184 = 3 M. L. T. 344 = 10 Bom. L. R. 230 =

14 Bur. L. R. 49 = 18 M. L. J. 100.

ASSUMPSIT.

—See LIMITATION—ASSUMPSIT.

ATTACHMENT.

—See C. P. C. OF 1908, S. 60, O. 21, R. 41, ETC. O. 38 RR. 5 6—EXECUTION OF DECREE—ATTACHMENT IN.

ATTESTATION.

—See DEED—ATTESTATION.

(1) HINDU LAW—WILL—EXECUTION—ATTESTATION.

(2) HINDU LAW—REVERSIONER—WIDOW—ALIENATION BY—ATTESTATION OF DEED, AND

(3) TRANSFER OF PROPERTY ACT, S. 59—ATTESTATION.

AUCTION SALE.

—Agreement of several not to bid at—Offence if an.

The dictum of Baron Gurney in the case of *Levi v. Levi* was much relied upon to show that an agreement of several not to bid at an auction was an indictable offence; but this was a mere dictum and cannot be relied upon (133). (*Mr. Baron Parke.*) DOOLUBDASS PETTAMBERDASS v. RAMLOLL THACKOORSEYDASS.

(1850) 5 M. I. A. 109 = 7 Moo. P. C. 239 = Perry, O. C. 232 = 1 Sar. 403.

—Conditions of—Addition of, subsequent to sale—Validity—Property escheated to Government—Auction sale of—Ratification by higher authority—Addition of condition of, subsequent to sale—Effect.

The conditions of sale published before the auction are the only binding conditions, and if there be inserted, subsequently thereto, a condition of ratification, by higher authority in the memorandum of sale, its effect is, at best, simply to enable that authority to refuse to ratify the contract by reason of the non-observance or the non-performance of some express condition of sale.

Where a sale of a landed property which has been escheated by the Government was made by Government without any restriction being attached to the original notice of sale, which stated that the highest bidder was to be the purchaser; it was held, that the Government could not, subsequent to the bid and the deposit of the earnest money, impose any condition, but was bound to make over possession irrespective of the character of the highest bidders.

"The right to refuse to complete this sale is founded on a memorandum at the foot of the statement of the biddings, in these terms:—"This auction is knocked down to S. on the condition of its being ratified by the Collector." The principal question in this case is, whether the ratification of the sale by the Collector was or could be made a condition of the sale. Now it is clear from the evidence that what is sought to be imposed as a condition was no part of the original conditions of sale. Their Lordships apprehend that, looking at the terms of the memorandum, the words "on the condition, etc., etc." must be qualified in this manner, —that, supposing the conditions of the sale have not been complied with, then the Collector might refuse to ratify it; but to hold it to have been in the power of the Collector to refuse to ratify the sale because the purchaser was a rebel, would be a determination utterly repugnant to the terms and conditions upon which, according to the public notice, the sale was to be conducted. Even assuming, therefore, that the appellant is right with regard to the ratification of the Collector being a condition which attaches upon the sale, he was bound to show that the refusal to ratify the contract was by reason of the non-observance or the non-performance of some express condition of sale." SHEO LALL BOHRA v. SHEIKH MAHOMED.

(1869) 13 W. R. 4 (P. C.) = 2 Suth. 283.

—Ingrossing or regrating—Common law offence of—Extension of—Permissibility.

The offence of ingrossing or regrating ought not to be extended, and would not meet with much countenance in these times, when the true principles of trade and commerce are better and more generally understood (133). (*Mr. Baron*

AUCTION SALE—(Contd.)

Parke.) DOOLUBDASS PETTAMBERDASS v. RAMLOLL THACKOORSEYDASS.

(1850) 5 M. I. A. 109 = 7 Moo. P. C. 239 = Perry, O. C. 232 = 1 Sar. 403.

—Ingrossing or regrating—Common law, offence of—Necessaries of life—Offence possible only with regard to.

The Common Law offence of ingrossing or regrating can be committed only with respect to the necessities of life (132). (*Mr. Baron Parke.*) DOOLUBDASS PETTAMBERDASS v. RAMLOLL THACKOORSEYDASS.

(1850) 5 M. I. A. 109 = 7 Moo. P. C. 239 = Perry, O. C. 232 = 1 Sar. 403.

—Price of—Enhancement of—Employment of agents merely for purposes of—Illegal conspiracy if an.

Wager contracts between the plaintiffs and defendants upon the price that Patna opium would fetch at the next Government sale at Calcutta, each party knowing that the other might use means to enhance or depress such price.

Held, that employing agents at such sale (all of whom were cognizant that the object was to enhance the price of opium sold) to bid, there being no *crimen falsi* committed, did not constitute an illegal conspiracy or such fraud as would vitiate the wager contracts (133). (*Mr. Baron Parke.*) DOOLUBDASS PETTAMBERDASS v. RAMLOLL THACKOORSEYDASS.

(1850) 5 M. I. A. 109 = 7 Moo. P. C. 239 = Perry, O. C. 232 = 1 Sar. 403.

—Puffers—Employment by vendor of—Avoidance of sale on ground of.

By authorising the employment of puffers, the vendor is guilty of a fraud on the competing bidders, and cannot profit by it (133-4). (*Mr. Baron Parke.*) DOOLUBDASS PETTAMBERDASS v. RAMLOLL THACKOORSEYDASS.

(1850) 5 M. I. A. 109 = 7 Moo. P. C. 239 = Perry, O. C. 232 = 1 Sar. 403.

—Puffing—Real bidding—Distinction.

A puffer is not a real bidder. By arrangement between him and the vendor his bid is to go for nothing; but as to the competing bidders, it appears to be what it is not, a real bidding. (*Mr. Baron Parke.*) DOOLUBDASS PETTAMBERDASS v. RAMLOLL THACKOORSEYDASS.

(1850) 5 M. I. A. 109 (133-4) = 7 Moo. P. C. 239 = Perry, O. C. 232 = 1 Sar. 403.

—Purchase at—Fraud on the public—If and when a. See CONTRACT—WAGERING CONTRACT—FRAUD OF WINNER.

(1850) 5 M. I. A. 109 (132-3).

AUTHORITIES.

—See DECISIONS.

BAIL.

—Person on—If can be deemed to be under imprisonment. See IMPRISONMENT—BAIL.

(1903) 30 I. A. 154 (158) = 30 C. 872 (879).

BAKASHT.

—Meaning of. See BENGAL ACTS—TENANCY ACT OF 1885, S. 120—WORDS—BAKASHT.

(1926) 53 I. A. 176 (180) = 5 P. 735.

BANK OF ENGLAND NOTE.

—Number if part of contract of, *quaere.* (*Lord Buckmaster.*) HONGKONG AND SHANGHAI BANKING CORPORATION v. LO LEE SHI.

(1928) 110 I. C. 127 = 28 L. W. 880 = A. I. R. 1928 P. C. 116 = 55 M. L. J. 627 (632).

BANKER AND CUSTOMER.

—Cheque—Payment of amount of, to wrong person—Liability of Bank in case of—Mistake or inadvertence—Payment by.

The question in the appeal was whether a cheque drawn by a firm of M. N. & Co., upon the respondent bank,

BANKER AND CUSTOMER—(Contd.)

payable to the appellants or their order, was paid to the servant of the appellants. The cheque was received by the appellants on a certain date, and on the following day they endorsed it in blank, and delivered it to their servant S, who presented it at the bank for payment.

The respondents, in their written statement, said that the cheque was presented for payment, and the amount thereof was paid to S. After the plaintiffs had opened their case, the defendants, however, applied for leave to amend their written statement by the addition of a paragraph which would enable them to raise the defence that, if as a matter of fact, the bank did not pay S, but some other person who was not a servant or agent of the appellants, but who represented himself to be so, such payment was made in consequence of the negligence and default of S, and without any negligence or default of the bank, and that the bank was discharged by such payment. The amendment was allowed, but no evidence was given by the defendants in support of this view of the case.

Held, on the evidence, reversing the decision in appeal and restoring that of the trial Judge, that the respondent bank had, on the presentation of the cheque by the appellants' servant, S, failed to pay the same in such manner as to be discharged of the obligation.

Their Lordships cannot agree with the learned Judges who heard the case on appeal that the alternative was simply whether the bank officers or some of them appropriated the money or S made a mis-statement when he said he was not paid. There was another possible alternative, *viz.*, that by mistake or inadvertence one of the poddars had paid the wrong person, and the bank officers, who may at first have thought they paid S, persisted in saying that they had (119-20). (*Sir Richard Couch.*) **LALL CHAND v. THE AGRA BANK, LTD.**

(1891) 18 I. A. 111 =
Bald. 510 = 6 Sar. 35.

———Customer—Deposit of money of, in names of himself and his wife "payable to either or survivor"—Wife's right to money on her surviving her husband. *See* BENAMI—ADVANCEMENT.

(1928) 55 I. A. 235.

———Customer—Money paid by—Ownership of third persons in—Notice to Bank of—Constructive notice—What amounts to.

To affect a bank with knowledge of the ownership of moneys paid into the accounts of their customers by the mere form of the signature on the negotiable documents by which such moneys are transferred is to proceed far beyond the recognised limits of the doctrine of notice, and such a principle if accepted would create a serious embarrassment to the conduct of banking business.

V was sole agent for the appellants for the sale of kerosine oil for Bengal and the United Provinces. Being indebted to the respondent bank he paid the bank by a cheque which was signed "M, per pro V sole agent for B. & U. P.". M was the head clerk and manager of V's agency for the appellants and the signature was authorised and honoured.

Held, that, even if the amount of the cheque represented appellant's money in V's hands there was nothing on the face of the cheque to affect the bank with knowledge of any infirmities in V's title.

Had V's account, to which the proceeds of appellant's oil business were paid, been kept with the bank under circumstances that could fairly impute to them knowledge that the moneys were not V's, different considerations would apply. (*Lord Buckmaster.*) **TEXAS COMPANY v. BOMBAY BANKING CO.**

(1919) 46 I. A. 250 (256) =

44 B. 139 (146-7) = (1920) M. W. N. 70 =

11 L. W. 320 = 24 C. W. N. 469 =

22 Bom. L. R. 429 = 54 I. C. 121 = 26 M. L. T. 370 =

30 C. L. J. 446.

BANKER AND CUSTOMER—(Contd.)

———Customer—Mortgage by—Payment of, from customer's current account—Banker's duty as regards—Interest on mortgage amount—Banker's right to charge, till payment of principal.

In the absence of special direction to that effect a banker is not bound to pay off a mortgage which he has against his customer, from the latter's current account, and interest is properly charged upon it until the customer directs that the principal should be paid off. (*Lord Davey.*) **THAKHUR JAWAHIR SINGH v. LACHMAN DAS.**

(1905) 9 C. W. N. 745.

———Factory customer—Proprietorship of—Change in—Intimation of, not given to banker—Dealings by him with Factory without knowledge of change—Appropriation of payments made in course of—Binding character of, on customer.

The appellant was the son and legal representative of one G, a banker, deceased. In January, 1890, G began to act as banker to a Factory known as the Indigo Factory. At that time B was the proprietor and manager of the Factory. From the 7th January, 1890 to the 31st October, 1891, G supplied funds for carrying on the Factory upon tankhas (orders) drawn by the manager on G's bank. The concern was financed by Messrs. Gisborne & Co., Calcutta, B used to draw hundis upon them, and these were made over to G's bank, which obtained the proceeds of them and credited them in the account with the concern. Monthly accounts of receipts and disbursements used to be sent by G's bank to the Indigo Factory in duplicate. One of those used to be signed by the *gomasta* of G's bank; that used to be retained in the Factory, and the other, sent without any signature, used to be signed by the manager and sent back to G's bank. The account for February 1890 showed a balance due from the concern to G's bank of Rs. 11,395-12-6, and at the end there was a statement signed by B that that was correct. The accounts continued to be headed and attested by B in that way up to and including that for December 1890. The headings of the accounts for January, February and March, 1891, were altered, B being no longer called proprietor, but only manager of the Factory. He ceased to be the manager about the end of March 1891, and A became the manager, his name appearing in the accounts, which were attested by him down to and including October 1891.

On 1st November, 1890, M had become the proprietor of the Factory, and B continued to be the manager, as stated above, till March 1891, when, as also stated above, he ceased to be manager and A was appointed the manager. No intimation of the transfer to C was, however, given to G's bank, and G's bank was not aware of the transfer to M until January 1891.

On 1st November, 1890, when C became the proprietor, the balance due to G's bank on the accounts was Rs. 17,673-8-9. That balance was carried forward to the November account which was signed as correct by M's then manager B. After repeated demands, B in January 1891 paid to G's bank Rs. 25,000 which G's bank appropriated towards liquidating the debt then due including the balance due when B was proprietor. Subsequent monthly accounts up to October 1891 were also signed by the then managers of M.

The account for October 1891 showed a balance due to G's bank for principal and interest of Rs. 25,058-11-1½, and on the 27th May 1892 G brought the suit out of which the appeal arose against M to recover Rs. 19,179-8-0, the balance after giving credit for Rs. 7,348-3-7½ received on 1st May 1892. The defence was that the plaintiff had wrongfully appropriated part of the Rs. 25,000 to the payment and satisfaction of B's debt, and that B had no authority from the defendant to permit the plaintiff to make that appropriation.

BANKER AND CUSTOMER—(Contd.)

Held, that in the circumstances of the case the appropriation in question was not wrongful.

The real claim in the suit is for the sum due on the whole account from February 1890 and not on the balance due in October. The course of business was rather between G's bank and the Indigo Factory than between it and the actual proprietor and the plaintiff's *gomasta* might have honestly and reasonably believed from the previous transactions that the Rs. 25,000 were intended to be applied in the same manner as the payments had been applied in the previous accounts. The plaintiff's *gomasta* had reasonable cause for believing that defendant's manager, the former proprietor, had authority to make payments in liquidation of former debts. (*Sir Richard Couch.*) *RAM PERTAB v. MARSHALL.*

(1898) 26 C. 701 = 3 C. W. N. 313 = 7 Sar. 455.

BENAMI (OR BENAMI TRANSACTION).

WHAT IS A.

ADOPTION OF.

ADVANCEMENT.

ANALOGY IN ENGLISH LAW TO.

BENAMIDAR.

CHARACTERISTICS OF.

CHILDREN—BENAMI PURCHASES IN NAMES OF.

CONCURRENT FINDINGS ON QUESTION OF.

COURT'S DUTY TO RECOGNISE AND GIVE EFFECT TO.

CRITERION IN CASE OF.

DEBT—EXECUTION SALE OF.

DECISION ON QUESTION OF.

DEEDS FORMING PART OF ONE TRANSACTION.

ELABORATION TO PERFECTION OF.

ENGLISH PARTIES DOMICILED IN INDIA.

EVIDENCE.

EXECUTION SALE.

FATHER.

CHILD.

DAUGHTER.

SON.

FICTION AND FALSEHOOD.

FRAUDULENT BENAMI.

FRAUDULENT TRANSFER.

GIFT OR.

GIFT IN RETURN FOR SERVICES.

HINDU—MAHOMEDAN MISTRESS.

HINDU LAW—JOINT FAMILY.

HINDU LAW—RELIGIOUS ENDOWMENT.

HUSBAND—WIFE.

INTENTION TO BENEFIT TRANSFEREE OR PERSON IN WHOSE NAME PROPERTY IS PUT.

ISSUE IN CASE OF.

JUDGMENT-DEBTOR—TRANSFER BY.

LACHES IN INSTITUTING PROCEEDINGS RAISING QUESTION OF.

LEGALITY OF.

MAHOMEDAN—SON AND WIFE.

MAHOMEDAN MOTHER—DAUGHTER.

MAHOMEDAN UNCLE—NEPHEW.

MAHOMEDAN WOMAN—PERSON WITH WHOM SHE HAD CONTRACTED AN IRREGULAR MARRIAGE.

MORTGAGE.

MOTHER-IN-LAW—SON-IN-LAW.

NATURE OF.

OBJECT FOR PUTTING PROPERTY IN NAME OF A PERSON.

ONUS OF PROOF OF.

OSTENSIBLE OWNER—CREDITORS OF.

PRACTICE OF.

PRESUMPTION—ONUS OF PROOF.

PURCHASE BENAMI—SUIT BASED UPON.

QUESTION OF.

REVENUE SALE—BENAMI PURCHASE AT.

BENAMI (OR BENAMI TRANSACTION)—(Contd.)

SAME TRANSACTION—DEEDS FORMING PART OF.

SIMILAR TRANSACTION—PROOF OF BENAMI IN CASE OF.

SON AND WIFE.

TRIAL JUDGE'S DECISION ON QUESTION OF.

What is a.

—It is very much the habit in India to make purchases in the names of others, and, from whatever cause or causes the practice may have arisen, it has existed for a series of years, and these transactions are known as "Benamie transactions" (72). (*Lord Justice Knight Bruce.*) *GOPEEKRIST GOSAIN v. GUNGAPERSAUD GOSAIN.*

(1854) 6 M. I. A. 53 = 2 Suth. 13 = 4 W. R. 46 = 1 Sar. 493.

Adoption of.

—*Explanation for—Necessity in India.*

Benami transactions are so common in India as to require no explanation why, in a particular instance, they were adopted (357). (*Lord Justice James.*) *RAMAMANI AMMAL v. KULANTHAI NATCHIAR.* (1871) 14 M. I. A. 346 = 17 W. R. 1 = 2 Suth. 493 = 2 Sar. 736.

Advancement.

—*English law, presumption of—Applicability of.*

In England, where the person in whose name a purchase is made is one for whom the party making the purchase was under an obligation to provide, the presumption is advancement; and it is said that that ought to be deemed the law of India also, not because it is the law of England, but because it is founded on reason and the fitness of things, or natural justice, that on such grounds it ought to be considered the law of India. Their Lordships are not satisfied that this view of the rule is accurate, and that it is not merely *proprii juris*. Various reasons may be urged against the abstract propriety of the English rule. It is merely one of positive law, and not required by any rule of natural justice to be incorporated in any system of laws, recognising a purchase by one man in the name of another, to be for the benefit of the real purchaser. Their Lordships, therefore, are not prepared to act against the general rule, even in the absence of peculiar circumstances; but in India there is what would make it particularly objectionable, namely, the impropriety or immorality of making an unequal division of property among children (75-6). (*Lord Justice Knight Bruce.*) *GOPEEKRIST GOSAIN v. GUNGAPERSAUD GOSAIN.*

(1854) 6 M. I. A. 53 = 2 Suth. 13 = 4 W. R. 46 = 1 Sar. 493.

—The exception in the English law by way of advancement in favour of wife or child does not apply in India (205). (*Sir George Farwell.*) *BILAS KUNWAR v. DEORAJ RANJIT SINGH.*

(1915) 42 I. A. 202 = 37 A. 557 (565) = 17 Bom. L. R. 1006 =

22 C. L. J. 516 = 13 A. L. J. 991 =

(1915) M. W. N. 757 = 19 C. W. N. 1207 =

18 M. L. T. 248 = 2 L. W. 830 =

30 I. C. 299 = 29 M. L. J. 335.

—The general rule and principle of the Indian law as to resulting trusts differs but little, if at all, from the general rule of English law upon the same subject; but it has been established that owing to the widespread and persistent practice which prevails amongst the natives of India, whether Mahomedan or Hindu, for owners of property to make grants and transfers of it benami for no obvious reason or apparent purpose, without the slightest intention of vesting in the donee any beneficial interest in the property granted or transferred, as well as the usages which these natives have adopted and which have been protected by statute, no exception has ever been engrafted on the general law of India negating the presumption of the resulting trust in

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Advancement—(Contd.)**

favour of the person providing the purchase-money, such as has, by the courts of chancery in the exercise of their equitable jurisdiction, been engrafted on the corresponding law in England in those cases where a husband or father pays the money and the purchase is taken in the name of a wife or child. In such a case there is, under the general law in India, no presumption of an intended advancement as there is in England (278). (*Lord Atkinson.*) **KERWICK v. KERWICK.** (1920) 47 I. A. 275 = 48 C. 260 (263-4) =

32 C. L. J. 490 = 13 L. W. 455 =
2 U. P. L. R. (P. C.) 153 = 28 M. L. T. 194 =
(1920) M. W. N. 738 = 23 Bom. L. R. 730 =
57 I. C. 834 = 39 M. L. J. 296.

—*English parties domiciled in India—Husband's purchase in wife's name in case of.*

The appellant and his wife, the respondent, were both born in India of English parents, and had resided practically all their lives in India. The appellant bought land in Burma with his own money, but had the sale-deeds executed in the name of his wife, and erected houses upon it at his own expense.

In a suit instituted by the appellant against the respondent in the Chief Court of Lower Burma for a declaration that the houses were held by her as his benamidar and that he was the true owner of the same and for a decree directing the respondent to convey them to the appellant, *held*, that the principle of law applicable to the case was that which would be applied to a similar case if tried by the Court of Chancery in England, that an intended advancement would *prima facie* be presumed, that that presumption might be rebutted, but that the onus of rebutting it rested upon the appellant.

It is a mistake to suppose that the determination of the question which rule of law is in any given case applicable—whether it is the English presumption of advancement or the Indian rule of no presumption of an intended advancement—entirely depends on race, place of birth, domicile or residence; these are not to be treated as being *per se* as decisive. What are treated as infinitely more important are the widespread and persistent usages and practices of the native inhabitants. But subject to this qualification it is their Lordships' view that the principles and rules of law which would be applicable to this case if it were tried in one of the Courts of Chancery in England were applicable to it when tried in Rangoon (279). (*Lord Atkinson.*) **KERWICK v. KERWICK.** (1920) 47 I. A. 275 = 48 C. 260 (263-5) =

13 L. W. 455 = 32 C. L. J. 490 = 2 U. P. L. R. 153 =
28 M. L. T. 194 = (1920) M. W. N. 738 =
23 Bom. L. R. 730 = 57 I. C. 834 = 39 M. L. J. 296.

—*Hindus—Mahomedans—No distinction between.*

The law applicable to a case in which a person alleges that he purchased property from his own funds, benamee, in the names of his wife and son, was reviewed in the case reported in 6 M. I. A. 53. To the decision of a case arising between Mahomedans, none of the reasons which in the judgment in that case were drawn exclusively from Hindu law could be applied. But in both cases alike that judgment is authority for the propositions, that the criterion of these cases in India is to consider from what source the purchase-money comes; that the presumption is, that a purchase made with the money of A, in the name of B, is for the benefit of A; and that, from the purchase by a father, whether Mahomedan or Hindu, in the name of his son, you are not at liberty to draw the presumption which the English law would draw, of an advancement in favour of that son (246-7). (*Sir James W. Colville.*) **MOULVIE SAYYUD UZHUR ALI v. MUSSUMAT BEBEE ULTA F. FATIMA.**

(1869) 13 M. I. A. 232 = 13 W. R. 1 = 4 B. L. R. 1 =
2 Sar. 522 = 2 Suth. 279.

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Advancement—(Contd.)**

—6 M. I. A. 53 is authority for the proposition that, from the purchase by a father, whether Mahomedan or Hindu, in the name of his son, you are not at liberty to draw the presumption which the English law would draw of an advancement in favour of that son (247). (*Sir James W. Colville.*) **MOULVIE SAYYUD UZHUR ALI v. MUSSUMAT BEBEE ULTA F. FATIMA.** (1869) 13 M. I. A. 232 =

13 W. R. 1 = 4 B. L. R. 1 = 2 Suth. 279 =
2 Sar. 522.

—The law as to benami conveyances taken by a father in the name of a son, whether in Hindu or Mahomedan families, should be considered in all Courts in India as conclusively settled by the decision of the Privy Council in *Gossain v. Gossain* (6 M. I. A. 53). (*Sir Joseph Napier.*) **NAWAB AZIMUT ALI KHAN v. HURDWAREE MULL.**

(1870) 13 M. I. A. 395 (401-2) = 14 W. R. P. C. 14 =
5 B. L. R. P. C. 578 = 2 Suth. 343 = 2 Sar. 571.

—*Husband—Bank deposit of his money in name of wife or in joint names of himself and his wife.*

The general principle of equity, applicable both in this country and in India, is that in the case of a voluntary conveyance of property by a grantor, without any declaration of trust, there is a resulting trust in favour of the grantor, unless it can be proved that an actual gift was intended. An exception has, however, been made in English law; and a gift to a wife is presumed, where money belonging to the husband is deposited at a Bank in the name of a wife, or, where a deposit is made in the joint names of both husband and wife. This exception has not been admitted in Indian law, and there is, therefore, under it no presumption of an intended advancement. (*Lord Parmoor.*) **GURAN DITTA v. RAM DITTA.** (1928) 55 I. A. 235 =

55 C. 944 = 32 C. W. N. 817 = 29 Punj. L. R. 429 =
28 L. W. 66 = 109 I. C. 723 (2) = 48 C. L. J. 119 =
5 O. W. N. 668 = I. L. T. 40 Lah. 144 =
30 Bom. L. R. 1384 = 26 A. L. J. 1215 =
(1928) M. W. N. 917 = A. I. R. 1928 P. C. 172 =
55 M. L. J. 651.

—*Husband—Purchase in wife's name by.*

A purchase in India by a native of India of property in India in the name of his wife unexplained by other proved or admitted facts is to be regarded as a *benami* transaction by which the beneficial interest in the property is in the husband, although the ostensible title is in the wife. The rule of the law of England that such a purchase by a husband in England is to be assumed to be a purchase for the advancement of the wife does not apply to India (283). (*Sir John Edge.*) **SURA LAKSHMIAH CHETTY v. KOTHANDARAMA PILLAI.** (1925) 52 I. A. 286 =

48 M. 605 = 23 A. L. J. 662 =
42 C. L. J. 8 = 27 Bom. L. R. 1076 =
29 C. W. N. 1013 = (1925) M. W. N. 717 =
3 P. L. R. 290 = 23 L. W. 138 = 88 I. C. 327 =
A. I. R. 1925 P. C. 181 = 49 M. L. J. 109.

—*Son—Father's purchase in name of.*

The appellant and respondent were brothers, and joint heirs by the Hindu law of their deceased father, R. Many years before his death, and previously to the birth of the appellant, R purchased a talook in the name of the respondent. The question for decision in the case was whether the said talook did or did not, at the time of R's death, form part of the real estate of R, so as to pass to the appellant and respondent jointly under a general devise to them contained in his will, or descended to them as joint heirs in case of intestacy. The case of the appellant was, that the talook formed part of his father's real estate. The respondent, on the contrary, contended that it was his separate property, having been brought by his father in his name, for his

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Advancement—(Contd.)**

separate use and benefit. There was no question but that all the purchase money was provided by R. It was certainly not the money of the respondent.

Held, differing from the Supreme Court, that, according to the law by which the case must be governed, the presumption in favour of the transaction being a *benami* transaction was different from that which would have existed by the law of England, and that the onus was on the respondent to prove whether what was *prima facie* the nature of the transaction was really not so (79). (*Lord Justice Knight Bruce.*) **GOPEEKRIST GOSAIN v. GUNGA-PERSAUD GOSAIN.** (1854) 6 M. I. A. 53 = 2 Suth. 13 = 4 W. R. 46 = 1 Sar. 493.

—A Mahomedan, during his lifetime, caused the kabuliati of the village in suit, together with the entire taluka, to be executed in the name of his sons, so that in virtue thereof they continued in possession during their father's lifetime, and after their father's death they held continuous possession till 1263-F; in the middle of 1263-F, when British rule was established, the entire taluka was settled with strangers for non-payment of the arrears of Government revenues; after 1266-F (1859), on the re-occupation of the province, the settlement of the entire taluka was made with the deceased Mahomedan in the absence of the plaintiff. The sons relied upon the kabuliati, and the possession under it, as evidence that their father in his lifetime made them real owners of the estate, and that they were not *furzidars*.

Held, that the onus of proving that the sons were made real owners of the estate, and that they were not *furzidars*, lay upon them, there being, according to the law in India, no presumption in their favour from the fact of their being the sons of the deceased (98). (*Sir Richard Couch.*) **ABDUL WALID KHAN v. MUSSAMAT NURAN BIBI.** (1885) 12 I. A. 91 = 11 C. 597 (604) = 4 Sar. 627.

Analogy in English Law to.

—A *benami* transaction is quite unobjectionable and has a curious resemblance to the doctrine of the English law that the trust of the legal estate results to the man who pays the purchase-money and this again follows the analogy of the English common law that where a feoffment is made without consideration the use results to the feoffor (205). (*Sir George Farwell.*) **BILAS KUNWAR v. DEORAJ RANJIT SINGH.** (1915) 42 I. A. 202 = 37 A. 557 (565) = 17 Bom. L. R. 1006 = 22 C. L. J. 516 = 13 A. L. J. 991 = (1915) M. W. N. 757 = 19 C. W. N. 1207 = 18 M. L. T. 248 = 2 L. W. 830 = 30 I. C. 299 = 29 M. L. J. 335.

—A *benami* dealing has a curious resemblance to the doctrine of our English law that the trust of the legal estate results to the man who pays the purchase-money, and this again follows the analogy of our common law that where a feoffment is made without consideration the use results to the feoffor (9). (*Mr. Ameer Ali.*) **GUR NARAYAN v. SHEO LAL SINGH.** (1918) 46 I. A. 1 = 46 C. 566 (574-5) = 17 A. L. J. 66 = 9 L. W. 335 = 23 C. W. N. 531 = 12 Bur. L. T. 122 = 49 I. C. 1 = 36 M. L. J. 68.

Benamidar.**ADMISSION BY ONE.**

—*Admission of benami nature by one—Effect against other alleged benamidars of.*

In a case in which the question was whether a purchase by a person in the names of his son and wife was or was not *benami* for him, *held*, that the admission of the son that it was *benami*, though it directly applied only to one portion of the property in question, threw a light upon, or at least tended to corroborate, the direct evidence which had been

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Benamidar—(Contd.)****ADMISSION BY ONE—(Contd.)**

given as to the nature of the other transaction (247). (*Sir James W. Colville.*) **MOULVIE SAYYUD UZHUR ALI v. MUSSUMAT BEBEE ULTA F. FATIMA.**

(1869) 13 M. I. A. 232 = 13 W. R. 1 = 4 B. L. R. 1 = 2 Suth. 279 = 2 Sar. 522.

—*Contract by—Covenants in—Binding character of, on real owner.*

There may be circumstances under which the real parties may be bound, although the contract is entered into nominally with the benamidar. No doubt, no such general proposition can be laid down as that because the contracting party was only what is called a benamidar, therefore all the covenants which she made in the transaction are binding upon the true owners of the property. Cases may be supposed where the contract may be intended to be made, and may be, in fact, made with the nominal party only; but on the other hand, there may be cases where the contract is with the real parties, and probably in the greater number it will be found that the contract is so made; and when persons are interested on the one side in the estate, and on the other in the money to be received for the estate, the parties who are so beneficially interested on either side are those between whom it may be expected that the contract would actually be. The question in all such cases will be whether the benamidar was dealt with as the sole contracting party, or whether she entered into the transaction as the agent and on behalf of the real owners and by their authority (198-9). (*Sir Montague E. Smith.*) **BISHESWARI DEBYA v. GOVIND PERSAD TEWARI.** (1876) 3 I. A. 194 = 26 W. R. 32 = 3 Suth. 284 = 3 Sar. 626 = Bald. 7.

HYPOTHECATION OF PROPERTY HELD BY.

—*Hypothecatee's suit on, against benamidar and real owner—Maintainability—Decree in suit—Form of—Hypothecation induced by real owner.*

In execution of a decree for money obtained against B and another certain shares in certain villages were purchased by N for Rs. 12,325. The purchase was made by N *benami* for B. Both the sum required for depositing the earnest money, and the sum of Rs. 9,000, the balance of the purchase-money, were, at B's instance, borrowed by N from S, the father of the appellant. After the purchase N executed, also at the instance of B, a hypothecation, mortgaging the purchased shares of the villages to S to secure the payment of the Rs. 9,000 and interest. S was, at the time when he advanced the amounts to N and at the time when he took a hypothecation deed from him, aware that N was only a benamidar and that B was the real owner of the shares purchased. Nevertheless S instituted a suit on the hypothecation bond against N only, and obtained a decree for payment of the money and an order that the decree should be executed against the property hypothecated. At the sale held in execution of that decree S himself became the purchaser of the property. Subsequently S brought two suits against B and two others to recover possession of the property. Those suits were dismissed on the ground that S was aware that N was only a benamidar, that nevertheless he obtained a decree upon the hypothecation bond against N alone, and that by his purchase in execution of that decree he acquired no valid title to the property.

Thereupon S instituted the suit out of which the appeal arose against B & N, seeking to recover the balance of the amount of the hypothecation bond from B personally, and also against the property hypothecated in the bond.

Held, reversing the High Court, that, although, after the judgment in the former suit, it might be difficult to hold that the deed executed by N was a valid hypothecation of

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Benamidar—(Contd.)****HYPOTHECATION OF PROPERTY HELD BY—(Contd.)**

the property, the facts admitted by B and also found by the court in the former suit between the parties were sufficient to show that S was entitled in equity to have it declared that the sums claimed with interest were a charge upon the property (110-1).

Their Lordships accordingly passed a mortgage decree. (*Sir Richard Couch.*) **SARJU PARSHAD v. BIR BHADDAR SEWAK PANDAY.** (1893) 20 I. A. 108 = 15 A. 304 = 6 Sar. 7.

MORTGAGE BY—VALIDITY OF—RIGHT TO DISPUTE—ESTOPPEL.

—*Real owner—Right of—Benami character known to mortgagee.*

A person, in whose name property was put benami to protect it against the claims of certain creditors of the real owner, executed a mortgage of that property in favour of the plaintiff, who was, however, not misled by that fraudulent device in taking the mortgage. In a suit brought to enforce the mortgage, *held*, that the real owner was not estopped from showing that the property mortgaged to the plaintiff did not belong to the mortgagor at the date of the mortgage (66-8). (*Sir Barnes Peacock.*) **MOHESH LAL v. MOHUNT BAWAN DAS.** (1883) 10 I. A. 62 = 9 C. 961 (973-4) = 13 C. L. R. 221 = 4 Sar. 424.

—*Real owner's decree-holder—Execution purchaser—Right of—Estoppel against real owner—Effect of.*

Where the benamidar of certain property exercising acts of ownership mortgages it to a *bona fide* mortgagee for consideration without notice, neither the true owner nor his judgment-creditor purchasing the property in execution of a decree subject to the rights of the mortgage, can question the rights of such mortgagee. (*Sir Richard Couch.*) **MIR MAHOMED MOZUFFER HOSSEIN v. KISHORI MOHUN ROY.** (1895) 22 I. A. 129 (137) = 22 C. 909 (919-20) = 6 Sar. 583 = 5 M. L. J. 101.

—*Real owner's heirs—Estoppel against—Conduct amounting to.*

A Mahomedan executed a benami gift deed in favour of his wife and registered it. After his death, his widow, claiming to be entitled under the said deed to the property comprised therein, mortgaged the same. A, her son by the deceased, represented his mother in the whole transaction of the mortgage. He acted with one G as am-mokhtar on her behalf under a power-of-attorney authorising him to do so; he signed the mortgage on her behalf and in her name; and he and G received the money advanced by the mortgagee, as appeared from the official certificate by the Sub-Registrar indorsed on the deed.

Held, that the actings above referred to on the part of A created an estoppel against him, or any one claiming in his right, from disputing the title of his mother to grant the mortgage (212-3).

They (the said actings) amounted to a declaration by A to the lender that the gift deed in favour of his mother was a valid deed, or, in any view, that if the document was open to legal objections, A, as the person entitled to challenge the deed, waived his right to do so, and consented for his interest to represent and to hold the deed of gift as valid, and consequently as giving a legal right to his mother, as the proprietor, to grant the mortgage. There was a distinct representation by A professing to act as his mother's attorney, that she was owner in possession, having a good title to create a valid mortgage affecting the lands. It is quite impossible to take any other view of the effect of A's conduct in the whole transaction, and particularly his signing the mortgage and taking payment of the money; and it is

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Benamidar—(Contd.)****MORTGAGE BY—VALIDITY OF—RIGHT TO DISPUTE—ESTOPPEL—(Contd.)**

equally clear that the transaction was concluded on the footing of that representation, and that the creditor was thereby induced to lend the money on the security of the mortgage. In this state of the facts the terms of S. 115 of the Evidence Act directly apply to the case, for A, having by his acts and the declaration which his acts involved, intentionally caused the lender to believe that his mother, as proprietor under the deed of gift, was entitled to grant the mortgage, neither he nor a purchaser from him can be allowed to deny the truth of what was thereby represented, believed, and acted upon (213). (*Lord Shand.*) **SARAT CHUNDER DEY v. GOPAL CHUNDER LAHA.** (1892) 19 I. A. 203 = 20 C. 296 (307-8) = 6 Sar. 224.

—*Real owner's heirs—Right of—Estoppel against real owner—Effect.*

A Mahomedan executed in favour of his wife a benami deed of gift and registered it. After his death, his widow, claiming title under the deed of gift, mortgaged the property comprised in it. During the husband's lifetime, he did nothing else which would have the effect of holding out his wife to the world as the owner of the property. He never parted with the possession of the property. There was no mutation of names in the Government registers, and practically nothing different from an ordinary benami arrangement.

Held, that in the state of facts abovementioned no plea of estoppel could be urged against the heirs of the deceased husband founded on his actings (211).

The mortgage by the widow was granted after the death of her husband, and consequently after his children had become proprietors of certain shares of the property held in title by their mother as benamidar (210). The appellants (who urge the plea of estoppel) cannot point to any declaration, act, or mission, on the part of the husband which they can successfully maintain could warrant them in believing, and acting on the belief, that the widow was the owner of the property which they purchased (211).

If the mortgage had been granted by the widow (the benamidar) during her husband's lifetime and in circumstances showing that he consented to her granting the deed, estoppel might have been successfully pleaded against his heirs in answer to any challenge of the deed by them (210). (*Lord Shand.*) **SARAT CHUNDER DEY v. GOPAL CHUNDER LAHA.** (1892) 19 I. A. 203 = 20 C. 296 (304-6) = 6 Sar. 224.

MORTGAGE BY REAL OWNER.

—*Suit to enforce—Benamidar if a necessary party to. See MORTGAGE—SUIT TO ENFORCE—PARTIES—REAL OWNER ALLEGED.*

(1852) 5 M. I. A. 271 (277).

OWNERSHIP—INDICIA OF, IN NAME OF BENAMIDAR.

—*Practice of—Inference adverse to real owner from—Petition to Collector by real owner putting forward benamidar as owner—Petition in connection with payment of Government revenue—Inference adverse from.*

It is perfectly well known to be a common practice in India where property is in the name of a man, although not the true owner, that all the proceedings as far as the Government is concerned take place in his name (159).

In a case in which the question was whether an execution purchase made by C, the predecessor in interest of the plaintiffs, was made on his own behalf, or as benamidar for the appellant, his principal, the other evidence in the case satisfactorily established the fact that the purchase by C was as

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Benamidar—(Contd.)****OWNERSHIP- INDICIA OF, IN NAME OF BENAMIDAR—(Contd.)**

benamidar for the appellant. The plaintiffs relied upon certain petitions presented by the appellant to the Collector in connection with the payment of the Government revenue due in respect of the property purchased. In the first the appellant did not put forward his own title; in the second he put forward C as the owner of the property.

Held, that no very strong inference could be drawn against the appellant from the fact that in the petition he stated the title according to what it ostensibly was (159).

All that the appellant then wanted to do was to pay the Government revenue, so that the estate should be in no danger of being forfeited (159). (*Sir Montague E. Smith.*) **LOKHEE NARAIN ROY CHOWDHRY v. KALYPUDDO BANDOPADHYA.**

(1875) 2 I. A. 154 = 23 W. R. 358 = 3 Suth. 122 = 3 Sar. 472

OWNERSHIP—APPARENT.**—Real owner's enjoyment—No bar to.**

In the ordinary case of benami the holding of a settlement or transfer by the benamidar would not interfere with the real owner's enjoyment (174) (*Lord Hobhouse.*) **MUHAMMAD IMAM ALI KHAN v. SARDAR HUSAIN KHAN.**

(1898) 25 I. A. 161 = 26 C. 81 (97) = 2 C. W. N. 737 = 7 Sar. 432.

PURCHASER FROM.

—Real owner's suit to recover property from. *See* **BENAMI—BENAMIDAR—SALE BY—REAL OWNER.**

SALE BY.

—Real owner—Sale to—Contract for—Suit by real owner for specific performance of, and for recovery of property—Nature of—Limitation—Benamidar legal and beneficial owner—Contract on foot of. *See* **LIMITATION ACT OF 1908, ART. 113—APPLICABILITY—BENAMIDAR.**

(1922) 49 I. A. 335 = 45 M. 641.

—Real owner—Suit to recover property sold from purchaser—Onus of proof in—Possession long with purchaser.

The defendants claimed the suit property under a purchase thereof by their father from B, a Mahomedan woman. The plaintiffs were the daughter of B by M, and the husband of that daughter. They sued for the recovery of the property, alleging that B was a mere benamidar for M, and that the property was really purchased by M in B's name. The defendants claimed to be purchasers for value from B without notice of the benami title. They had been in possession for nearly 24 years.

Held, that the onus was very strong on the plaintiffs to defeat a possession for so long a period of property for which full value had been given to the person in the apparent ownership of it (42). (*Sir Montague E. Smith.*) **RAMCOOMAR KOONDOO v. MACQUEEN.**

(1872) Sup I. A. 40 = 11 B. L. R. 46 = 18 W. R. 168 = 3 Sar. 160 = 2 Suth. 656.

—Real owner—Suit to recover property sold from purchaser—Onus of proof in—Purchase for value without notice—Plea by purchaser of.

The appeal arose out of a suit brought by the plaintiff-appellant to recover possession of land which he alleged to have been conveyed to him by one G for the sum of Rs. 30,000 by a deed, dated 15—9—1871. The defendants in the suit were G himself and the respondents in the appeal to the P. C. The respondents alleged that G, though registered as owner of the property in question, was a mere benamidar, and that they were the true owners, and had been continuously in possession. G filed a written statement, in which

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Benamidar—(Contd.)****SALE BY—(Contd.)**

he supported the contention of the respondents as regards the title to the property, and denied that he ever executed the deed of sale alleged by the plaintiffs, or received the consideration.

Both the Courts below found that G was a mere benamidar, and that the respondents were the true owners, and had been always in possession, and there was no dispute on those points in the appeal to the P. C. But, while the first Court found that the plaintiff was a purchaser for valuable consideration in the *bona fide* belief that G was the real owner, the High Court were not satisfied that G ever executed the deed of September 1871 or received the money. They therefore reversed the decree below, and dismissed the suit with costs.

On appeal by the plaintiff, held that, when it had been shown that the alleged vendor was not the true owner, the plaintiff could only rely on his claim as purchasing in good faith for value from a person who, by the act of the true owners, had become the apparent owner (281).

Held further, on the evidence, that the plaintiff, who was bound to give clear evidence that he paid money on the faith of G's title, had wholly failed to do so (282). (*Sir Arthur Hobhouse.*) **RUTTO SINGH v. BAJRANG SINGH.**

(1883) 13 C. L. R. 280 = Bald. 475.

—Real owner—Suit to recover property sold from purchaser—Purchase for value without notice—Plea of—Appeal—Maintainability for first time in.

The appellants, who had purchased the suit property in execution of a decree obtained by them against A, sued for the recovery of the same freed from the mortgage thereon created in favour of the respondents by A's wife, on the ground that the wife was merely a benamidar for her husband. The respondents did not either in their written statement or at the trial raise the plea that they were *bona fide* mortgagees for value without notice of the wife being a mere benamidar. In the appeal to the High Court, however, the plea was allowed to be raised by them, and was given effect to, notwithstanding objection taken by the appellants.

Held, that the High Court acted rightly in allowing the plea (136-7). (*Sir Richard Couch.*) **MIR MAHOMED MOZUFFER HOSSEIN v. KISHORI MOHUN ROY.**

(1895) 22 I. A. 129 = 22 C. 909 (919) = 6 Sar. 583 = 5 M. L. J. 101.

—Real owner—Suit to recover property sold from purchaser—Title of benamidar—Inquiry into—Necessity—Plea by real owner of—Nature of inquiry to be made—Allegation as to—Necessity.

In the case of a purchase from the apparent owner the circumstances which should prompt inquiry as to whether he is the real owner or not may be infinitely varied; but, without laying down any general rule, it may be said that they must be of such a specific character that the Court can place its finger upon them, and say that upon such facts some particular inquiry ought to have been made. It is not enough to assert generally that inquiries should be made, or that a prudent man would make inquiries; some specific circumstances should be pointed out as the starting point of an inquiry, which might be expected to lead to some result (44-5). (*Sir Montague E. Smith.*) **RAMCOOMAR KOONDOO v. MACQUEEN.**

(1872) Sup I. A. 40 = 11 B. L. R. 46 = 18 W. R. 166 = 2 Suth. 656 = 3 Sar. 160.

—Real owner's heirs—Suit by, to recover property sold—Estoppel by misrepresentations of real owner—Plea specific of, in defence—Necessity—Plea that benamidar was real owner—Proof of estoppel under—Permissibility. *See*

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Benamidar—(Contd.)****SALE BY—(Contd.)****EVIDENCE ACT—S. 115—PLEA OF ESTOPPEL—SPECIFIC PLEA OF.****(1873) 2 Suth. 809 (815-6).****—Validity of—Right to dispute—Estoppel—Real owner—Holding out benamidar as owner—Effect.**

It is a principle of natural equity, which must be universally applicable, that when one man allows another to hold himself out as the owner of an estate and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title unless he can overthrow that of the purchaser by showing, either that he had direct notice, or something which amounts to constructive notice, of the real title, or that there existed circumstances which ought to have put him upon an inquiry that, if prosecuted, could have led to a discovery of it (43-4). (*Sir Montague E. Smith.*) **RAMCOO-MAR KOONDOO v. MACQUEEN.**

(1872) Sup. I. A. 40 = 11 B. L. R. 46 = 18 W. R. 166 = 3 Sar. 160 = 2 Suth. 656.**—Validity of—Right to dispute—Real owner's right of—Estoppel against—Conduct amounting to—Effect on his heir.**

A sale-deed in respect of property executed in favour of a Hindu lady stated that the vendor had received the full amount of the price therefor from her Stridhanam fund through her husband. The lady in her turn sold the property to the defendants, who were *bona fide* purchasers of the property, for the full value thereof. It appeared that the lady's husband during his lifetime had in every way, both publicly and privately, whenever he was called upon to make any representation on the subject, always represented that the property conveyed by his wife was her property. In a suit brought after the husband's death by his heirs to recover the property from the defendants, alleging that the money with which the purchase was made in the name of the wife was really the husband's money, and that the husband was the real owner of the property purchased and the wife a mere benamidar for him, *held* that, under the circumstances of the case, it would be contrary to every principle of equity that the defendants should be turned out of the property in favour of the heirs of the husband (814).

It appears to their Lordships that there was a misrepresentation by the husband in allowing the property to be taken by the wife under a deed of sale, representing that the purchase-money was her Stridhanam, and in all his acts, both public and private, during his lifetime, that the property was his wife's. After that representation on the part of the husband, his heirs were no more entitled to recover than he himself would have been in his lifetime. The heirs, claiming by descent from the father, were as much bound by the misrepresentations made by the father, as the father would have been if the wife in his lifetime had actually sold the property to a *bona fide* purchaser (815). (*Sir Barnes Peacock.*) **LUCHMUN CHUNDER GEER GOSSAIN v. KALI CHUNDER SINGH.**

(1873) 2 Suth. 809 = 19 W. R. 292 = 4 Sar. 802.

—The manager of an encumbered estate put up to public auction one of the villages appertaining to the estate. The nominal purchaser was one K, but he was as a matter of fact put forward by the zemindar of the estate, who provided him with the money. No conveyance was executed by the manager in favour of K. On the restoration of the estate to the zemindar, he caused L, the adopted son of K, who had by this time died, to execute a conveyance of the village in favour of R. The deed purported to be a deed of sale, but in reality no money passed, L merely acting on the command of the zemindar. R subsequently applied through

RENAMI (OR BENAMI TRANSACTION)—(Contd.)**Benamidar—(Contd.)****SALE BY—(Contd.)**

her mother as guardian for registration and mutation of names in respect of the village. Her application was supported by the zemindar and R's name was accordingly entered in the Government register as proprietrix of the village.

In a suit brought by the purchaser of the village from R against the zemindar's son, the zemindar having died in the interval, for a declaration of the plaintiff's title, and for possession and other relief, *held*, that the zemindar and those claiming under him, including his son, were estopped from denying the title of R and of the plaintiff.

The zemindar was the true owner, and K was a mere trustee for the zemindar. L only succeeded to his father's trusteeship. Further, as the zemindar was the proprietor of the estate of which the village in question was a part, when the right of K to get a conveyance became extinct, the full right as well as the title was in the zemindar. In this position of affairs not only did the zemindar cause L to execute the conveyance, but he actively assisted R in obtaining registration and mutation of names. By so doing he caused her to change her position, for by registration, she became bound for all the State liabilities which attach to the registered holders of immovable property. By these actings the zemindar, if he had been alive, would have been estopped from claiming back the property, and the present defendant, his son who has succeeded by gratuitous title, cannot also do so (101-2). (*Lord Duncedin.*) **RAJA OF DEO v. ABDULLAH.**

(1918) 45 I. A. 97 =**45 C. 909 (918-9) = 16 A. L. J. 576 =****(1918) M. W. N. 406 = 22 C. W. N. 891 =****8 L. W. 163 = 24 M. L. T. 62 = 28 C. L. J. 192 =****20 Bom. L. R. 851 = 45 I. C. 770 = 35 M. L. J. 46.****SALE DEED BY—COVENANTS IN.****—Binding character of, against real owner.**

Where it appears that the real owner authorized not only the sale by the benamidar itself, but a sale in the very terms of the deed of sale executed by him, all the stipulations in the deed are binding on and enforceable against the real owner. *Contra* where the real owner authorised the sale only, and the benamidar exceeded his authority by entering into particular stipulations (199). (*Sir Montague E. Smith.*) **BISHESWARI DEBYA v. GOVIND PERSAD TEWARI.**

(1876) 3 I. A. 194 = 26 W. R. 32 = 3 Suth. 284 = 3 Sar. 626 = Bald. 7.**—Breach of—Damages for—Suit against real owners for—Maintainability—Conditions.**

The plaintiff alleged that the three first defendants were the real purchasers of a mahal at a rent sale of the same, but that they caused the name of their mother, Defendant No. 4, to be entered as purchaser. It further alleged that, being indebted to the plaintiff, the three first defendants, the real owners of the mouza, caused a kabola to be executed by the defendant No. 4 in favour of the plaintiff in part satisfaction of his debt, and became witnesses to the deed of sale, and that the defendants 1 to 3 received the balance of consideration in cash. The plaintiff then referred to a stipulation in the deed of sale to the effect that the executant of the deed would put matters right in the event of any one giving trouble to the plaintiff by making any objection to the sale, and that, in the event of her failing to do so, she would return the consideration money, and that in default the plaintiff might realise it by means of a suit. The plaintiff then alleged that, after the plaintiff had held possession of the mahal, he was ousted from it by the Collector of Burdwan as receiver of the estates to which the mahal appertained, that thereupon the plaintiff applied to the High

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Benamidar—(Contd.)****SALE-DEED BY—COVENANTS IN.**

Court, which had appointed the Collector receiver, to have the estate released without success, that in consequence the plaintiff called upon the defendants either to release the estate or refund the consideration money as stipulated in the deed of sale, but that they neglected to do so.

Held that the plaint and the allegations found in it disclosed a cause of action against all the defendants, and that the suit ought not to have been dismissed against the three first defendants on the ground that it did not (199).

The plaint allegations clearly show that, far from the plaintiff having elected to deal with defendant No. 4 only, the sons, the three first defendants, caused the contract to be made, the defendant No. 4 was a mere instrument, and the sons were the real parties who entered into the contract. The plaint treats defendant No. 4 as merely an agent acting on behalf of her sons in the matter of the sale and the sons as authorising not only the sale itself but a sale in the very terms of the deed which their mother executed. If, of course, it should turn out on the trial of the suit, that the plaintiff, knowing the facts, really did elect to treat the mother as the sole contracting party, the plaintiff would fail (199). (*Sir Montague E. Smith.*) **BISHESWARI DEBYA v. GOVIND PERSAD TEWARI.** (1876) 3 I. A. 194 =

26 W. R. 32 = 3 Suth. 284 = 3 Sar. 626 = Bald. 7.

SUIT BY.**—Right of—Parties to—Real owner if one.**

A benamidar can maintain an action in his own name in respect of property which stands in his name, or is acquired in his name, although the beneficial owner is no party to it (9-10). (*Mr. Ameer Ali.*) **GUR NARAYAN v. SHEO LAL SINGH.** (1918) 46 I. A. 1 = 46 C. 566 (574-5) =

17 A. L. J. 66 = 9 L. W. 335 = 23 C. W. N. 531 =

12 Bur. L. T. 122 = 49 I. C. 1 = 36 M. L. J. 68.

—Suit by or against—Decision in—Effect against real owner.

In a proceeding by or against the benamidar, the person beneficially entitled is fully affected by the rule of *res judicata*. It is open to the latter to apply to be joined in the action; but whether he is made a party or not, a proceeding by or against his representative in its ultimate result is fully binding in him. (*Mr. Ameer Ali.*) **GUR NARAYAN v. SHEO LAL SINGH.** (1918) 46 I. A. 1 (9-10) =

46 C. 566 (575) = 17 A. L. J. 66 = 9 L. W. 335 =

23 C. W. N. 531 = 12 Bur. L. T. 122 = 49 I. C. 1 = 36 M. L. J. 68.

TITLE OF.

—Admission by real owner of—Revenue—Payment of—Proceedings in connection with—Putting forward by real owner of benamidar as owner in. *See* BENAMI—BENAMIDAR—OWNERSHIP—INDICIA OF.

(1875) 2 I. A. 154 (159).

—Admission by real owner of—Sale-deed by alleged benamidar's sons in favour of alleged real owner—Recital in, that property belonged to benamidar—Effect—Sale-deed not representing real transaction. *See* BENAMI—PRESUMPTION—ONUS OF PROOF—SALE DEED BY ALLEGED BENAMIDAR'S SONS, ETC. (1904) 9 C. W. N. 89.

—Inquiry into—Circumstance exciting—Consubine alleged benamidar of land sold—Building put upon land by her paramour with whom she lived.

The mere fact of a man building upon, or spending money to improve, property belonging to the woman with whom he lived and co-habited as his mistress, cannot lead to the inference that, contrary to the apparent title, he had purchased the land for himself. This circumstance is not

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Benamidar—(Contd.)****TITLE OF—(Contd.)**

sufficient to put a purchaser of the property from her upon inquiry whether she was the real owner or not (45). (*Sir Montague E. Smith.*) **RAMCOOMAR KOONDOO v. MACQUEEN.** (1872) Sup. I. A. 40 =

11 B. L. R. 46 = 18 W. R. 166 = 3 Sar. 160 = 2 Suth. 656.

—Inquiry into—Circumstance exciting—Consubine alleged benamidar—Residence of, with paramour alleged real owner.

B, a Mahomedan woman who co-habited with M as his mistress, sold property standing in her name. The daughter of B by M, and the husband of that daughter, sued to recover the property sold by B from the purchasers, alleging that she was a mere benamidar, that M was the real owner, and that the circumstances of the case were such as to put the purchasers from B on inquiry as to whether she was the real owner or merely a benamidar. The High Court held that the purchasers ought to have made inquiry, because of the status and position of B.

Held, that there was nothing in the position of B as a Mahomedan woman living with her children upon the suit estate, and sometimes letting it, which should have put any one upon inquiry whether she was the real owner or not, especially as the former life of B led to no presumption that she might not have had money to purchase for herself (44). (*Sir Montague E. Smith.*) **RAM COOMAR KOONDOO v. MACQUEEN.** (1872) Sup. I. A. 40 = 11 B. L. R. 46 =

18 W. R. 166 = 3 Sar. 160 = 2 Suth. 656.

—Inquiry into—Circumstance exciting—Consent of family—Sale-deed executed with—Recital in deed as to.

A sale-deed executed by a Mahomedan woman recited that she made the sale with the consent of her family. It was not shown either that the recital was an unusual one, or that it was usual to insert it in deeds where the consent of the family was really required and obtained. The evidence showed that it was in common form.

Held, that the recital was not sufficient to put the purchaser on inquiry as to whether the vendor was the real owner of the property purported to be sold or was a mere benamidar (45-6).

The recital is one without any specific force or meaning, inserted, like many other general phrases, in Indian deeds to exclude any possible objection that might be raised against them. It is very like that which so frequently occurs after a full conveyance: "I and my heirs have no longer any claim." Those words are often unnecessary, but they are of very frequent occurrence (45). (*Sir Montague E. Smith.*) **RAM COOMAR KOONDOO v. MACQUEEN.** (1872) Sup. I. A. 40 = 11 B. L. R. 46 =

18 W. R. 166 = 3 Sar. 160 = 2 Suth. 656.

—Real owner's heir's right to dispute—Estoppel—Conduct amounting to.

In a case in which plaintiff alleged that his mother was only a benamidar for his father in respect of properties caused by him to be transferred in her name, *held*, that plaintiff had, by his conduct and admissions, before suit, precluded himself from setting up such a case (36). (*Sir Barnes Peacock.*) **MUSAMMAT THAKRO v. GANGA PERSHAD.** (1887) 15 I. A. 29 = 10 A. 197 (205-6) = 5 Sar. 133.

TRUSTEE FOR REAL OWNER.

—A benamidar has no beneficial interest in the property or business that stands in his name; he represents, in fact, the real owner, and so far as their relative legal position is

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Benamidar—(Contd.)****TRUSTEE FOR REAL OWNER—(Contd.)**

concerned he is a mere trustee for him (9). (*Mr. Ameer Ali.*)
GUR NARAYAN v. SHEO LAL SINGH.

(1918) 46 I. A. 1 = 46 C. 566 (574-5) =
17 A. L. J. 66 = 9 L. W. 335 = 23 C. W. N. 52 =
12 Bur. L. T. 122 = 49 I. C. 1 = 36 M. L. J. 68.

———Vendor only a, for vendee—Finding in appeal of—
Propriety—Pleadings and trial in Court below proceeding
on foot of his being a real owner and raising question of
validity of sale. See SALE—VALIDITY OF—QUESTION OF,
ON FOOT OF VENDOR BEING REAL OWNER.

(1876) 3 Suth. 333 (335. 337).

Characteristics of.**———Secrecy—Obscurity.**

Secrecy, and therefore obscurity, is characteristic of
benami transactions (193). (*Sir Arthur Hobhouse.*)
BAIJNATH SAHAI v. RUGHONATH PERSHAD SINGH

(1882) 12 C. L. R. 186 = 4 Sar. 372 = Bald. 437.

Children—Benami purchases in names of.**———Common in India.**

Benamiee purchases in the names of children, without any
intention of advancement, are frequent in India (79). (*Lord*
Justice Knight Bruce.) GOPEEKRIST GOSAIN v. GUNGA
PERSAUD GOSAIN.

(1854) 6 M. I. A. 53 =
2 Suth. 13 = 4 W. R. 46 = 1 Sar. 493.

Concurrent findings on question of.

———P. C.'s interference with. See P. C.—PRACTICE—
QUESTION OF FACT—CONCURRENT FINDINGS—INTER-
FERENCE WITH—BENAMI.

Court's duty to recognise and give effect to.

See BENAMI—LEGALITY OF.

Criterion in case of.

The knowledge and assent of the person in whose name
a benamiee purchase is made is immaterial; the criterion is,
the quarter from which the money comes, and in the greater
number of instances of benamiee purchases they are made in
the names of persons ignorant at the time of their being so
made (74). (*Lord Justice Knight Bruce.*) GOPEEKRIST
GOSAIN v. GUNGAPERSAUD GOSAIN.

(1854) 6 M. I. A. 53 = 2 Suth. 13 =
4 W. R. 46 = 1 Sar. 493.

———The general rule in India in the absence of all other
circumstances is: "The criterion in these cases in India is
to consider from what source the money comes with which
the purchase-money is paid" (205). (*Sir George Farwell.*)
BILAS KUNWAR v. DEORAJ RANJIT SINGH.

(1915) 42 I. A. 202 = 37 A. 557 (565) =
17 Bom. L. R. 1006 = 22 C. L. J. 516 =
13 A. L. J. 991 = (1915) M. W. N. 757 =
19 C. W. N. 1207 = 18 M. L. T. 248 = 2 L. W. 830 =
30 I. C. 299 = 29 M. L. J. 335.

———Gift in return for services—Plea of—Criterion in case
of—Distinction. See BENAMI—GIFT IN RETURN FOR
SERVICES.

(1898) 25 I. A. 38 = 26 C. 227.

Debt—Execution sale of.

———Certified purchaser at—Suit for recovery of debt by
——Benami title of third person—Plea by debtor of—Main-
tainability. See C.P.C. OF 1908, OR. 21, R. 79 (3)—DEBT.
(1872) 14 M. I. A. 496 (526).

Decision on question of.**———Basis proper of—Evidence—Suspicion.**

In a case in which the question was whether a purchase
made by the appellant at an execution sale was a purchase
on his own account and for his own benefit or was benami

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Decision on question of—(Contd.)**

for the judgments-debtors, their Lordships observed: "Un-
doubtedly, there are in the evidence circumstances which may
create suspicion, and doubt may be entertained with regard
to the truth of the case made by the appellant; but in
matters of this description it is essential to take care that
the decision of the Court rests not upon suspicion, but
upon legal grounds, established by legal testimony (43-4).
(*Lord Westbury.*) SREEMANCHUNDER DEY v. GOPAL-
CHUNDER CHUCKERBUTTY. (1866) 11 M. I. A. 28 =

7 W. R. P. C. 10 = 1 Suth. 651 = 2 Sar. 215.

———Suspicion are not proof (602). (*Sir James W.*
Colville.) MOONSHEE BUZLOOR RUHEEM v. SHUMSOON-
NISSA BEGUM. (1867) 11 M. I. A. 551 =

8 W. R. P. C. 3 = 2 Suth. 59 = 2 Sar. 259.

———In the judgment delivered in the case reported in 11
M.I. A. 28, in which the question was whether a transaction
was benamiee or not, there is this passage at p. 43:—"Un-
doubtedly there are, in the evidence, circumstances which
may create suspicion, and doubt may be entertained with
regard to the truth of the case made by the appellant; but in
matters of this description it is essential to take care that the
decision of the Court rests not upon suspicion, but upon
legal grounds, established by legal testimony."

That principle is sufficient to dispose of this appeal,
which only differs from the case referred to in this respect,
that in the appeal now to be decided, there is not, in their
Lordships' opinion, any legal evidence to create suspicion, or
any doubt to be entertained with regard to the substantial
honesty of the transaction (244-5). (*Lord Justice James.*)
FAEZ BAKSH CHOWDRY v. FUKEROODEEN MAHOMED.

(1871) 14 M.I. A. 234 = 9 B. L. R. 456 =
2 Suth. 490 = 2 Sar. 733.

———Where a transaction is alleged to be a benami trans-
action it is essential to take care that the decision of the
Court rests not upon suspicion, but upon legal grounds,
established by legal testimony. (*Lord Shaw.*) HAKIM
MOULVI MUHAMMAD MAHBUB ALI KHAN v. BHARAT
INDU.

(1918) 23 C. W. N. 321 (325-6) =
53 I. C. 54 = (1919) M. W. N. 507.

———Where a sale of property is alleged to be only a sham
and benami transaction brought about collusively and
fraudulently to delay or defraud the creditors of the vendor,
it is essential to take care that the decision of the Court
rests not upon suspicion, but upon legal grounds, established
by legal testimony (416). (*Lord Phillimore.*) SETH MANIK
LAL MANSUKBHAI v. RAJA BIJOY SINGH DUDHORIA.

(1920) 25 C. W. N. 409 = 62 I. C. 356 =
(1921) M. W. N. 80.

———Basis proper of—Evidence on both sides unsatisfactory.

Where, in a case in which the question is whether a
transaction is a benami or a genuine transaction, the evi-
dence on neither side is wholly convincing, it is necessary to
rely largely upon the surrounding circumstances, the position
of the parties and their relation to one another, the motives
which could govern their actions, and their subsequent
conduct. (*Sir Arthur Wilson.*) DALIP SINGH v. CHAU-
DHRAIN NAWAL KUNWAR. (1908) 35 I. A. 104 =

30 A. 258 (266) = 4 M. L. T. 141 = 12 C. W. N. 609 =
10 Bom. L. R. 600 = 14 Bur. L. R. 151.

———Concurrent decisions of Indian Courts on—P. C.'s
interference with. See P. C.—PRACTICE—QUESTION OF
FACT—CONCURRENT FINDINGS—INTERFERENCE WITH
—BENAMI.

———Points to be considered.

The points to be considered in deciding whether a trans-
fer is benami or not are:—

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Decision on question of—(Contd.)**

(1) What are the probabilities of the case on consideration of the deed itself, and the position of the grantor; what motive he had for putting the property into benami;

(2) what is the direct evidence on the point, oral evidence given by witnesses who proposed to speak to it;

(3) whether there has been mutation of names, whether any witnesses have been called to prove the deed, whether proof has been given of payment of the money, of the receipt of the rents, and of the payment of the revenue by the grantee; and

(4) what assertions of title have been made by the grantor or his representative from time to time in legal and other proceedings. (*Lord Hobhouse.*) **UMAN PARSHAD v. GANDHARP SINGH.** (1887) 14 I. A. 127 = 15 C. 20 = 5 Sar. 71 = R. & J's No. 98.

———Trial Judge's decision—Reversal by High Court of—P. C. appeal—Points to be considered in. *See* P. C.—**APPEAL—BENAMI—TRIAL JUDGE'S DECISION ON QUESTION OF.** (1917) 32 M. L. J. 468 (476).

Deeds forming part of one transaction.

———*Proof of benami in regard to one of—Effect of, on others.*

D, who was said to be wishing to raise money, sent for M, and on his coming an agreement was made by which he was to pay her Rs. 12,000, and to receive in return a putni of her estate, with the exception of the house in which she lived, and about 20 bighas of land. He was also to have a Kobala or deed of sale of the house and premises, and the Rs. 12,000 were equally distributed between the putni and the kobala. It was apparent from the evidence that that was one transaction. The putni was executed on 3—8—1876, and the kobala on the following day.

It was found by the courts below, and their Lordships concurred in finding, that the kobala was not intended to be a real transaction.

Held, that that was very important with reference to the putni, because it was evidently one transaction, and it would be very difficult, if not impossible, to come to the conclusion that if part of the transaction was altogether an unreal one, and that it was never intended that it should operate as a sale, the other part, that is the putni, was intended to be a real transaction. (*Sir Richard Couch.*) **JIBUN-NISSA v. ASGAR ALI.** (1890) 17 C. 937 = 5 Sar. 574.

Elaboration to perfection of.

———*Common in India.*

The benami transactions in this case have been elaborated with a perfection that is uncommon even in India (281). (*Sir Arthur Hobhouse.*) **RUTTO SINGH v. BAJRANG SINGH.** (1883) 13 C. L. R. 280 = Bald. 475.

English parties domiciled in India.

———*Husband—Wife—Purchase in name of—Benami or not.*

The appellant bought land with his own money, but had the sale-deeds executed in the name of his wife, the respondent, and erected houses upon it at his own expense. In a suit by him for a declaration that the houses were held by his wife as his benamidar and that he was the real owner of the same, *held*, that the plaintiff had discharged the burden which rested upon him, and had rebutted the presumption that the conveyances to his wife of the sites of the two houses and the subsequent erection of those houses upon those sites were not advancements (289).

The conveyances having been in fact made to the wife direct, if the plaintiff is to succeed in showing that this was not done, *prima facie*, for the purpose of making an advancement to her he must be prepared to show for what other rational purpose it was done (284). (*Lord Atkinson.*)

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**English parties domiciled in India—(Contd.)**

KERWICK v. KERWICK. (1920) 47 I. A. 275 = 48 C. 260 (270) = 32 C. L. J. 490 = 13 L. W. 455 = 2 U. P. L. R. (P. C.) 153 = 28 M. L. T. 194 = (1920) M. W. N. 738 = 23 Bom. L. R. 730 = 57 I. C. 834 = 39 M. L. J. 296.

Evidence.

———*Held*, on the evidence affirming the courts below, that the plaintiff-appellant had failed to establish that the purchase of a putnee talook by J was really benami for the appellant's husband. (*Sir John Romilly.*) **MUSSUMAT KRIPOMOYE DEBIA v. GERISHCHUNDER LAHORE.**

(1861) 8 M. I. A. 467 = 2 W. R. 1 = 1 Suth. 448 = 1 Sar. 805.

———The plaintiff-appellant was the registered owner of certain property. The question was whether he was also the beneficial owner or only benamidar for the respondent.

The Sub-Judge decided the question in favour of the appellant. On appeal, the High Court decided in favour of the respondent, and reversed the decree below.

On appeal to the P. C. *held*, on the evidence, mainly that afforded by the possession of the property in question, that the appellant was only a benamidar, and that the decree of the High Court in favour of the respondent was correct (204). (*Sir Arthur Hobhouse.*) **BAIJNATH SAHAY v. RUGHONATH PERSHAD SINGH.**

(1882) 12 C. L. R. 186 = 4 Sar. 372 = Bald. 437.

———In an action founded on the allegation that a purchase by B was a simulate transaction, and that the property was held in her name benami for W, *held*, on the evidence, reversing the High Court and restoring the trial Judge, that the plaintiff had entirely failed to prove that B's ownership was benami for W. (*Lord Shaw.*) **HAKIM MOULVI MUHAMMAD MAHBUB ALI KHAN v. BHARAT INDU.**

(1918) 23 C. W. N. 321 = (1919) M. W. N. 507 = 53 I. C. 54.

———Admission by alleged real owner that purchase was for benefit of alleged benamidar—Admissibility. *See* **HINDU LAW—SELF-ACQUISITION—THROWING INTO COMMON STOCK—EVIDENCE.**

(1917) 44 I. A. 201 = 40 A. 159.

———Admission by alleged real owner prior to suit that he held possession on behalf of alleged benamidar (his minor daughter) and would restore it to her—Value of. *See* **BURMESE BUDDHIST LAW—DAUGHTER—MOTHER'S INHERITANCE.** (1928) 56 M. L. J. 244 (253, 254-5).

———Admission of benami by one of alleged benamidars—Effect of, against other alleged benamidars. *See* **BENAMI—BENAMIDAR—ADMISSION OF BENAMI NATURE, ETC.** (1869) 13 M. I. A. 232 (247).

———Deeds forming part of one transaction—Proof of benami in regard to one of—Effect of, on other deed or deeds. *See* **BENAMI—DEEDS FORMING PART OF ONE TRANSACTION.** (1890) 17 C. 937.

———*Execution of deed—Genuineness of transaction—Payment of purchase-money—Evidence satisfactory as to first, but not as to second or third.*

In a suit by the plaintiff, a pleader, to recover possession of property on the strength of a sale-deed executed in his favour in respect thereof, the question was whether the sale was a real transaction or was a colorable one. There was satisfactory evidence of the actual execution of the deed; but the evidence of the genuineness of the transaction and of the payment of the purchase-money was not satisfactory.

Held, reversing the High Court and restoring the Sudder Ameen, that the plaintiff had not discharged the onus which lay upon him of proving that the transaction was a real one. **MUSSUMAT USHRUFOONNESSA BEGUM v. BABOO GRI.**

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Evidence—(Contd.)**

DHAREE LALL. (1872) 19 W. R. 118 = 2 Suth. 763 = 5 Sar. 708.

—Execution sale—Purchase at—Benami or not—Evidence. See BENAMI—EXECUTION SALE.

—Execution sale—Wife's purchase at—Benami for husband (judgment-debtor) or not—Evidence—Registry of her name—Rent suits brought in her name jointly with husband—Value of.

In a case in which the question was whether a purchase by a Hindu lady of a share of her husband's ancestral estate at a sale by the Collector in satisfaction of a claim of the Government against the husband as surety for a person who was employed in the Collectorate was benami for her husband, *held*, that the registry of the wife's name, whenever it took place, was of no value, as it would follow the sale certificate, as was also the fact that rent suits were brought in her name jointly with her husband (75). (*Sir Richard Couch.*) DHARANI KANT LAHIRI CHOWDHRY v. KRISTO KUMARI CHOWDHRY. (1886) 13 I. A. 70 =

13 C. 181 (187) = 4 Sar. 759.

—Father—Son—Purchase in name of one—Benami nature of—Question as to, arising between the sons—Conduct, and views of sons as to nature of transaction—Value of.

The appellant and respondent were brothers, and joint heirs by the Hindu law of their deceased father, R. Many years before his death, and previously to the birth of the appellant, R purchased a talook in the name of the respondent. The question was whether the purchase in the name of the respondent was a mere benamee purchase, or a purchase for the respondent's separate use and benefit.

Held, that on such a question the views which the sons might have taken of the matter were of very little importance; that they might have mistaken their rights, and their conduct could only be material as being that of persons knowing what the father's intention was, and, as, therefore, proving that intention (84). (*Lord Justice Knight Bruce.*) GOPEEKRIST GOSAIN v. GUNGAPERSAUD GOSAIN.

(1854) 6 M. I. A. 53 = 2 Suth. 13 = 4 W. R. 46 = 1 Sar. 493.

—Father—Son—Purchase in name of one—Benami nature of—Question as to, arising between the sons—Conversations during life of father—Parol evidence of—Value of.

Where the question was whether a purchase made by a Hindu in the name of his then only son was a mere benami purchase or was a purchase for his separate use and benefit, and the question arose years after the father's death, *held*, that it would be unsafe to allow the title at law to be affected by parol evidence of conversations during the life of the father (82). (*Lord Justice Knight Bruce.*) GOPEEKRIST GOSAIN v. GUNGAPERSAUD GOSAIN.

(1854) 6 M. I. A. 53 = 2 Suth. 13 = 4 W. R. 46 = 1 Sar. 493.

—Husband—Wife—Purchase in name of—Benami or not—Admission by husband deceased that purchase was with wife's own funds—Admissibility and value of, as against adopted son and heir at law of husband. See (1) ADMISSION—PREDECESSOR IN INTEREST—ADMISSION BY—SUCCESSOR IN INTEREST—ADMISSIBILITY AGAINST (2) DECEASED. (1860) 13 M. I. A. 419 (424-5).

—Husband—Wife—Purchase in name of—Benami for husband or not—Evidence—Dealings subsequent with property by husband as owner—Value of.

The question was whether property purchased in May, 1909 by a Hindu in the name of his wife belonged to her or was purchased in her name benami for her husband. In

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Evidence—(Contd.)**

July 1909, the husband and wife jointly gave an equitable mortgage of the property to one K, the property being stated to be in their possession and enjoyment. On 30-3-1910 the husband and wife granted a lease of the property to another. On 4-12-1912 the wife died. On 18-3-1914, the husband on his representation that he "is in possession of and is entitled to" the property obtained in the Registration Department the Collector's certificate. On 21-2-1918, the husband mortgaged the property and in the deed of mortgage it was stated that he had purchased the property out of his own self-acquired earnings and was absolutely entitled to it. The wife was, until she died, under the influence of her husband, and had no independent advice and the plaintiff, her son, was a minor of tender years without practically any one to protect the interest, if any, which he might have had.

Held, nevertheless, that the transactions referred to above would be material evidence on the question whether the position of the wife in respect of the property in question was that of a beneficial owner or of a mere benamidar for her husband (292-3).

Those transactions show how the husband dealt with the property in question (293). (*Sir John Edge.*) SURA LAKSHMIAH CHETTV v. KOTHANDARAMA PILLAI.

(1925) 52 I. A. 286 = 48 M. 605 =

23 A. L. J. 662 = 42 C. L. J. 8 = 27 Bom. L. R. 1076 =

29 C. W. N. 1013 = (1925) M. W. N. 717 =

3 P. L. R. 290 = 23 L. W. 138 =

A. I. R. 1925 P. C. 181 = 88 I. C. 327 = 49 M. L. J. 109.

—Mutation of names—Absence of.

The absence of any mutation of names hardly tells much in favour of the view that a transaction was a mere benami transaction intended for the purpose of baffling somebody who was claiming the property as against the transferor, because without that mutation the transferor would remain the ostensible owner in the Collector's records, and the purpose of baffling his adversary would be a very imperfect one (131). (*Lord Hobhouse.*) UMAN PARSHAD v. GANDHARP SINGH. (1887) 14 I. A. 127 = 15 C. 20 (25) =

5 Sar. 71 = R. & J's No. 98.

—Mutation of names—Effecting of—Effect.

It is common experience that in these benami transactions there is a mutation of names when it is intended to baffle creditors, and all the proceedings which would attend a real transfer are carefully gone through in order to throw a veil over the reality (131). (*Lord Hobhouse.*) UMAN PARSHAD v. GANDHARP SINGH. (1887) 14 I. A. 127 =

15 C. 20 (25) = 5 Sar. 71 = R. & J's No. 98.

—Possession and management of property continuing with alleged real owner—Value of—Benamidar alleged his minor daughter. See BURMESE BUDDHIST LAW—DAUGHTER—MOTHER'S INHERITANCE.

(1928) 56 M. L. J. 244 (254).

—Possession of property—Value of—Mahomedan father—Son infant—Purchase in name of—Benami or not—Question as to.

Where, in a case in which a Mahomedan purchased with his own funds property in the names of his infant sons, the question was whether he intended his sons to be benamidars or beneficial owners, *held*, that the possession of the property was important as evidence (43-4). (*Lord Hobhouse.*) SYED ASHGAR REZA v. SYED MEDHI HOSSEIN KHAN.

(1893) 20 I. A. 38 = 20 C. 560 (569-70) = 6 Sar. 283.

—Possession of property and receipt of rents and profits thereof—Value of.

Where there are benami transactions and the question is

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Evidence—(Contd.)**

who is the real owner, the actual possession or receipt of the rents of the property is most important (165). (*Sir Richard Couch.*) **IMAM BANDI BEGUM v. KUMLESWARI PERSHAD.** (1886) 13 I. A. 160 = 14 C. 109 (117) = 4 Sar. 732.

Relationship of parties—Weight due to.

Though the exception in the English law by way of advancement in favour of wife or child does not apply in India, yet the relationship is a circumstance which is taken into consideration in India in determining whether the transaction is benami or not (205). (*Sir George Farwell.*) **BILAS KUNWAR v. DEORAJ RANJIT SINGH.**

(1915) 42 I. A. 202 = 37 A 557 (565) = 17 Bom. L. R. 1006 = 22 C. L. J. 516 = 13 A. L. J. 991 = (1915) M. W. N. 757 = 19 C. W. N. 1207 = 18 M. L. T. 248 = 2 L. W. 830 = 30 I. C. 299 = 29 M. L. J. 335.

Rent and revenue receipts—Non production by benamidar's representative of—Effect—Receipts likely to be in custody of real owner's representative.

G, a Mahomedan lady, executed two transfers to B the husband of her only daughter, F, in 1863 and 1864. G died in December, 1866, leaving F, who in 1876 executed a deed of gift in respect of the properties covered by the said deeds of transfer in favour of her daughter, M, who died childless in her lifetime. The defendant was the husband of M.

B died childless in 1865, and was succeeded by his widow, F, and another, the survivor of whom, F, died in October, 1879. The plaintiff was the next reversionary heir of B.

On an issue between the plaintiff and the defendant as to whether the two transfers executed by G, in favour of B, in 1863 and 1864 were real transfers or benami, held, that the absence of evidence to prove the receipts of the rents and to prove the payment of the revenue by B, did not tell against the plaintiff, but that it rather told against the defendant, who might have produced both documents and witnesses who could throw light upon the case (131-2).

In an ordinary case of a benami dispute, in which the benamidar or those claiming under him maintain that the transaction is a real one, and the transferor and those claiming under him maintain that it is a sham, each party has in his own power such receipts, such evidence of payments, such connection with the agents concerned, as should suffice to prove his own case if it is a true one. But this case is peculiar, because here the title of benamidar, and the title of the original true owner, coalesced in the person of F within 4 years of the first transaction, and within 3 years of the second; and it was she—and it is the defendant who is her representative who have had in their hands the whole of the evidence necessary to prove whether the transaction was a sham or a real one (131-2). (*Lord Hobhouse.*) **UMAN PARSHAD v. GANDHARP SINGH.**

(1887) 14 I. A. 127 = 15 C. 20 (25-6) = 5 Sar. 71 = R. & J's No. 98.

Revenue payment and appropriation of surplus profits by benamidar—Evidence of—Admissibility—Failure to adduce same—Inference adverse from.

In an enquiry whether or not an estate was held benami, if the alleged benamidar produces accounts showing that he and not the alleged real owners paid the revenue for the property in question, and that the balances went into his private cash-book, or were applied to his private purposes, such evidence would be admissible for him. The admissibility of such evidence does not shift the burden of proof, but its non-production may, in certain cases, be a circumstance which, when placed in the balance of probabilities, must weigh against the alleged benamidar (199). (*Sir*

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Evidence—(Contd.)**

(*Arthur Hobhouse.*) **BAIJNATH SAHAY v. RUGHONATH PERSHAD SINGH.** (1882) 12 C. L. R. 186 = 4 Sar. 372 = Bald. 437.

—Same transaction—Deeds forming part of—Proof of one being benami—Effect of, on other deeds. See BENAMI—DEEDS FORMING PART OF ONE TRANSACTION.

(1890) 17 C. 937.

—Similar transaction—Proof of benami in case of—Presumption of benami from. See BENAMI—SIMILAR TRANSACTION. (1882) 12 C. L. R. 186 (202).

—Suspicion—Decision on question of benami—Basis proper of. See BENAMI—DECISION ON QUESTION OF—BASIS PROPER OF.

—Title—Deeds—Possession of, with alleged real owner—Explanation for his obtaining them not satisfactory—Other evidence strong against benami plea.

In a case in which the question was, whether the purchase of a Putnee Talook made by J was a benami transaction—that is, whether it was bought with the money of and in trust for H, the husband of the appellant, held that the simple possession by the appellant of all the deeds and papers relating to the Talook, without satisfactory proof of the mode by which the appellant alleged that she acquired possession of them, could not be allowed to outweigh the other circumstances of the case, which strongly preponderated against the appellant (475). (*Sir John Romilly.*) **MUSSUMAT KRIPOMOYEE DEBIA v. GERISHCHUNDER LAHORE.** (1861) 8 M. I. A. 467 = 2 W. R. 1 = 1 Suth. 448 = 1 Sar. 805.

—Transferor—Statement of, that he did not intend to confer beneficial interest—Value of.

The mere statement by a husband or father who has made an apparent advancement in favour of a wife or child that he did not intend it to confer any beneficial interest in the thing given or transferred to the donee or transferee is of little avail unless he establishes at the same time with reasonable clearness that he had other and different motives for the action he took (281-2). (*Lord Atkinson.*) **KERWICK v. KERWICK.** (1920) 47 I. A. 275 = 48 C. 260 (267) = 32 C. L. J. 490 = 13 L. W. 455 =

2 U. P. L. R. (P. C.) 153 = 28 M. L. T. 194 = (1920) M. W. N. 738 = 23 Bom. L. R. 730 = 57 I. C. 834 = 39 M. L. J. 296.

—Very slight evidence enough.

In view of the fact that the system of putting property benami is extremely common in India, even a slight quantity of evidence will suffice for the purpose of shewing that a deed executed in proper form, and apparently effecting a valid transfer to another, was a sham transaction (129). (*Lord Hobhouse.*) **UMAN PARSHAD v. GANDHARP SINGH.** (1887) 14 I. A. 127 = 15 C. 20 (23) = 5 Sar. 71 = R. & J's No. 98.

—In regard to benami transactions, Courts of law should not approach them with that scrupulous rigour which in other systems of jurisprudence may demand the existence of the clearest positive evidence that the *ex facie* owner of a property is a trustee for or holds the same for the interest of another, Benami transactions are very familiar in Indian practice and even a slight quantity of evidence to show that it was a sham transaction will suffice for the purpose. (*Lord Shaw.*) **HAKIM MAULVI MUHAMMAD MAHBUB ALI KHAN v. BHARAT.**

(1918) 23 C. W. N. 321 (326) = (1919) M. W. N. 507 = 53 I. C. 54.

Execution Sale.

PURCHASE AT—BENAMI NATURE OF.

—Debt—Execution sale of—Certified purchaser at—

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Execution sale—(Contd.)****PURCHASE AT—BENAMI NATURE OF—(Contd.)**

Suit for recovery of debt by—Benami title of third person—
Plea by debtor of—Maintainability. See C. P. C. OF 1908
—Or, 21, R. 79(3)—DEBT.

(1872) 14 M. I. A. 496 (526).

DECREE-HOLDERS—BENAMI FOR ONE OF.

—Where the question was whether a purchase by one N at an execution sale was benami for B, one of the decree-holders, *held*, on the evidence, affirming the High Court that it had not been proved that N was benamidar for B. (316-7). (*Lord Phillimore*). *RAI RADHA KRISHNA v. BISHESHAR SAHAY*. (1922) 49 I. A. 312 =

1 Pat. 733 (738) = 21 A. L. J. 23 = 37 C. L. J. 430 =

25 Bom. L. R. 680 = 27 C. W. N. 294 =

9 O. & A. L. R. 194 = 16 L. W. 190 = 3 Pat. L. T. 529 =

31 M. L. T. 209 (P. C.) = (1922) P. C. 336 =

67 I. C. 914 = 44 M. L. J. 718.

**JUDGMENT-DEBTOR—PURCHASE
BENAMI FOR—EVIDENCE.**

—Their Lordships found upon the evidence, that the purchase made by the plaintiff's vendor of the property in dispute, was made benami for the judgment-debtor and therefore the plaintiff did not acquire any title under his purchase. (*Sir Barnes Peacock*.) *RAM CHUNDER BYSACK v. DINONATH SURMA SIKKAR*. (1879) 3 Suth. 659 =

Bald. 290 = 5 C. L. R. 470.

—The appellant purchased a talook at a sale in execution of a decree obtained by a judgment-creditor. The respondent, the assignee of another judgment-creditor, who had obtained a decree in a separate suit against the same judgment-debtor, brought a suit against the appellant to set aside the sale on the ground that his purchase was not *bona fide*, being made in collusion with the judgment-debtor, and that, notwithstanding the purchase by the appellant, the estate continued to be the judgment-debtor's property, both at law and in equity.

Held, reversing the Court below, that the respondent had failed to show that the appellant was a bare trustee for the judgment-debtor. (*Lord Westbury*.) *SREEMANCHUNDER DEY v. GOPAUL CHUNDER CHUCKERBUTTY*.

(1866) 11 M. I. A. 28 = 7 W. R. P. C. 10 =

1 Suth. 651 = 2 Sar. 215.

—In a case in which it was alleged that an execution purchase made by the appellant was not a *bona fide* purchase, but was merely benami for the judgment-debtors, their Lordships observed that the fact that the purchase was not challenged by the judgment-creditors was a circumstance tending to show that the purchase was a *bona fide* purchase (48).

It is natural to suppose, that, if this purchase had been generally felt not to be a *bona fide* purchase, it would have been questioned by the judgment-creditors themselves, and that they would not probably, for a small consideration, have parted with their judgments to another person, but would have themselves instituted a suit to set aside the sale (48). (*Lord Westbury*.) *SREEMANCHUNDER DEY v. GOPAULCHUNDER CHUCKERBUTTY*.

(1866) 11 M. I. A. 28 = 7 W. R. P. C. 10 =

1 Suth. 651 = 2 Sar. 215.

—The question was whether an execution purchase of a talook made by the appellant was a purchase made by him in his own behalf or for his own benefit, or was merely *benami* for the judgment-debtors. To prove that the purchase was merely benami for the judgment-debtors, the circumstance relied upon was the fact, which it was alleged appeared on the judicial proceedings under which the sale was made, that two previous sales had been effected of the

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Execution sale—(Contd.)****JUDGMENT-DEBTOR—PURCHASE BENAMI FOR—
EVIDENCE—(Contd.)**

same talook, in both of which the real, though not the apparent, purchasers were the judgment-debtors, and that those sales had consequently been set aside. The Courts below considered that those facts justified the inference that the judgment-debtors had formed the design in the case in question, for the third time, to acquire the property through the instrumentality of a person acting apparently on their own behalf.

Held, "Although the fact of these former sales may be referred to, as they appear on the proceedings in the cause in which the sale was made, yet no legal inference affecting the integrity of the present proceeding can with any propriety be drawn from them." (45-6). (*Lord Westbury*.) *SREEMANCHUNDER DEY v. GOPAULCHUNDER CHUCKERBUTTY*.

(1866) 11 M. I. A. 28 = 7 W. R. P. C. 10 =

1 Suth. 651 = 2 Sar. 215.

—Where it was alleged that an execution purchase made by the appellant was not a *bona fide* purchase but was the result of a collusive agreement between the judgment-debtors, the original owners of the estate, and the appellant, to buy in the estate for the benefit of the judgment-debtors, *held* that it was material to inquire what relation the purchase-money paid before bore to the value of the estate, and that that circumstance was a strong circumstance, though not conclusive proof of a *bona fide* purchase (44). (*Lord Westbury*.) *SREEMANCHUNDER DEY v. GOPAULCHUNDER CHUCKERBUTTY*.

(1866) 11 M. I. A. 28 = 7 W. R. P. C. 10 =

1 Suth. 651 = 2 Sar. 215.

—Where the question was whether an execution purchase made by the appellant was one made in his own behalf and for his own benefit or was merely benami for the judgment-debtors, reliance was placed in support of the case of the benami nature of the purchase on the fact that the appellant was unable to give a satisfactory account of the manner in which he obtained the purchase-money.

Held, that that circumstance, although it might excite doubt, was not a thing from which it could be legitimately inferred that the appellant was a bare trustee of the purchase so made by him (46).

It is easy to suppose a case in which the appellant might not in reality be the *bona fide* purchaser on his own account, and yet in which there would be no ground for holding that the estate was the property of the judgment-debtor. It is possible to suppose that some of the family of the judgment-debtors might have been willing to find, either wholly or partly, the money for the purchase; but if it were established that the money was not the property of the appellant, we could not derive from that, the conclusion that the estate was, therefore, the property of the judgment-debtors (49).

It was said that no other owner was suggested by the appellant. There was no obligation upon him to suggest any other owner. He was under no obligation to show where the money was derived; but, taking everything against the appellant upon that point, there is still a great chasm between that inference and the conclusion that the estate is the judgment-debtor's property, both at law and in equity (49). (*Lord Westbury*.) *SREEMANCHUNDER DEY v. GOPAULCHUNDER CHUCKERBUTTY*. (1866) 11 M. I. A. 28 =

7 W. R. P. C. 10 = 1 Suth. 651 = 2 Sar. 215.

—Where the question was whether an execution purchase made by the appellant was one made on his own behalf and for his own benefit or was merely benami for the judgment-debtors, reliance was placed in support of the case of the benami nature of the purchase on the fact that the

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Execution sale—(Contd.)****JUDGMENT-DEBTOR—PURCHASE BENAMI FOR—
EVIDENCE—(Contd.)**

appellant and the judgment-debtors lived on good terms together even after the purchase in question; and that they were not open and avowed enemies, which it was said would have been the necessary consequence if the appellant had in reality been the purchaser of the judgment-debtor's estate for his own benefit.

Held, that that circumstance was one from which no legal inference resulted (46). (*Lord Westbury*.) **SREMANCHUNDER DEY v. GOPALCHUNDER CHUCKERBUTTY.**

(1866) 11 M. I. A. 28 = 7 W. R. P. C. 10 =
1 Suth. 651 = 2 Sar. 215.

—Wife's purchase—Benami for husband (judgment-debtor) or not—Evidence. See **BENAMI—EVIDENCE—EXECUTION SALE.** (1886) 13 I. A. 70 (75) = 13 C. 181 (187).

**JUDGMENT-DEBTOR—PURCHASE BENAMI FOR
—ONUS OF PROOF OF.**

—*Suit by another creditor of same debtor.*

The appellant purchased a talook at a sale in execution of a decree obtained by a judgment-creditor. The respondent, the assignee of another judgment-creditor who had obtained a decree in a separate suit against the same judgment-debtor, brought a suit against the appellant for a declaration that, in making the purchase, the appellant acted merely as the agent of the judgment-debtors, that the purchase-money which was actually paid by the appellant was not in reality the money of the appellant, that the purchase did not affect any transfer of the ownership of the talook, and that notwithstanding the purchase, the estate was the judgment-debtor's property, both at law and in equity.

Held, that the onus lay upon the respondent of proving his case, of proving that the money with which the Talook was purchased was money of the judgment-debtors, or that it was supplied or found by some third person for the benefit of the judgment-debtors (43, 47). (*Lord Westbury*.) **SREEMANCHUNDER DEY v. GOPALCHUNDER CHUCKERBUTTY.** (1866) 11 M. I. A. 28 = 7 W. R. P. C. 10 = 1 Suth. 651 = 2 Sar. 215.

—*Plea of—Presumption—Onus of proof of—Laches in instituting suit raising question—Motive for benami ceasing to exist long before.*

In a case in which the question was, whether the purchase of a public Talook made by J in 1835 was a benami transaction—that is, whether it was bought with the money of and in trust for H, the husband of the appellant, *held* that the circumstance that the suit was instituted only nine years after the sale of the Talook as belonging to J in execution of a decree obtained against him for arrears of rent had taken place made strongly against the claim of the appellant, especially as the person on whose account the matter was alleged to have been kept secret had died a few months after the rent sale (475-6). (*Sir John Romilly*.) **MUSSUMAT KRIPOMOYE DEBIA v. GERISHCHUNDER LAHORE.**

(1861) 8 M. I. A. 467 = 2 W. R. 1 = 1 Suth. 448 = 1 Sar. 805.

—*Plea of, by ryots in possession of land purchased—Maintainability.*

As regards the ryots in possession of land sold in execution of a decree, the certified purchaser, when put into possession, becomes their landlord, both by title and possession, and it may well be that they should not be allowed to set up the *benami* right of another against the person to whom they had thus become tenants (525-6). (*Sir Montague E. Smith*.) **MUSSUMAT BUHUNS KOWUR v. LALLA BUHOOREE LALL.** (1872) 14 M. I. A. 496 = 18 W. R. 157 = 10 B. L. R. 159 = 2 Suth. 575 = 3 Sar. 69.

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Execution sale—(Contd.)****ZAMINDAR—MANAGER OF—PURCHASE BY.**

—*Benami for Zamindar or not—Evidence.*

The question was whether an execution purchase made by C, the predecessor in interest of the plaintiffs, was made by him on his own behalf, or as the manager, and on behalf of the appellant.

The facts admitted or proved were as follows: C had been for a period of about a year the manager of the appellant, the zemindar, and had the possession and management of some at least of his funds. A month only before the sale, C had advanced a sum of Rs. 4400 to M, in execution of the decree against whom the sale in question was held. Though the bond for the amount was taken in C's own name, the amount was admittedly advanced by C out of the appellant's money in his hands, and the bond was held by C on behalf of, and as benamidar for, the appellant. The transaction of the sale in question followed soon after. A creditor obtained a judgment against M, and there was to be a sale in execution of her life interest in nine annas of an estate in which the appellant held the other seven in his own right, and a reversionary interest in the nine that were sold.

C had no express instructions previous to the sale from the appellant to purchase those nine annas for him. But R, who was an agent, or acting at that time as an agent, of the appellant, was a bidder for those nine annas, and had bid Rs. 2260 for the property. At that stage, when he had given that bidding, which was the last of four, somebody suggested to him that he ought not to bid for the appellant, but that C, the manager, was the proper person to purchase the property for the appellant. Accordingly C was called into the room, the state of the biddings made known to him, and then he made upon the last bidding of R the small advance of Rs. 2. The evidence was that C took the bidding out of R's hands who was professing to act for the appellant, saying at the time, or shortly after, that he purchased for the appellant.

The subsequent conduct of C was inconsistent with his having purchased on his own account, and was entirely consistent with the view that he purchased on behalf of the appellant, for whom he was acting as manager. The property purchased was in the hands of ryots, and the appellant was in possession of the same so far as possession could be obtained of such property. He also paid the Government revenue. C never set up any title in himself and never interfered with the possession of the estate given by him to the appellant in any manner inconsistent with the character he took upon himself at the sale—the character of a manager for the appellant.

Held that C's purchase was on behalf of, and as benamidar for, the appellant, and not on his own behalf (161-2.)

Their Lordships, therefore, upon the whole matter, think that although C may have had no previous instructions to purchase from the appellant, yet that, being his manager, and finding himself at this sale, he purchased for him, after having stopped R, who was there before him bidding for the appellant, in that operation (161). (*Sir Montague E. Smith*.) **LOKHU NARAIN ROY CHOWDHRY v. KALYPUDDO BANDOPADHYA.** (1875) 2 I. A. 154 = 23 W. R. 358 = 3 Suth. 122 = 3 Sar. 472.

Father.**CHILD.**

—Benami purchase in name of—Common in India. See **BENAMI—CHILDREN.** (1854) 6 M. I. A. 53 (79).

—Purchase in name of—Advancement—Presumption. See **BENAMI—ADVANCEMENT.**

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Father—(Contd.)****DAUGHTER.**

—Burmese Buddhist Law—Daughter—Mother's inheritance—Share of minor daughter in—Transfer by father by registered partition deed in lieu of—Benami or not. *See* BURMESE BUDDHIST LAW—DAUGHTER—MOTHER'S INHERITANCE. (1928) 56 M. L. J. 244.

—Mahomedan daughter—Gift to—Benami or not. *See* MAHOMEDAN LAW—GIFT—FATHER—DAUGHTER—GIFT TO—BENAMI OR NOT. (1879) 3 Suth. 601.

—Purchase in name of—Advancement—Presumption of. *See* BENAMI—ADVANCEMENT.

SON.

—Benami purchase in names of, and of wife—Common in India. *See* BENAMI—SON AND WIFE.

(1869) 13 M. I. A. 232 (246).

—Hindu father—Property in name of—Benami for son—Evidence. *See* HINDU LAW—JOINT FAMILY—FATHER—PROPERTY IN NAME OF—BENAMI FOR SON.

(1885) 12 I. A. 150 (157-8) = 8 A. 6 (13).

—Hindu father—Son—Purchase in name of minor—Benami or not. *See* HINDU LAW—JOINT FAMILY—FATHER—SON—PURCHASE IN NAME OF MINOR—BENAMI OR NOT. (1854) 6 M. I. A. 53.

—Mahomedan father—Son—Gift to—Benami or not. *See* MAHOMEDAN LAW—GIFT—FATHER—SON—GIFT TO—BENAMI OR NOT. (1896) 24 I. A. 1 = 19 A. 267.

—Mahomedan father—Son—Gift to—Benami or not—Object of transaction to give son more than would go to him by succession *ab intestato*. *See* MAHOMEDAN LAW—GIFT—FATHER—SON—GIFT TO—BENAMI OR NOT—OBJECT OF TRANSACTION, ETC.

(1867) 11 M. I. A. 517 (546).

—Mahomedan father—Son—Gift to—Family settlement—Benami transaction to be followed by—Test—Evidence. *See* MAHOMEDAN LAW—GIFT—FATHER—SON—GIFT TO—FAMILY SETTLEMENT.

(1875) 2 I. A. 87 (111).

—Mahomedan father—Son—Purchase in name of—Benami or not. *See* MAHOMEDAN LAW—FATHER—SON—PURCHASE IN NAME OF—BENAMI OR NOT.

—Mahomedan father—Son of tender years—Hibbanamah in favour of—Gift—Family settlement—Fraudulent benami—Test—Evidence. *See* MAHOMEDAN LAW—FATHER—SON OF TENDER YEARS—HIBBANAMAH IN FAVOUR OF. (1883) 11 I. A. 10 (19) = 10 C. 616 (623-4).

—Purchase in name of—Advancement—Presumption of. *See* BENAMI—ADVANCEMENT.

—Purchase in names of, and of wife—Benami or not—Presumption. *See* MAHOMEDAN LAW—SON AND WIFE—PURCHASE IN NAMES OF.

(1869) 13 M. I. A. 232 (247).

Fiction and falsehood.

—Usual in cases of benami.

Fiction and falsehood are very usual in benami disputes (166.) (*Lord Hobhouse*.) MUHAMMAD IMAM ALI KHAN v. SARDAR HUSAIN KHAN. (1898) 25 I. A. 161 = 26 C. 81 (89) = 2 C. W. N. 737 = 7 Sar. 432.

Fraudulent benami.

—Effect—Distinction.

A mere benami, or ism furzee title, is simply a nominal title without interest. It may, or may not, be fraudulent in design. Such a disposition by a donor, where the transfer of the property, from its very nature, effected a legal trans-

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Fraudulent benami—(Contd.)****SON—(Contd.)**

fer of it, would be simply the creation of a trust in his favour, (546). (*Sir Edward Williams*.) NAWAB UMJAD ALLY KHAN v. MUSSUMAT MOHUNDEE BEGUM.

(1867) 11 M. I. A. 517 = 10 W. R. P. C. 25 =

2 Suth. 98 = 2 Sar. 315 = R. & J's. No. 7 (Oudh).

—Mahomedan father—Son of tender years—Hibbanamah in favour of—Gift—Family Settlement—Fraudulent benami—Test—Evidence. *See* MAHOMEDAN LAW—FATHER—SON OF TENDER YEARS—HIBBANAMAH IN FAVOUR OF.

(1883) 11 I. A. 10 (19) =

10 C. 616 (623-4).

—Plea of—Creditors of alleged benamidar—Availability against—Fraud not carried out.

In a case in which a Mahomedan father purchased property with his own funds but in the name of his son, because he (the father) had daughters and was desirous of varying the rule of succession between sons and daughters, and the question of the effect of the transaction arose, on the son's death, between his attaching-decree-holders and the father, their Lordships, while expressing the opinion that the case certainly admitted of being viewed thus, that the conveyance was merely colourable, to be treated as real should it become necessary to defeat a daughter's claim, but fictitious as between father and sons, observed that that view of the case was not presented to the trial Court, and that if it had been so presented, the Judge would have been justified in declining to act on such an allegation of fraud against creditors of the son made after the son's decease in favour of the father alleging his own fraud (401-2). (*Sir Joseph Napier*.) NAWAB AZIMUT ALI KHAN v. HURDWAREE MULL. (1870) 13 M. I. A. 395 = 14 W. R. P. C. 114 =

5 B. L. R. P. C. 578 = 2 Suth. 343 = 2 Sar. 571.

—Plea by transferor of—Maintainability—Fraud carried out—Effect.

Quære whether, where a grantor alleges that a transaction apparently real was fictitious, and was for the purposes of effecting a fraud and the fraud was completed, he can be heard in a Court of law to say that the transaction was other than what it appears to be. (*Lord Atkin*.) MA NGWE v. MAUNG THA MAUNG.

(1928) 56 M. L. J. 244 (254) = 49 C. L. J. 167 =

A. I. R. 1929 P. C. 55.

—Plea by transferor of—Proof of, required.

The facts that can be relied upon in support of a plea by a transferor that a transfer apparently real was really fictitious and was for the purpose of effecting a fraud make it the duty of the Court adjudicating on the allegation of such a grantor to see that he proves by cogent evidence the averment that he makes. (*Lord Atkin*.) MA NGWE NAING v. MAUNG THA MAUNG.

(1928) 56 M. L. J. 244 (254) = 49 C. L. J. 167 =

A. I. R. 1929 P. C. 55.

—Property transferred under—Transferor's right to recover—Fraud not carried out—Maxim "In pari delicto"—Applicability.

Where a benami conveyance is executed to defraud creditors, and the purpose of the fraud is not only not effected, but absolutely defeated, there is nothing to prevent the transferor from repudiating the entire transaction, revoking all authority of his confederate to carry out the fraudulent scheme, and recovering possession of his property. (*Lord Atkinson*.) PETHAPPERUMAL CHETTY v. MUNIANDI SERVAL. (1908) 35 I. A. 98 (102-3) =

35 C. 551 (559) = 18 M. L. J. 277 = 4 M. L. T. 12 =

7 C. L. J. 528 = 12 C. W. N. 562 = 10 Bom. L. R. 590 =

5 A. L. J. 290 = 14 Bur. L. R. 108 = 4 L. B. R. 266.

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Fraudulent benami—(Contd.)**

—Resulting trust in favour of real owner after death of benamidar—Transfer to be treated as fictitious as between parties but as real for defeating third parties' claims.

Where it appeared that a Mahomedan father purchased property with his own funds but had the conveyance drawn up in his son's name because he had daughters and was desirous of varying the rule of succession between sons and daughters, their Lordships thought that the case certainly admitted of being viewed thus, that the conveyance was merely colourable, to be treated as real should it become necessary to defeat a daughter's claim, but fictitious as between father and sons (401-2).

Quare, whether the legal effect of the arrangement was or was not to confer a resulting life estate on the father after the death of his son (402). (*Sir Joseph Napier*.) **NAWAB AZIMUT ALI KHAN v. HURDWAREE MULL.**

(1870) 13 M. I. A. 395 = 14 W. R. P. C. 114 = 5 B. L. R. P. C. 578 = 2 Suth. 343 = 2 Sar. 571.

Fraudulent transfer.

—Distinction — Test — Pleadings — Construction — Pleas of benami and of fraudulent transfer—What amounts to.

The difference between a benami transaction and one that is a fraudulent transfer within the meaning of S. 53 of the Transfer of Property Act is distinct, though it is often slurred. To the suggestion that the transaction was benami a complete answer is furnished by the admission that the transferor owed the transferee the amount stated to be consideration for the sale deeds and more.

A plea that the alleged transferor was and always remained the real owner of the properties alleged to have been transferred is a plea that the transaction was benami and not that it was a fraudulent transfer within the meaning of S. 53 of the Transfer of Property Act. (*Sir Lawrence Jenkins*.) **MINA KUMARI BIBI v. BIJOY SINGH DUDHURIA.**

(1916) 44 I. A. 72 (76-7) = 44 C. 662 (670-1) = 21 M. L. T. 344 = 5 L. W. 711 = 21 C. W. N. 585 = 25 C. L. J. 508 = 19 Bom. L. R. 424 = 15 A. L. J. 382 = 1 Pat. L. W. 425 = 40 I. C. 242 = 32 M. L. J. 425.

Gift or.

—Intention to benefit alleged benamidar—Object of preventing third parties from claiming property put in his or her name—Existence of—Effect. See BENAMI—MAHOMEDAN WOMAN—PERSON WITH WHOM SHE HAD CONTRACTED AN IRREGULAR MARRIAGE—PURCHASE IN NAME OF.

(1872) 14 M. I. A. 433 (440-2) = 17 W. R. 259 = 2 Suth. 543 = 3 Sar. 58.

—The very principle of a resulting trust is, that the property has been purchased with money belonging to another, with an implied trust that it should belong to that other person to whom the money also belonged. But if it was the intention of the person to whom the money belonged that there should be no such trust, then, of course, no such implied trust could arise, because it is only a trust by implication, and the presumption would then be met by the facts (437-8). (*Sir Montague Smith*.) **MUSSUMAT AMEERO-ONNISSA KHANUM v. MUSSUMAT ASHRUFOONNISSA.**

(1872) 14 M. I. A. 433 = 17 W. R. 259 = 2 Suth. 543 = 3 Sar. 58.

—Hindu—First wife—Transfer to, on occasion of his second marriage—Object of, to prevent issue of second wife from claiming shares in property. See HINDU LAW—HUSBAND—WIFE—FIRST WIFE—TRANSFER TO, ON OCCASION OF HIS SECOND MARRIAGE.

(1887) 15 I. A. 29 (35) = 10 A. 197.

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Gift or—(Contd.)**

—Mahomedan father—Son—Gift to—Object of, to give him more than would go to him by succession *ab intestato*. See MAHOMEDAN LAW—GIFT—FATHER—SON—GIFT TO—BENAMI OR NOT—OBJECT OF GIFT, ETC.

(1867) 11 M. I. A. 517 (546).

—Mahomedan father—Son—Purchase in name of—Object of, to prevent daughters from succeeding to property. See MAHOMEDAN LAW—FATHER—SON—PURCHASE IN NAME OF—BENAMI OR NOT—OBJECT OF PURCHASE, ETC.

(1870) 13 M. I. A. 395 (401-2).

—Mahomedan mother—Daughter—Purchase in name of—Object of, to disinherit son. See MAHOMEDAN LAW—MOTHER—DAUGHTER—PURCHASE IN NAME OF.

(1906) 33 I. A. 86 = 33 C. 773 (784-5).

—Mahomedan mother—Daughter—Sale deed in favour of—Object of, to disinherit son. See MAHOMEDAN LAW—MOTHER—DAUGHTER—SALE DEED IN FAVOUR OF, WITH IMAGINARY CONSIDERATION.

(1906) 33 I. A. 86 = 33 C. 773 (784-5).

—Reservation of life interest by person supplying purchase-money—Effect.

If the real truth of the facts is this, that though these properties were purchased with the money of A, yet, nevertheless, if she purchased them with the express intention at the time that, after her death, they should go to B, that would not be a purchase benami within the meaning of the issue, that would not be a purchase on the terms that the property was to be absolutely hers (A's), but would be a purchase with the intention of benefiting the person in whose name the purchase was made; and it would make no difference in point of law, whether she did or did not reserve a life-interest and control over the disposition of the proceeds of the property during her life (308-9). **RAJA CHANDRANATH ROY v. RAMJAI MAZUMDAR.** (1870) 6 B. L. R. 303 = 15 W. R. 7 = 2 Sar. 613.

Gift in return for services.

—Plea of—Criterion in case of.

In many—in most—cases of alleged benami the payment of the purchase-money is a very important fact. But it is not the only criterion. Where defendant admits that the purchase in his name was made with plaintiff's funds but the property purchased was intended to be a gift in return for his services to plaintiff and his father, a much more important fact is the actual possession or receipt of the rents of the property.

Relying upon defendant's possession for nine and a half years without accounting to plaintiff for the profits and upon the fact that he had rendered some valuable services as alleged by him, their Lordships upheld his case of gift. (*Sir Richard Couch*.) **PANDIT RAM NARAIN v. MAULVI MUHAMMAD HADI.**

(1898) 26 I. A. 38 = 26 C. 227 = 3 C. W. N. 113 = 7 Sar. 425.

Hindu—Mahomedan mistress.

—Purchase in name of—Benami or gift.

Held, upon the facts, that a purchase of property by a Hindu in the name of his Mahomedan mistress was a benami transaction (256).

Their Lordships find no ground on which to treat a purchase by the talukdar of such a property as this bungalow in the name of his Mahomedan mistress in a manner differing from that on which a similar purchase by a Hindu in the name of a complete stranger would be treated, nor is there any ground for asserting that the probabilities of the case are in favour of an intention by the taluqdar to benefit his mistress; the exact contrary appears to their

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Hindu—Mahomedan mistress—(Contd.)**

Lordships to be the case (206). (*Sir George Farwell.*)
BILAS KUNWAR v. DESRAJ RANJIT SINGH.

(1915) 42 I. A. 202 = 37 A. 557 (565-6) =

17 Bom. L. R. 1006 = 22 C. L. J. 516 =

13 A. L. J. 991 = (1915) M. W. N. 757 =

19 C. W. N. 1207 = 18 M. L. T. 248 = 2 L. W. 830 =

30 I. C. 299 = 29 M. L. J. 335.

Hindu Law—Joint Family.

——Female member of—Purchase in name of, as guardian of minor son (a co-parcener)—Benami for her daughter—Plea by her of—Proof of—Onus. *See HINDU LAW—JOINT FAMILY—FEMALE MEMBER OF—PURCHASE IN NAME OF, ETC.* (1917) 32 M. L. J. 468 (469).

——Member of—Endowment deed executed by—Benami or not—Evidence. *See HINDU LAW—JOINT FAMILY—MEMBER OF—ENDOWMENT DEED EXECUTED BY.*

(1890) 17 I. A. 110 (116-7) = 18 C. 10 (18).

——Partition—Allotment of shares at—Benami nature of—Proof of—Onus. *See HINDU LAW—JOINT FAMILY—PARTITION—ALLOTMENT OF SHARES AT—BENAMI NATURE OF.* (1922) 43 M. L. J. 104.

Hindu Law—Religious Endowment.

——Idol—Purchase in name of one's own—6 M. I. A.—Principle of—Applicability. *See HINDU LAW—RELIGIOUS ENDOWMENT—IDOL—PURCHASE IN NAME OF ONE'S OWN.* (1873) 20 W. R. 95.

——Shebait—Debutter property—Purchase of, in name of son—Benami nature of. *See HINDU LAW—RELIGIOUS ENDOWMENT—SHEBAIT—DEBUTTER PROPERTY—PURCHASE OF, IN NAME OF SON.*

(1921) 48 I. A. 258 (266) = 48 C. 1019 (1028-9).

Husband—Wife.

——Benami purchase in names of, and of son—Common in India. *See BENAMI—SON AND WIFE.*

(1869) 13 M. I. A. 232 (246).

——English parties domiciled in India—Wife—Purchase by husband in name of. *See BENAMI—ENGLISH PARTIES DOMICILED IN INDIA.* (1920) 47 I. A. 275 (284, 289) = 48 C. 260 (270).

——Hindu husband—Bank deposit of money of, in name of wife, or in joint names of himself and his wife—Benami or not. *See HINDU LAW—HUSBAND—BANK DEPOSIT OF MONEY OF, ETC.* (1928) 55 I. A. 235 = 55 C. 944.

——Hindu husband—First wife—Transfer to, on occasion of his second marriage—Object of, to prevent issue of second wife from claiming shares in property—Transaction benami or gift. *See HINDU LAW—HUSBAND—WIFE—FIRST WIFE—TRANSFER TO, ON OCCASION OF HIS SECOND MARRIAGE.* (1887) 15 I. A. 29 (35) = 10 A. 197.

——Hindu wife—Execution sale—Purchase at—Benami for husband (judgment-debtor) or not. *See BENAMI—EVIDENCE OF—EXECUTION SALE.*

(1886) 13 I. A. 70 = 13 C. 181.

——Hindu wife—Purchase in name of—Benami for husband or not. *See HINDU LAW—HUSBAND—WIFE—PURCHASE IN NAME OF.*

——Mahomedan husband—Benamidar for wife—Plea by latter of—Presumption—Onus of proof—Ostensible ownership with husband. *See MAHOMEDAN LAW—HUSBAND—BENAMIDAR FOR WIFE—PLEA BY LATTER OF.*

(1867) 11 M. I. A. 213 (219-20).

——Mahomedan husband—Estate held by third party as benamidar for—Transfer to first wife of, on occasion of his second marriage—Benami or gift. *See MAHOMEDAN LAW—HUSBAND—ESTATE HELD BY ANOTHER PERSON AS BENAMIDAR FOR.*

(1893) 20 I. A. 38 (48-9) = 20 C. 560 (573).

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Husband—Wife—(Contd.)**

——Mahomedan wife—Purchase in name of—Benami for husband or not—Mortgage deed in his favour—Sale deed in wife's name in discharge of. *See MAHOMEDAN LAW—HUSBAND—WIFE—PURCHASE IN NAME OF—BENAMI FOR HUSBAND OR NOT—MORTGAGE DEED IN HIS FAVOUR.* (1897) 25 I. A. 15 (19) = 25 C. 473 (476-7).

——Purchase in name of—Advancement—Presumption. *See BENAMI—ADVANCEMENT.*

——Purchase in name of, and of son jointly—Presumption. *See MAHOMEDAN LAW—SON AND WIFE—PURCHASE IN NAMES OF.* (1869) 13 M. I. A. 232 (247).

Intention to benefit transferee or person in whose name property is put.

——Nature of transaction in case of—Gift not benami. *See BENAMI—GIFT OR.*

Issue in case of.

——Form proper of—Benami purchase—Plea of—Suit based upon—Denial by defendant. *See PRACTICE—PLEADINGS—CONSTRUCTION—CONFESSION AND AVOIDANCE.* (1870) 6 B. L. R. 303 (307-8).

Judgment-debtor—Transfer by.

——Benami and fraudulent nature of—Proof of. *See C. P. C. OF 1908, OR. 21, R. 63—DECREE-HOLDER—JUDGMENT-DEBTOR.*

(1920) 25 C. W. N. 409 (413-4).

Laches in instituting proceedings raising question of.**Effect.**

In a case in which the question was, whether the purchase of a Putnee Talook made by J was a benami transaction—that is, whether it was bought with the money of and in trust for H, the husband of the appellant, *held*, that the fact that the appellant instituted the suit only after the lapse of nearly 10 years, and after the deaths of persons, who could have spoken positively to the truth of the case, and whose evidence was of the greatest value in the determination of it was a very important circumstance against the claim of the appellant (476). (*Sir John Romilly.*) *MUSSUMAT KRIPOMOYE DEBIA v. GERISCHUNDER LAHOREE.*

(1861) 8 M. I. A. 467 = 2 W. R. 1 = 1 Suth. 448 = 1 Sar. 805.

——The suit was brought to recover possession of a talook, which had been purchased at a revenue sale by H in his own name in 1848. The suit was not commenced till 16—2—1859, nearly 11 years after the purchase. The suit was brought on the alleged ground that the moneys with which the purchase was made were not the moneys of H himself, but of a lady named B, with whom he was living as her husband. Admittedly the transaction was not a *benami* transaction. The case for the plaintiff was that the money, although it was the money of B, belonged in fact to an Imambarah, of which she was the owner, as a sort of lay owner, and that there was a resulting trust in favour of B, in consequence of the money with which the estate was purchased having been so provided. All the parties who knew exactly what the transaction was and who could have explained it were dead.

Held, that, when the suit was brought to set aside a purchase which was made eleven years before, which remained unimpeached from the time when it was made until the institution of the suit, every court would be bound to look with very great jealousy at the evidence which was brought forward in order to support such a case (440). (*Sir Montague E. Smith.*) *MUSSUMAT AMEEROONNISSA KHANUM v. MUSSUMAT ASHRUFOONNISSA.*

(1872) 14 M. I. A. 433 = 17 W. R. 259 = 2 Suth. 543 = 3 Sar. 58.

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Laches in instituting proceedings raising question of—(Contd.)**

—Though benami transactions are very familiar in Indian practice, and even a slight quantity of evidence to show that a transaction was a sham transaction will suffice for the purpose, yet such a transfer cannot be considered as nothing, and the person who impugns its apparent character must show something or other to establish that it is a benami or sham transaction. And the fact that the suit to declare the benami character of a transaction is brought after years of possession, and when the principal parties to the transaction challenged are dead, is a circumstance not without weight in such cases, and it involves a certain addition to the onus vesting upon the person who asserts that the transaction is benami. (*Lord Shaw.*) **HAKIM MOULVI MUHAMMAD MAHBUB ALI KHAN v. BHARAT.**

(1918) 23 C. W. N. 321 (326) =
(1919) M. W. N. 507 = 53 I. C. 64.

Legality of.

—Court's duty to recognise transaction and give effect to it.

The Legislature has not, by any general measure, declared benami transactions to be illegal; and, therefore, they must still be recognised, and effect given to them by the courts, except so far as positive enactment stands in the way, and directs a contrary course (522). (*Sir Montague E. Smith.*) **MUSSUMAT BUHUNS KOWUR v. LALLA BUHOOREE LALL.**

(1872) 14 M. I. A. 496 = 18 W. R. 157 =
10 B. L. R. 159 = 2 Suth. 575 = 3 Sar. 69.

—The system of acquiring and holding property and even of carrying on business in names other than those of the real owners, usually called the benami system, is and has been a common practice in the country (India). There is nothing inherently wrong in it, and it accords, within its legitimate scope, with the ideas and habits of the people. "It" (a benami dealing) "is quite unobjectionable and has a curious resemblance to the doctrine of our English law that the trust of the legal estate results to the man who pays the purchase-money, and this again follows the analogy of our common law that where a feoffment is made without consideration the use results to the feoffor." So long, therefore, as a benami transaction does not contravene the provisions of the law the Courts are bound to give it effect (9). (*Mr. Ameer Ali.*) **GUR NARAYAN v. SHEO LAL SINGH.**

(1918) 46 I. A. 1 = 46 C. 566 (574-5) =
17 A. L. J. 66 = 9 L. W. 335 = 23 C. W. N. 531 =
12 Bur. L. T. 122 = 49 I. C. 1 =
36 M. L. J. 68.

Mahomedan—Son and wife.

—Purchase in names of—Benami or not—Presumption. See **MAHOMEDAN LAW—SON AND WIFE—PURCHASE IN NAMES OF.**

(1869) 13 M. I. A. 232 (247).

Mahomedan mother—Daughter.

—Purchase in name of—Benami or gift—Object of purchase to disinherit son. See **MAHOMEDAN LAW—MOTHER—DAUGHTER—PURCHASE IN NAME OF.**

(1906) 33 I. A. 86 = 33 C. 773 (784-5).

—Sale-deed in favour of, with imaginary consideration—Object of, to disinherit son—Gift really intended. See **MAHOMEDAN LAW—MOTHER—DAUGHTER—SALE DEED IN FAVOUR OF, WITH IMAGINARY CONSIDERATION.**

(1906) 33 I. A. 86 = 33 C. 773 (784-5).

Mahomedan uncle—Nephew.

—Conveyance for value in favour of—Deed of—Benami—Evidence. See **MAHOMEDAN LAW—NEPHEW—CONVEYANCE FOR VALUE IN FAVOUR OF.**

(1906) 33 I. A. 68 = 28 A. 439 (453).

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Mahomedan woman—Person with whom she had contracted an irregular marriage.**

—Purchase of property in name of—Benami or gift.

A Mahomedan married woman, who had separated from her husband, contracted an irregular marriage with V, and co-habited with him for many years. During the time V so co-habited with the woman, he purchased an estate in his name, a portion of the purchase-money being supplied by the woman.

The Principal Sudder Ameen found that, though some of the money used for the purchase of the estate was supplied by the woman, she intended to make a gift of the same to V with whom she had been living for years, and that V was the real owner of the property purchased.

Their Lordships affirmed the decision of the Principal Sudder Ameen (440-2). (*Sir Montague E. Smith.*) **MT. AMEEROONNISSA KHANUM v. MT. ASHRUFOONNISSA.**

(1871) 14 M. I. A. 433 = 17 W. R. 259 =
2 Suth. 543 = 3 Sar. 58.

Mortgage.

—Benami or not. See **MORTGAGE—BENAMI TRANSACTION OR NOT.**

Mother-in-law—Son-in-law.

—Gift to.

Held, overruling the decision of the High Court, that a *hiba* or a deed of gift executed by a Mahomedan lady in favour of her son-in-law was only a benami transaction and that the ostensible donee took no interest in the properties purported to be conveyed by the instrument.

In coming to the above conclusion, their Lordships relied upon the following circumstances, amongst others:—

(1) The deed gave away the whole of the donor's property, thereby leaving her without means, and disinheriting her son and daughter too. There was no direct evidence to explain why such a gift should be made, while there was some evidence to show that it was a benami transaction.

(2) There was no change in the treatment of the property in pursuance of the deed.

(3) On the death of the alleged donee, none of the persons, who would be entitled to the property if the deed of gift were valid, made any claim to the same (238-9). (*Lord Hobhouse.*) **NIRMAL CHUNDER BONNERJEE v. MAHOMED SIDDICK.**

(1898) 25 I. A. 225 = 26 C. 11 (27-8) = 7 Sar. 383.

—Transfer in favour of.

Held, on a consideration of the evidence reversing the Court below, that two deeds of transfer executed by a Mahomedan lady in favour of the husband of her only daughter were real transfers and were not mere benami transactions (136). (*Lord Hobhouse.*) **UMAN PARSHAD v. GANDHARP SINGH.**

(1887) 14 I. A. 127 = 15 C. 20 (31) =
5 Sar. 71 = R. & J.'s No. 98.

Nature of.

—A benami conveyance is not intended to be an operative instrument. Where a transaction is once made out to be a mere benami it is evident that the benamidar absolutely disappears from the title. His name is simply an *alias* for that of the person beneficially interested. (*Lord Atkinson.*) **PETHEPPERUMAL CHETTI v. MUNIANDI SERVAL.**

(1908) 35 I. A. 98 (102) = 35 C. 551 (558) =
18 M. L. J. 277 = 4 M. L. T. 12 = 7 C. L. J. 528 =
12 C. W. N. 562 = 10 Bom. L. R. 590 = 5 A. L. J. 290 =
14 Bur. L. R. 108 = 4 L. B. R. 266.

—Real owner's heirs—Acts or omissions of, after his death—Effect of.

Where property was purchased by a person benami in the name of his mistress, their Lordships, in the view they took of the case, observed that it was unnecessary to consi-

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Nature of—(Contd.)**

der whether any acts or omissions by any of the parties after the death of the real owner could affect the nature of the transaction as it stood at his death (205). (*Sir George Farwell.*) **BILAS KUNWAR v. DESRAJ RANJIT SINGH.**

(1915) 42 I. A. 202 = 37 A. 557 (565) =
17 Bom. L.R. 1006 = 22 C.L.J. 516 =
13 A. L. J. 991 = 1915 M. W. N. 757 =
19 C. W. N. 1207 = 18 M. L. T. 248 =
30 I. C. 299 = 2 L. W. 830 = 29 M. L. J. 335.

Object for putting property in name of a person.

—Existence of—Nature of transaction in case of—Gift not benami. See **BENAMI—GIFT OR.**

Onus of Proof of.

—See **BENAMI—PRESUMPTION—ONUS OF PROOF.**

Ostensible owner—Creditors of.

—Plea of benami against.

In a case in which creditors seek to establish their claim against property of which their debtor was allowed for many years to have, at least, the ostensible ownership, and another person objects to their claim on the ground that the debtor was only his benamidar in respect of the property in question, it is the duty of a Court of Justice to put the objector to the rights of creditors founded on apparent ownership to strict proof of his objection; he must recover, if at all, on the case that he asserts (402-3). (*Sir Joseph Napier.*) **NAWAB AZIMUT ALI KHAN v. HURDWAREE MULL.**

(1870) 13 M. I. A. 395 =
14 W. R. P. C. 114 = 5 B. L. R. P.C. 578 =
2 Suth. 343 = 2 Sar. 571.

Practice of.

—Benami purchases are very common in India, and are due to many considerations which may not find their counterpart here (England), yet none the less they can easily be made a cloak and cover for improper and even dishonest transactions. (*Lord Buckmaster.*) **PEARY MOHAN MUKERJEE v. MANOHAR MUKERJEE.**

(1921) 48 I. A. 258 (266) = 48 C. 1019 (1028-9) =
23 Bom. L. R. 913 = 14 L. W. 104 =
(1921) M. W. N. 554 = 19 A. L. J. 773 = 26 C. W. N. 133 =
2 P. L. T. 725 = 62 I. C. 76 = 30 M. L. T. 24 =
(1922) P. C. 235 = 41 M. L. J. 68.

—Children—Benami purchases in names of—Common in India. See **BENAMI—CHILDREN.**

(1854) 6 M. I. A. 53 (79).

—Common in India.

The habit of holding land *benami* is inveterate in India (602). (*Sir James W. Colville.*) **MOONSHEE BUZLOOR RAHEEM v. SHUMS-ON-NISSA BEGAM.**

(1867) 11 M. I. A. 551 = 8 W. R. P. C. 3 =
2 Suth. 59 = 2 Sar. 259.

—It is well-known that *benamee* purchases are common in India, and that effect is given to them by the Courts according to the real intention of the parties (522). (*Sir Montague E. Smith.*) **MUSSUMAT BUHUNS KOWUR v. LALLA BUHOOREE LALL.**

(1872) 14 M. I. A. 496 =
18 W. R. 157 = 10 B. L. R. 159 =
2 Suth. 575 = 3 Sar. 69.

—It is familiar to us all that the system of putting property benami is so extremely common in India that the mere fact of a deed being executed in proper form, and apparently effecting a valid transfer to another, is not as good evidence of a real transfer as it would be in other countries (129). (*Lord Hobhouse.*) **UMAN PARSHAD v. GANDHARP SINGH.**

(1887) 14 I. A. 127 =
15 C. 20 (23) = 5 Sar. 71 = R. & J.'s No. 98.

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Practice of—(Contd.)**

—Benami purchases are very common in India. (*Lord Buckmaster.*) **PEARY MOHAN MUKERJI v. MANOHAR MUKERJI.**

(1921) 48 I. A. 258 (266) =
48 C. 1019 (1028-9) = 23 Bom. L. R. 913 =
14 L. W. 104 = (1921) M. W. N. 554 = 19 A. L. J. 773 =
26 C. W. N. 133 = 2 Pat. L. T. 725 = 62 I. C. 76 =
30 M. L. T. 24 = (1922) P. C. 235 = 41 M. L. J. 68.

—Mahomedans—Practice among.

It is perfectly clear that in so far as the practice of holding lands and buying lands in the name of another exists, that practice exists in India as much among Mahomedans as among Hindoos (246). (*Sir James W. Colville.*) **MOULVIE SAYYUD UZHUR ALI v. MUSSUMAT BEBEE ULTAI FATIMA.**

(1869) 13 M. I. A. 232 =
13 W. R. 1 = 4 B. L. R. 1 = 2 Suth. 279 = 2 Sar. 522.

—Presumption of benami from—Propriety.

In consequence of the tendency amongst natives to disguise their ownership under benami transfers of property, a natural suspicion arises often that such is the design when the transaction is really fair and open, and the apparent and real title are entirely consistent (544-5). (*Sir Edward V. Williams.*) **NAWAB UMJAD ALLY KHAN v. MUSSUMAT MOHUNDEE BEGUM.**

(1867) 11 M. I. A. 517 =
10 W. R. P. C. 25 = 2 Suth. 98 = 2 Sar. 315 =
R. & J.'s No. 7 (Oudh).

—The habit of holding land *benami* is inveterate in India; but that does not justify the Courts in making every presumption against apparent ownership (602). (*Sir James W. Colville.*) **MOONSHEE BUZLOOR RUHEEM v. SHUMSOONISSA BEGUM.**

(1867) 11 M. I. A. 551 =
8 W. R. P. C. 3 = 2 Suth. 59 = 2 Sar. 259.

—Son and wife—Benami purchases in names of—Common in India. See **BENAMI—SON AND WIFE.**

(1869) 13 M. I. A. 232 (246).

Presumption—Onus of Proof.

—Boy of ten or eleven—Real owner alleged only a—Presumption in favour of benami in case of.

In a case in which the question was, whether the purchase of a Putnee Talook made by J was a benami transaction—that is, whether it was bought with the money of and in trust for H, the deceased husband of the appellant, held, that the circumstance that H was, at the time of the transaction, a boy of ten or eleven years of age, created grave suspicion whether H was, as alleged, the real purchaser (471-2).

In what way a boy of ten or eleven years of age could be possessed of money sufficient for the purchase of the Putnee Talook, the evidence fails to explain (472). (*Sir John Romilly.*) **MUSSUMAT KRIPOMOYE DEBIA v. GERISCHUNDER LAHOREE.**

(1861) 8 M. I. A. 467 =
2 W. R. 1 = 1 Suth. 448 = 1 Sar. 805.

—Burmese Buddhist Law—Brother deceased—Benamidar for survivor—Claim by latter to property in deceased's name on foot of. See **BURMESE BUDDHIST LAW—BROTHER DECEASED.**

(1926) 4 R. 518.

—Certificated purchaser and registered owner alleged to be benamidar.

The party who alleges that the certificated purchaser and registered owner is a benamidar, must give substantial proof of that allegation (193). (*Sir Arthur Hobhouse.*) **BAIJNATH SAHAI v. RUGHONATH PERSHAD SINGH.**

(1882) 12 C. L. R. 186 = 4 Sar. 372 = Bald. 437.

—Deed executed in proper form and apparently effecting a valid transfer to another.

Though the system of putting property benami is extremely common in India, still a deed executed in proper form, and apparently effecting a valid transfer to another,

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Presumption—Onus of Proof—(Contd.)**

cannot be considered as nothing, and the person who impugns its apparent character must show something or other to establish that it is a benami or sham transaction (129). (*Lord Hobhouse.*) **UMAN PARSHAD v. GANDHARP SINGH.** (1887) 14 I. A. 127 = 15 C. 20 (23) = 5 Sar. 71 = R. & J.'s No. 98.

—Deeds forming part of same transaction—Proof of benami in regard to one of—Effect. *See* BENAMI—DEEDS FORMING PART OF SAME TRANSACTION.

(1890) 17 C. 937.

—Execution sale—Purchase at—Benami for judgment-debtor—Plea of—Suit by another creditor of same debtor. *See* EXECUTION SALE—PURCHASE AT—BENAMI NATURE OF—JUDGMENT-DEBTOR—PURCHASE BENAMI FOR—ONUS OF PROOF OF.

(1866) 11 M. I. A. 28 (43, 47).

—Hindu Law—Joint family—Female member of—Purchase in name of, as guardian of her minor son (a coparcener)—Benami for her daughter—Plea of. *See* HINDU LAW—JOINT FAMILY—FEMALE MEMBER OF—PURCHASE IN NAME OF, ETC.

(1917) 32 M. L. J. 468 (469).

—Hindu Law—Joint family—Partition—Allotment of shares at—Benami plea in regard to. *See* HINDU LAW—JOINT FAMILY—PARTITION—ALLOTMENT OF SHARES AT—BENAMI NATURE OF.

(1922) 43 M. L. J. 104.

—Laches in instituting proceedings raising question of—Effect. *See* BENAMI—LACHES IN INSTITUTING PROCEEDINGS RAISING QUESTION OF.

—Mahomedan husband—Benamidar for wife—Plea by her of. *See* MAHOMEDAN LAW—HUSBAND—BENAMIDAR FOR WIFE.

(1867) 11 M. I. A. 213 (219-20).

—Mahomedan wife—Purchase in name of—Benami for husband—Plea by him of. *See* MAHOMEDAN LAW—HUSBAND—WIFE—PURCHASE IN NAME OF—BENAMI FOR HUSBAND—PLEA BY HIM OF.

(1897) 25 I. A. 15 (18) = 25 C. 473 (476).

—Mutation of names—Absence of—Effect. *See* BENAMI—EVIDENCE—MUTATION OF NAMES—ABSENCE OF.

(1887) 14 I. A. 127 (131) = 15 C. 20 (25).

—Possession proceedings—Decision against alleged benamidar in—Suit by him for possession against real owner—Plea in.

The plaintiff-appellant was the registered owner of certain property. The question was whether he was also the beneficial owner or only benamidar for the respondent.

It appeared that contests arose between the partisans of the respondent and those of the appellant, and that the Magistrate of the district was called upon to quiet the possession under the Criminal Procedure Code. He decided that the respondent was in possession; and he ordered that such possession should be maintained, and that both parties should enter into recognizances to keep the peace. Thereupon the appellant instituted the suit out of which the appeal arose for recovery of the property.

Held, that, though the respondent, who alleged that the certificated purchaser and registered owner was a benamidar, must give substantial proof of that allegation, yet it was for the appellant, who had been found by a tribunal of competent jurisdiction to be out of possession, to prove that either that finding was wrong, or, if right, the possession of the respondent was a wrongful one, and should be displaced in the appellant's favour (193). (*Sir Arthur Hobhouse.*) **BAIJNATH SAHAY v. RUGHONATH PERSHAD SINGH.** (1882) 12 C. L. R. 186 = 4 Sar. 372 =

Bald. 437.

BENAMI (OR BENAMI TRANSACTION)—(Contd.)**Presumption—Onus of Proof—(Contd.)**

—Practice common of benami—Presumption of benami from—Propriety. *See* BENAMI—PRACTICE OF—PRESUMPTION OF BENAMI FROM.

—Sale-deed by alleged benamidar's sons in favour of alleged real owner—Recital in, that property belonged to benamidar—Effect—Sale-deed not representing real transaction.

The plaintiffs sued to recover certain property from the appellant, their divided uncle. The suit property had, some years before the death of the plaintiffs' father, been conveyed to him by certain third persons, and the same had been held in the name of the plaintiffs' father down to his death, and transactions in connection with the property were in the same name. After his death the patta was transferred to his sons, the plaintiffs. Some years after his death the 1st plaintiff alone, but describing himself as the guardian of his younger brother, the 2nd plaintiff, a minor, executed a deed by which he purported to sell to the appellant for an agreed price the suit property, describing it as having been enjoyed by their father and after his death belonging to his sons, the plaintiffs. It was admitted that there was no real sale on that occasion, though the object of the parties in entering into that transaction was not clear. The appellant resisted the suit on the ground that plaintiffs' father was only a benamidar for him and that he was the real owner.

Held, concurring with the High Court, that the deed of sale executed by the plaintiffs in favour of the appellant contained an important admission of the title of the plaintiff's father and of the plaintiffs.

Held, further, that what it was really incumbent upon the appellant to do, in order to displace the apparent title, and what he was peculiarly in a position to do if it could be done, was to show by satisfactory evidence that the funds out of which the suit property was purchased and developed were his own funds and that the evidence adduced by him fell far short of doing anything of the kind. (*Sir Arthur Wilson.*) **PULIVAMPATTI NARANIER v. KUPPIER.**

(1904) 9 C. W. N. 89.

—Similar transaction—Proof of benami in case of—Presumption from. *See* BENAMI—SIMILAR TRANSACTION.

(1882) 12 C. L. R. 186 (202).

—Son and wife—Purchase in names of. *See* MAHOMEDAN LAW—SON AND WIFE—PURCHASE IN NAMES OF.

(1869) 13 M. I. A. 232 (247).

—Stranger or distant relative—Purchase in name of—Plea in regard to.

If the person in whose name the purchase was effected had been a stranger in blood, or only a distant relative, no question could have arisen; he would have been *prima facie* a trustee, and if he desired to contend that the *prima facie* character of the transaction was not its real character, the burthen would have rested on him (75). (*Lord Justice Knight Bruce.*) **GOPEEKRIST GOSAIN v. GUNGAPERSAUD GOSAIN.**

(1854) 6 M. I. A. 53 = 2 Suth. 13 = 4 W. R. 46 = 1 Sar. 493.

Purchase benami—Suit based upon.

—Issue in case of—Form proper of—Denial by defendant. *See* PRACTICE—PLEADINGS—CONSTRUCTION—CONFESSION AND AVOIDANCE.

(1870) 6 B. L. R. 303 (307-8).

Question of.

—Decision on. *See* BENAMI—DECISION ON QUESTION OF.

Revenue sale—Benami purchase at.

—Plea of—Maintainability. *See* SALE OF LAND FOR REVENUE ARREARS ACT I OF 1845, Ss. 20-21.

(1870) 13 M. I. A. 419 (423).

BENAMI (OR BENAMI TRANSACTION)—(Concl'd.)**Same transaction—Deeds forming part of.**

—Proof of one being benami—Effect of, on other deeds.
See BENAMI—DEEDS FORMING PART OF ONE TRANSACTION.
 (1890) 17 C. 937.

Similar transaction—Proof of benami in case of.

—Presumption from.
 Once having established a benami transaction for one share, it becomes a much easier process to conclude that there was a similar transaction for another (202). (*Sir Arthur Hobhouse.*) **BAIJNATH SAHAY v. RUGHONATH PERSHAD SINGH.**
 (1882) 12 C. L. R. 186 = 4 Sar. 372 = Bald. 437.

Son and wife.

—Benami purchase in names of—Common in India.
 The defendant alleges that he purchased the suit property from his own funds, *benami*, in the names of his wife and son, that he is the real beneficial owner thereof, and that every act of ostensible ownership which was done was consistent with that state of the title. It is not a novel thing in India that that state of things should exist. It has been repeatedly brought before this Committee (246). (*Sir James W. Colville.*) **MOULVIE SAYYUD UZHUR ALI v. MUSSUMAT BEBEE ULTA F. FATIMA.**
 (1869) 13 M. I. A. 232 = 13 W. R. 1 = 4 B. L. R. 1 = 2 Suth. 279 = 2 Sar. 522.

Trial Judges' decision on question of.

—Reversal by High Court of—P. C. appeal—Points to be considered in case of. *See* P. C.—APPEAL—BENAMI—TRIAL JUDGES' DECISION ON QUESTION OF.
 (1917) 32 M. L. J. 468 (476).

BENGAL ACTS.

AFFRAYS ACT IV OF 1840.
 ALLUVIAL LAND SETTLEMENT ACT XXXI OF 1858.
 ALLUVION AND DILUVION ACT IX OF 1847.
 CESS ACT IX OF 1880.
 COURT OF WARDS ACT IX OF 1879.
 ESTATES PARTITION ACT V OF 1897.
 LANDLORD AND TENANT PROCEDURE ACT VIII OF 1869.
 LAND REGISTRATION ACT VII OF 1876.
 LAND REVENUE SALES ACT (OR REVENUE SALE LAW ACT) XI OF 1859.
 LAND REVENUE SALES ACT VII OF 1868.
 LIMITATION ACT XIII OF 1848.
 MINORS' ACT XL OF 1858.
 MUNICIPAL ACT III OF 1884.
 NORTH-WESTERN PROVINCES AND ASSAM CIVIL COURTS ACT XII OF 1887.
 PUBLIC DEMANDS RECOVERY ACT VII OF 1880.
 RENT ACT X OF 1859.
 RENT ACT VIII OF 1869.
 RENT RECOVERY (UNDER-TENURES) ACT VIII OF 1865.
 RENT SETTLEMENT ACT VIII OF 1879.
 REVENUE SALE LAW ACT XI OF 1859.
 TENANCY ACT VIII OF 1869.
 TENANCY ACT VIII OF 1885.
 VILLAGE CHAUKIDARI ACT VI OF 1870.

Affrays Act IV of 1840.

—Judgment dismissing petition under—Evidentiary value of.

A judgment dismissing a petition to a Magistrate under Act IV of 1840, praying for possession of part of the lands in question, as against the defendant, is no proof as to any holding, but is only proof that a charge of dispossession was made against the defendant, and dismissed (32). (*Sir Richard Couch.*) **CHUNDRABATI KOERI v. HARRINGTON.**
 (1891) 18 I. A. 27 = 18 C. 349 (355) = 5 Sar. 481.

BENGAL ACTS—(Contd.)**Affrays Act IV of 1840—(Contd.)**

—Order under—Possession for 3 years under—Title by prescription if acquired by.

Possession for three years under an order of a Magistrate in a proceeding under Act IV of 1840 does not create a title by prescription (81). (*Sir Barnes Peacock.*) **WISE v. AMEERUNNISSA KHATOON.**
 (1879) 7 I. A. 73 = 6 C. L. R. 249 = 4 Sar. 127 = 3 Suth. 730 = Bald. 350.

—Possession—Decision as to—Effect.

The decision of the Fouzlay Courts, as to the point of possession, was final (155). (*Lord Chelmsford.*) **RAJAH BURDACANT ROY v. BABOO CHUNDER COOMAR ROY.**
 (1868) 12 M. I. A. 145 = 11 W. R. 1 = 2 B. L. R. 1 = 2 Suth. 169 = 2 Sar. 402.

—Proceedings under—Scope of—Jurisdiction in.

Act IV of 1840 had nothing whatever to do with title, it merely regarded possession. The Magistrate was not to inquire into title, but merely to ascertain who was in possession *de facto*, and to retain him in possession (81). (*Sir Barnes Peacock.*) **WISE v. AMEERUNNISSA KHATOON.**
 (1879) 7 I. A. 73 = 6 C. L. R. 249 = 4 Sar. 127 = 3 Suth. 730 = Bald. 350.

Alluvial Land Settlement Act XXXI of 1858.

—S. 1—S. 1 of Act XXXI of 1858 empowers the Government either to add the revenue assessed upon the alluvial increment to the jumma of the parent estate and enter into a new engagement with the proprietor for the payment by the latter of the aggregate amount, or to make a separate settlement for the alluvial increment and to make this increment a separate estate. *Held*, that the fact that on previous occasions the Government chose to exercise their right in the manner first described imposed no obligation upon them to exercise their discretion in the same way on a subsequent occasion when a fresh survey was made of all the accretions. (*Lord Sinha.*) **SECRETARY OF STATE FOR INDIA IN COUNCIL v. PARBATI CHARAN SHAHA.**
 (1928) 55 I. A. 289 = 55 C. 1037 = 32 C. W. N. 906 = 110 I. C. 8 = 48 C. L. J. 163 = A. I. R. 1928 P. C. 193.

Alluvion and Diluvion Act IX of 1847.

(N.B.—*See also* UNDER ALLUVION AND DILUVION.)
 APPLICABILITY OF.

—Lands "gained" from sea, etc.—Meaning of. *See* BENGAL ACTS—ALLUVION AND DILUVION ACT IX OF 1847—PURPOSE OF.
 (1889) 17 I. A. 40 (51-2) = 17 C. 590 (602-3).

—Permanently settled estate—Land reformed on site of.

The provisions of Bengal Act IX of 1847 are inapplicable to land reformed on the site of a permanently settled estate, the revenue of which estate has been paid without abatement since the Permanent Settlement (52).

It was not intended by such a provision as this (S. 6 of the Act) to deal with the case of lands in permanent settlement which had become derelict of the sea or a river. They cannot be said to have been "added" to the estate to which they already belonged. Considering the solemn assurance given by the Government to the owners of permanently settled estates that they should not be liable to further assessment in respect thereof, their Lordships find it impossible to hold that it was ever intended by this enactment to subject them to an added assessment in respect of land for which they were already assessed because they had had the misfortune to be practically deprived of it for a time by an incursion of the sea or river. It would be straining the language unnaturally to include such a case as that with which their Lordships are dealing. If, indeed, such legisla-

BENGAL ACTS—(Contd.)**Alluvion and Diluvion Act IX of 1847—(Contd.)****APPLICABILITY OF—(Contd.)**

tion as is contained in the preceding S. 5 had been in force from the outset, so that as soon as land had been washed away from a permanently settled estate there had been a proportionate reduction of the revenue payable to the Government, it would not have been unreasonable to regard the land when again free from water as land "added" to the estate, and to assess it accordingly. It is clear that the Act provides no machinery for making a proportionate abatement where the land was covered with water at the time of the original survey. It is only "when on inspection of the new map" it appears that land has been washed away that there is any legislative authority for making an abatement (51-2). (*Lord Herschell.*) SECRETARY OF STATE FOR INDIA *v.* FAHAMIDUNNISSA BEGUM.

(1889) 17 I. A. 40 = 17 C. 590 (602-3) =
5 Sar. 391.

Permanent Settlement of 1793—Lands included in.

The Act has no application to lands included in the Permanent Settlement of 1793, and the assessment of which lands was then fixed for ever. No new assessment of such lands can be lawfully made (52). (*Lord Lindley.*) MAHARAJA JAGADINDRA NATH ROY BAHADOOR *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL.

(1902) 30 I. A. 44 = 30 C. 291 (300) =
7 C. W. N. 193 = 5 Bom. L. R. 1 = 8 Sar. 412.

ASSESSMENT PROCEEDINGS UNDER.**Diara Survey—What amounts to—Use of prior maps, superimposition of one map upon another and preparation of comparative map—Visiting and surveying of place itself—Sufficiency of.**

The suit was for the cancellation of assessment proceedings under Act IX of 1847. The evidence showed that there were previous maps to go by, and that the alluviated land was visited and surveyed in fact. The survey of 1862-3 and the maps of that date were used. Further information was obtained from the map prepared by Mr. Ellison in the year 1870, an important year in the history of the suit piece of ground, for a controversy had arisen which resulted in litigation under decree of the High Court dated 11-3-1868. A map called the Ellison map was made at the time, and following those proceedings, on 9-4-1870, the respondents' ancestors executed to the Government a doul kabuliyat, stating in detail the revenue to be paid. With those materials, namely, maps of 1862-3 and the map of 1870, the Deputy Collector in charge of the Diara operations and his surveyor proceeded to work. He reduced the district settlement map to a 4-inch scale map, then he superimposed it upon the revenue survey map, he himself prepared a comparative map, then he made comparisons locally "to test if the line was accurately drawn, and to find out where in the locality the line stood."

Held, on an examination of all the facts submitted, that it was quite impossible to affirm that a Diara survey was not made (252-3).

It is true that one map was superimposed upon another, surely a very natural thing to do when land was supposed to have undergone accretion, between two dates, but the land itself was visited and surveyed (252-3). (*Lord Shaw.*) SECRETARY OF STATE FOR INDIA *v.* JATINDRA NATH CHOWDHURY.

(1924) 51 I. A. 241 =
51 C. 802 (814-5) = (1924) M. W. N. 588 =
35 M. L. T. (P. C.) 146 = 29 C. W. N. 1 =
80 I. C. 1023 = A. I. R. 1924 P. C. 175 =
47 M. L. J. 48.

Fundamental irregularity—Meaning of—Invalidity of proceedings on ground of—Suit for declaration of—Onus on plaintiff.**BENGAL ACTS—(Contd.)****Alluvion and Diluvion Act IX of 1847—(Contd.)****ASSESSMENT PROCEEDINGS UNDER—(Contd.)**

In a suit brought in an ordinary court of law for a declaration that the proceedings of the assessing authorities under Act IX of 1847 were invalid because they were tainted by fundamental irregularity, that is to say, by a defiance of or non-compliance with the essentials of the procedure, *held*, that the burden of establishing such essential and fundamental violation of statutory requirements rested upon the person alleging it.

Unless this rule be adhered to it is manifest that the way will be opened to endless objections to procedure, even though these are substantially on questions of fact, and the object of the statute, namely, the assessment of lands, will thereby fail (250). (*Lord Shaw.*) SECRETARY OF STATE FOR INDIA *v.* JATINDRA NATH CHOWDHURY.

(1924) 51 I. A. 241 = 51 C. 802 (812-3) =
(1924) M. W. N. 588 = 35 M. L. T. (P. C.) 146 =
29 C. W. N. 1 = 80 I. C. 1023 = A. I. R. 1924 P. C. 175 =
47 M. L. J. 48.

Invalidity of—Suit for declaration of—Onus on plaintiff in—New Survey Map—Omission to prepare in accordance with Act—Invalidity of proceedings on ground of—Plea of.

In a suit brought in an ordinary court of law for a declaration that the proceedings of the assessing authorities under Act IX of 1847 were invalid on the ground that no new survey map was prepared in such a way as to satisfy the requirements of that Act, *held*, that it lay upon the plaintiffs challenging the assessment proceedings to prove the fundamental illegality of which they complained (250). (*Lord Shaw.*) SECRETARY OF STATE FOR INDIA *v.* JATINDRA NATH CHOWDHURY.

(1924) 51 I. A. 241 =
51 C. 802 (818) = (1924) M. W. N. 588 =
35 M. L. T. (P. C.) 146 = 29 C. W. N. 1 = 80 I. C. 1023 =
A. I. R. 1924 P. C. 175 = 47 M. L. J. 48.

Map separate of alluvial land per se—Omission to prepare—Objection to, to be taken in revenue proceedings—Suit for cancellation of proceedings—Objection in—Maintainability.

The respondents sued for a declaration that certain alluvial lands were within the ambit of a mahal of which they held a settlement from Government and for the cancellation of orders of the Collector, affirmed by the Board of Revenue, assessing certain revenue thereon, under Act IX of 1847. It appeared from the evidence that a Diara was made and that a comparative map was made by superimposing existing revenue survey maps upon one another, the result being tested by a local survey. The respondents urged that a separate map was not made of the alluviated land *per se*; that is to say, the results of the comparative map formed by inscribing the results of superimposition marked upon the maps used in that process, and when marked thus formed a comparative map, were not put upon a separate piece of paper which contained the outline of the alluviated land. That objection was, however, not urged before the Board of Revenue.

Held, that the objection was one which ought to have been taken in the revenue proceedings and before the Board of Revenue, which, if the objection had been taken before it, would at once have ordered the separate sheet to be prepared. (*Lord Shaw.*) SECRETARY OF STATE FOR INDIA *v.* JATINDRA NATH CHOWDHURY.

(1924) 51 I. A. 241 (252-3) = 51 C. 802 (815) =
(1924) M. W. N. 588 = 35 M. L. T. 146 =
80 I. C. 1023 = A. I. R. 1924 P. C. 175 =
47 M. L. J. 48

Objections to—Consideration of, and report upon by Board of Revenue—Desirability of.

BENGAL ACTS—(Contd.)**Alluvion and Diluvion Act IX of 1847—(Contd.)****ASSESSMENT PROCEEDINGS UNDER—(Contd.)**

It is a convenient and proper procedure that in an eminently practical matter, affecting measurements, surveys and maps of localities, with which the assessing officials on the one hand and owners on the other have presumably intimate local knowledge, an objection to the proceedings of the assessing authorities under Act IX of 1847 should be tabled to, and considered and reported upon by, the Board of Revenue (250). (*Lord Shaw.*) SECRETARY OF STATE FOR INDIA *v.* JATINDRA NATH CHOWDHURY.

(1924) 51 I. A. 241 = 51 C. 802 (812) =
(1924) M. W. N. 588 = 35 M. L. T. (P. C.) 146 =
29 C. W. N. 1 = 80 I. C. 1023 = A. I. R. 1924 P. C. 175 =
47 M. L. J. 48.

———*Validity of—Details of investigation upon points of fact—Objection to—To be raised before and dealt with by Board of Revenue.*

In a suit brought in an ordinary Court of Law for a declaration that the proceedings of the assessing authorities under Act IX of 1847 are invalid, it is not sufficient to submit that, upon the documents before the Board of Revenue, doubts arise as to whether this, that, or the other detail of investigation should have been set to rest more clearly in the course of the administrative procedure. If such doubts arise upon points of fact, the Board of Revenue is competent to deal with them and is, further, the proper court before which they should be stated. In order that the doubts should be promptly set at rest, it may have to be on the ground itself. Such is the proper function of an administrative body (250-1). (*Lord Shaw.*) SECRETARY OF STATE FOR INDIA *v.* JATINDRA NATH CHOWDHURY.

(1924) 51 I. A. 241 = 51 C. 802 (813) =
(1924) M. W. N. 588 = 35 M. L. T. (P. C.) 146 =
29 C. W. N. 1 = 80 I. C. 1023 =
A. I. R. 1924 P. C. 175 = 47 M. L. J. 48.

———*Validity of—Maps—Superimposition of—Propriety—Objection to—To be taken before Revenue Court.*

In a suit brought in an ordinary Court of Law for a declaration that the proceedings of the assessing authorities under Act IX of 1847 were invalid, the High Court seemed to taint with illegality or impropriety the operation of superimposition of maps in proceedings under the said Act.

Held, there is nothing wrong with this from the legal point of view, and from the practical point of view the Revenue Court can deal with it (253). (*Lord Shaw.*) SECRETARY OF STATE FOR INDIA *v.* JATINDRA NATH CHOWDHURY.

(1924) 51 I. A. 241 =
51 C. 802 (815-6) = (1924) M. W. N. 588 =
35 M. L. T. (P. C.) 146 = 29 C. W. N. 1 = 80 I. C. 1023 =
A. I. R. 1924 P. C. 175 = 47 M. L. J. 48.

———*Validity of—Objection to—Riddles—Propounding of—Not enough.*

In a suit brought for a declaration that the proceedings of the assessing authorities under Act IX of 1847 were invalid, the question was whether there was or was not a new survey map prepared in such a way as to satisfy the requirements of the Act of 1847. The objection that there was no such survey map itself was not taken before the Board of Revenue in the proceedings under that Act. And, as the result of a long and searching argument, the most that could be said by the plaintiffs was that the point might have been left not entirely cleared up.

Held, that, on principle, and on authority, that was entirely insufficient.

The plaintiffs-appellants have merely propounded a riddle. The Board is of opinion that the observations in the case reported in I. L.R. 44 C. 858 as to the futility of propounding riddles fitly apply also to proceedings in the Board of

BENGAL ACTS—(Contd.)**Alluvion and Diluvion Act IX of 1847—(Contd.)****ASSESSMENT PROCEEDINGS UNDER—(Contd.)**

Revenue, a Board specially charged with the settlement of disputes as to boundaries and changes therein and other matters of fact and procedure which are capable of being most satisfactorily treated with all the advantages of local and special and accumulated experience (255-6). (*Lord Shaw.*) SECRETARY OF STATE FOR INDIA *v.* JATINDRA NATH CHOWDHURY.

(1924) 51 I. A. 241 =
51 C. 802 (818-9) = (1924) M. W. N. 588 =
35 M. L. T. (P. C.) 146 = 29 C. W. N. 1 = 80 I. C. 1023 =
A. I. R. 1924 P. C. 175 = 47 M. L. J. 48.

———*Estate paying revenue directly to Government—What amounts to an.*

The suit villages were part of an estate called Debnathpur bearing towzi No. 4908 of the Backergunj Collectorate owned and possessed by the plaintiffs.

On the 1st of September, 1839, a grant was made by the Government to Debnath Roy, benamidar for the plaintiff's predecessor in title, of a tract of the jungle and forest land then known as Tushkhali, but later as Debnathpur. The grant was an ijara lease for 20 years, and was rent-free.

Debnath Roy, taking advantage of rules recently framed by the Government, obtained a grant on 17-11-1856, of the portion of waste land in the Sunderbans estimated to contain 34,000 bighas. The transaction was evidenced by a pottah and a kabuliyat. The grant was at a progressive rate for a term of 99 years, to take effect from 1st September, 1839, and power was reserved to the Government to make a survey and measurement at any time between the 20th and 30th years from that date to ascertain the area of the land granted and to calculate the stipulated revenue. In the course of a survey of the leased lands directed by the Commissioner of the Sunderbans in 1858, a map was prepared in or about 1863, and it was determined that the grant included an area of only 14,505 bighas, 5 cottahs. That led to a litigation, as the result of which a doul of 9th April, 1870, was executed in favour of the plaintiff's predecessors in title of 33,441 bighas, 17 cottahs, 7 chittacks of land known as Debnathpur for the remaining 68 years of the 98 years' lease. In 1870, Mr. Ellison, in the course of a survey, prepared a map in which the plaintiff's mahal was depicted. The plaintiffs had been paying revenue in accordance with the arrangement, and their mahal had been numbered towz No. 4908.

Held, that the view of the High Court that mahal Debnathpur was not, as Act IX of 1847 required, "an estate paying revenue directly to Government" was obviously erroneous (249). (*Lord Shaw.*) SECRETARY OF STATE FOR INDIA *v.* JATINDRA NATH CHOWDHURY.

(1924) 51 I. A. 241 = 51 C. 802 (811) =
(1924) M. W. N. 588 = 35 M. L. T. 146 (P. C.) =
29 C. W. N. 1 = 80 I. C. 1023 =
A. I. R. 1924 P. C. 175 = 47 M. L. J. 48.

———*Intention and effect of.*

The intention and effect of the Act IX of 1847 was merely to alter the machinery by which lands gained from the sea or rivers by alluvion or dereliction were to be assessed, and not to subject to assessment any lands which would not have been liable thereto under the law in force at the time when the Act was passed. (*Viscount Cave.*) SECRETARY OF STATE FOR INDIA *v.* MAHARAJA OF BURDWAN.

(1921) 48 I. A. 565 (573) = 49 C. 103 (113) =
26 C. W. N. 619 = 4 U. P. L. R. (P. C.) 1 =
35 C. L. J. 92 = (1922) P. C. 6 = 67 I. C. 835 =
42 M. L. J. 61.

INTENTION, EFFECT AND PURPOSE OF.

———*Land not assessable to revenue under law at the time—No intention to assess.*

BENGAL ACTS—(Contd.)**Alluvion and Diluvion Act IX of 1847—(Contd.)****INTENTION, EFFECT AND PURPOSE OF—(Contd.)**

The terms of the Bengal Alluvion and Diluvion Act IX of 1847 make it clear that its intention and effect were merely to alter the machinery by which lands gained from the sea or rivers by alluvion or dereliction were to be assessed, and not to subject to assessment any lands which would not have been liable thereto under the law in force at the time the Act was passed (47).

Its purpose was merely to change the mode of assessment in the case of a class of land already liable to be assessed under existing legislation, *viz.*, land gained by alluvion or dereliction which was not included within the limits of a permanently settled estate. The terms of the 1st section pointed to this and nothing more, and the details of the legislation support the same conclusion (51). (*Lord Herschell.*) **SECRETARY OF STATE FOR INDIA v. SRIMATI FAHAMIDUNNISSA BEGUM.** (1889) 17 I. A. 40 = 17 C. 590 (599, 602) = 5 Sar. 391.

—Interpretation of—Law prior to Act—Consideration of—Necessity.

To a right interpretation of the Bengal Alluvion and Diluvion Act IX of 1847 it is essential to examine carefully the state of the law at that time, and to see what lands were then liable to assessment, and whether the prior legislation throws any light upon the meaning of the words "lands gained from the sea or from rivers by alluvion or dereliction" (47). (*Lord Herschell.*) **SECRETARY OF STATE FOR INDIA v. SRIMATI FAHAMIDUNNISSA BEGUM.**

(1889) 17 I. A. 40 = 17 C. 590 (599) = 5 Sar. 391.

PERMANENT SETTLEMENT OF 1793—LAND WHETHER INCLUDED IN OR NOT.**—Evidence—Survey map subsequent—Value of.**

The question what lands were included in the Permanent Settlement of 1793 may or may not be satisfactorily proved by subsequent survey maps (52). (*Lord Lindley.*) **MAHARAJA JAGADINDRA NATH ROY BAHADOOR v. SECRETARY OF STATE FOR INDIA IN COUNCIL.**

(1902) 30 I. A. 44 = 30 C. 291 (300) = 7 C. W. N. 193 = 5 Bom. L. R. 1 = 8 Sar. 412.

—Evidence—Thak or survey map subsequent—Lands shown on—Not conclusive.

When the question arises whether lands shown on a particular thak or survey map made since 1793 were or were not included in the lands charged with the assessment permanently fixed in 1793, the inquiry is at once enlarged, and it would not be right in point of law to direct the Judge of first instance that he ought in all cases to act on the last thak or survey map, and to treat it as decisive in the absence of evidence to the contrary (53). (*Lord Lindley.*) **MAHARAJA JAGADINDRA NATH ROY BAHADOOR v. SECRETARY OF STATE FOR INDIA IN COUNCIL.**

(1902) 30 I. A. 44 = 30 C. 291 (302) = 7 C. W. N. 193 = 5 Bom. L. R. 1 = 8 Sar. 412.

—Onus of proof.

The onus of proving that any particular lands were included in the Permanent Settlement of 1793, in other words, the onus of proving that the Government revenue then fixed was assessed upon any particular lands, is clearly on those who affirm that such was the case (52). (*Lord Lindley.*) **MAHARAJA JAGADINDRA NATH ROY BAHADOOR v. SECRETARY OF STATE FOR INDIA IN COUNCIL.**

(1902) 30 I. A. 44 = 30 C. 291 (300) = 7 C. W. N. 193 = 5 Bom. L. R. 1 = 8 Sar. 412.

—Onus of proof—Shifting of—Thak and survey maps of 1851-3—Effect of.

Their Lordships are not prepared to say as a matter of law that the appellants' counsel were right in contending that the burden of proof on the question whether any particular lands

BENGAL ACTS—(Contd.)**Alluvion and Diluvion Act IX of 1847—(Contd.)****PERMANENT SETTLEMENT OF 1793—LAND WHETHER INCLUDED IN OR NOT—(Contd.)**

were included in the Permanent Settlement of 1793 was shifted on to the Government by the thak and survey maps of 1851-3, and that those maps ought to have been held sufficient proof that what was part of the bed of the Brahmaputra in those years was included in the Permanent Settlement of 1793. The Brahmaputra was then, as it is now, a public navigable river, and if the lands in question were then part of its bed, as they were in 1851 and apparently also in 1838, it is difficult to suppose, and it ought not to be assumed, that those lands were included in the lands permanently assessed in 1793. No Court can properly act on the assumption that in 1793 a state of things existed different from what appears from any evidence before the Court (52). (*Lord Lindley.*) **MAHARAJA JAGADINDRA NATH ROY BAHADOOR v. SECRETARY OF STATE FOR INDIA IN COUNCIL.**

(1902) 30 I. A. 44 = 30 C. 291 (300-1) = 7 C. W. N. 193 = 5 Bom. L. R. 1 = 8 Sar. 412.

—Question as to—Fact or Law.

In every case the question what lands were included in the permanent settlement is a question of fact and not of law (52). (*Lord Lindley.*) **MAHARAJA JAGADINDRA NATH ROY BAHADOOR v. SECRETARY OF STATE FOR INDIA IN COUNCIL.**

(1902) 30 I. A. 44 = 30 C. 291 (300) = 7 C. W. N. 193 = 5 Bom. L. R. 1 = 8 Sar. 412.

PERMANENTLY SETTLED ESTATE.

—Lands included in—Applicability of Act to. *See* **BENGAL ACTS—ALLUVION AND DILUVION ACT OF 1847—APPLICABILITY OF.** (1902) 30 I. A. 44 (52) = 30 C. 291 (300).

—Lands re-formed on site of—Applicability of Act to. *See* **BENGAL ACTS—ALLUVION AND DILUVION ACT OF 1847—APPLICABILITY OF.** (1889) 17 I. A. 40 (51-2) = 17 C. 590 (602-3).

—Land shown by new map to have been washed away from, since previous survey—Abatement of assessment in case of—Right to.

Quaere, whether when the new map shows that land has been washed away from a settled estate since the previous survey, a proportionate abatement ought to be made under the Act of 1847 (52). (*Lord Herschell.*) **SECRETARY OF STATE FOR INDIA v. FAHAMIDUNNISSA BEGUM.**

(1889) 17 I. A. 40 = 17 C. 590 (602-3) = 5 Sar. 391.

—Law prior to Act as to.

By the legislation prior to 1847 it was intended to bring under assessment lands not included in a permanent settlement, whether they were waste or gained by alluvion or dereliction, but all such lands as were comprised in permanently settled estates were to be rigorously excluded from further assessment. And in addition to this, the proprietors of such estates were assured that they could protect themselves against any action of the Revenue authorities which would tend to infringe upon their rights by appeal to the Civil Court (50). (*Lord Herschell.*) **SECRETARY OF STATE FOR INDIA v. SRIMATI FAHAMIDUNNISSA BEGUM.**

(1889) 17 I. A. 40 = 17 C. 590 (602) = 5 Sar. 391.

—Non-navigable river flowing through—Churs formed in—Liability to assessment of—River bed part of permanently settled estate.

The Government is entitled to Public Revenue under Act IX of 1847 from churs formed in a non-navigable river, even where it flows through a permanently settled zemindary, as well as up to the middle line of the river where that is the boundary of the zemindary, and this even where it appears

BENGAL ACTS—(Contd.)**Alluvion and Diluvion Act IX of 1847—(Contd.)****PERMANENTLY SETTLED ESTATE—(Contd.)**

that the river bed was part of the permanently settled zemindary (254-5). I. L. R. 49 C. 103, approved and followed. (*Lord Shaw.*) SECRETARY OF STATE FOR INDIA *v.* JATINDRA NATH CHOWDHURY. (1924) 51 I. A. 241 = 51 C. 802 (817) = (1924) M. W. N. 588 = 35 M. L. T. (P. C.) 146 = 29 C. W. N. 1 = 80 I. C. 1023 = A. I. R. 1924 P. C. 175 = 47 M. L. J. 48.

—Purpose of—Applicability of—Lands “gained” from sea, etc.—Meaning of.

The purpose of the Act IX of 1847 was merely to change the mode of assessment in the case of a class of land already liable to be assessed under existing legislation, *viz.*, land gained by alluvion or dereliction which was not included within the limits of a permanently settled estate. The terms of the 1st section pointed to this and nothing more, and the details of the legislation support the same conclusion. It is only to lands “gained” from the sea or river by alluvion or dereliction that the legislation is applicable. The previous legislation shows that these words must be limited to lands gained since the period of the settlement. It is only in relation to these lands, therefore, that the previous enactments are to cease to have effect. (*Lord Herschell.*) SECRETARY OF STATE FOR INDIA *v.* FAHAMIDUNNISSA BEGUM.

(1889) 17 I. A. 40 (51-2) = 17 C. 590 (602-3) = 5 Sar. 391.

—S. 5—Submerged land—Remission of revenue in respect of—Application successful for—Effect of, on owner's rights. See ALLUVION AND DILUVION—DILUVIATED LAND—ABANDONMENT OF RIGHTS IN.

(1872) 10 B. L. R. 406 (432).

—Ss. 5 and 6—Lands whether within—Lands not within Permanent Settlement of 1793—Last survey under S. 3 of Act to be taken as starting-point in case of.

Assuming lands not to be within the Permanent Settlement of 1793, then their Lordships agree with the contention of the appellant that the last survey made under S. 3 of the Act IX of 1847 is to be taken as the starting-point for deciding, when the next survey is made, whether lands are within Ss. 5 and 6 of that Act (53). (*Lord Lindley.*) MAHARAJA JAGADINDRA NATH ROY BAHADOOR *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL.

(1902) 30 I. A. 44 = 30 C. 291 (301-2) = 7 C. W. N. 193 = 5 Bom. L. R. 1 = 8 Sar. 412.

—Permanently settled estate—Lands included in, or fresh additions and surplus accretions to—Proof of—Onus—Quantum—Thak and survey maps made after 1793—Evidentiary value of—Public navigable river—Lands on bed of—Dry lands in 1793.

The question was whether certain pieces of land, which were in the year 1881 assessed with Government revenue as fresh additions and surplus accretions to the appellant's taluq (estate) under the provisions of Act IX of 1847, were or were not lands which were included in his permanently settled estate. That estate included four mouzahs. The Brahmaputra, which is a public navigable river, ran through those mouzahs. The bed of the river presumably was Government property. The bed was not the property of the appellant, and was not the property of his predecessors-in-title in 1793. Where the river then flowed was not shown by the evidence in the case; but there was evidence to show that in 1838 it was in the same situation as in 1851 and 1853. After that time, and before 1851, the river had shifted its course, and its former bed had become dry land, and it so remained at date of suit. That dry land was the land in dispute. Locally it was situate in the appellants' mouzahs. In 1881 the diara survey authorities, on behalf

BENGAL ACTS—(Contd.)**Alluvion and Diluvion Act IX of 1847, Ss. 5 & 6—****(Contd.)**

of the Government, purporting to act in accordance with the provisions of Act IX of 1847, surveyed and marked out the pieces of land in question as surplus accretions and additions to the appellant's said four villages, and assessed the same accordingly. The suit out of which the appeal arose was thereupon filed by the appellant for having it declared that the assessment of 1881 was illegal, and for a return of the assessments paid under it.

The material issue on the question was whether the disputed lands were the reformed lands appertaining to the permanently settled taluq of the plaintiff, or whether they were fresh additions or surplus accretions to the taluk as contended on behalf of Government. A local inquiry was directed, and a commissioner (Amin) was appointed to conduct it and to report the result. The thak and survey maps of 1851-3 and of 1881 were before him; he took evidence, and examined the locality and made a map and report. That map showed that the lands in question were dry in 1881 and since, but that they formed the bed of the river Brahmaputra in 1851-3, and that in those years the river flowed through the appellants' property, and that that property was included in the Permanent Settlement of 1793. Further, the Amin ascertained and gave the acreage of that property, and included the bed of the river in that acreage. He did not, however, find where the river was, nor how the bed of the river was dealt with, when the permanent settlement was fixed in 1793.

Upon that map and report the Court of first instance decided the above issue in favour of the appellant, and ordered the assessments paid to be refunded to him. The District Judge reversed that decision, and dismissed the appellants' suit with costs. The High Court affirmed the District Judge, on the ground that he had not committed any error in law affecting the issue in question.

Their Lordships affirmed the courts below observing “It certainly cannot be assumed that the lands in question were dry land in 1793, or that the land forming the bed of a public navigable river was included in the assessment then permanently fixed” (54). (*Lord Lindley.*) MAHARAJA JAGADINDRA NATH ROY BAHADOOR *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL.

(1902) 30 I. A. 44 = 30 C. 291 (302) = 7 C. W. N. 193 = 5 Bom. L. R. 1 = 8 Sar. 412.

—S. 6—Fundamental irregularity in assessment proceedings—What amounts to—Suit to set aside proceedings on ground of—Maintainability.

In view of the provisions of S. 6 of Bengal Act IX of 1847, the proceedings of the assessing authorities under the Act may be subject to being quashed in the ordinary Courts of Law if they have been tainted by fundamental irregularity. In other case the orders of the Board of Revenue are final. Three conditions must be noted: (1) Fundamental irregularity, that is to say, a defiance of or non-compliance with the essentials of the procedure would give ground for questioning the proceedings in a Court of Law; (2) the burden of establishing such essential and fundamental violation of statutory requirements rests upon the person alleging it; and (3) it is not sufficient to submit in a court of law that, upon the documents before the Board of Revenue, doubts arise as to whether this, that or the other detail of investigation should have been set to rest more clearly in the course of the administrative procedure. (*Lord Shaw.*) SECRETARY OF STATE FOR INDIA *v.* JATINDRA NATH CHOWDHURY.

(1924) 51 I. A. 241 (250-1) = 51 C. 802 = (1924) M. W. N. 588 = 35 M. L. T. 146 = 29 C. W. N. 1 = 80 I. C. 1023 = A. I. R. 1924 P. C. 175 = 47 M. L. J. 48.

BENGAL ACTS—(Contd.)**Alluvion and Diluvion Act IX of 1847, S. 6.—(Contd.)**

—Orders of Board of Revenue under—Finality of—Condition—Fundamental irregularity—Quashing of proceedings on ground of—Suit for—Maintainability.

The words of S. 6 of Act IX of 1847 imposing finality upon the orders of the Board of Revenue are subject to the condition that the proceedings of the assessing authorities are not tainted by fundamental irregularity, that is to say, a defiance of or non-compliance with the essentials of the procedure. If they are so tainted the proceedings will be subject to being quashed in the ordinary Courts of Law (250). (*Lord Shaw.*) SECRETARY OF STATE FOR INDIA *v.* JATINDRA NATH CHOWDHURY.

(1924) 51 I. A. 241 = 51 C. 802 (812) =
(1924) M. W. N. 588 = 35 M. L. T. (P. C.) 146 =
29 C. W. N. 1 = 80 I. C. 1023 =
A. I. R. 1924 P. C. 175 = 47 M. L. J. 48.

—Permanently settled estate—Land included in—Land re-formed on site of—Liability to assessment of. See BENGAL ACTS—ALLUVION AND DILUVION ACT OF 1847—APPLICABILITY OF.

—Words—Land added to estate—Churs formed after Decennial Settlement—Liability to assessment of—Riverbed belonging to settled estate—Effect. See BENGAL REGULATION II OF 1819, S. 3.

(1921) 48 I. A. 565 (576) = 49 C. 103 (115-6).

—Ss. 6, 9—Board of Revenue—Assessment to revenue of land to which Act inapplicable—Suit in Civil Court to declare *ultra vires* proceedings relating to—Maintainability—Plaintiffs' right to declaratory decree—Discretion in Court to refuse it.

Once the conclusion is reached that the provisions of the Bengal Alluvion and Diluvion Act IX of 1847 are inapplicable to the case of re-formed land being part of a settled estate in respect of which the full assessment has continued to be paid, it follows that neither the local revenue authorities nor the Board of Revenue can effectually render such land liable to assessment. Where, therefore, in violation of the right solemnly secured to the owner of a permanently settled estate, the Board of Revenue have claimed to subject his land to an additional assessment, contrary to the provisions of Act IX of 1847, a Civil Court has jurisdiction to review the decision of the Board of Revenue and to declare that the proceedings of the Revenue authorities in assessing such land were *ultra vires* (52-4). If the Civil Court has jurisdiction at all, that jurisdiction may be invoked as a matter of right, and it is not a case for the exercise of the Court's discretion. If the party appealing to the civil tribunal can establish that the court has jurisdiction, and that the Board of Revenue have acted *ultra vires*, he is entitled as of right to a decree (46-7). (*Lord Herschell.*) SECRETARY OF STATE FOR INDIA *v.* SRIMATI FAHAMIDUNNISSA BEGUM.

(1889) 17 I. A. 40 = 17 C. 590 (604, 598) = 5 Sar. 391.

—S. 9—Effect—Board of Revenue—Assessment to revenue of land to which Act inapplicable—Suit in Civil Court to declare proceedings relating to, *ultra vires*—Maintainability.

The Bengal Alluvion and Diluvion Act IX of 1847 was inapplicable to the case of re-formed land being part of a settled estate in respect of which the full assessment had continued to be paid. And the Act provided, on its right construction, that where the Board of Revenue held that land to which Act IX of 1847 was inapplicable was liable to assessment an action would at the instance of the aggrieved party lie in the Civil Court to declare its proceedings *ultra vires*. The Act also contained a provision (S. 9) that no action in any court of justice should lie against the Govern-

BENGAL ACTS—(Contd.)**Alluvion and Diluvion Act IX of 1847, S. 9.—(Contd.)**

ment or any of its officers on account of anything done in good faith in the exercise of the powers conferred by the Act.

Purporting to act under the Act the Board of Revenue held that land to which the Act was inapplicable was liable to assessment. In a suit brought in the Civil Court to declare its proceedings *ultra vires*, it was contended in bar of the suit that where the acts done by the Board of Revenue were within the powers conferred by the Act the protection afforded by S. 9 would be unnecessary and that it must be applicable to acts done in assumed exercise of the powers conferred but really in excess of them.

Held, that the Board of Revenue could not, by purporting to exercise a jurisdiction which they did not possess, make their order upon such a matter final, and exempt themselves from the control of the Civil Court (53).

Full effect can be given to S. 9 without holding that it deprives the owner of a permanently settled estate of that right of appeal which is given to him in order that he may have determined in a Civil Court "the justness of the demand" of the revenue authorities (53). (*Lord Herschell.*) SECRETARY OF STATE FOR INDIA *v.* SRIMATI FAHAMIDUNNISSA BEGUM.

(1889) 17 I. A. 40 =

17 C. 590 (603-4) = 5 Sar. 391.

Cess Act IX of 1880.

—Ss. 6, 72—Net annual profits—Meaning—Lease of property for working mines—Royalty received by land owner for—Liability of, for cess.

Plaintiff, who had leased landed property for the working of coal mines, received from the lessees, besides the rent for the surface land, a percentage on the coal raised by the lessees or mine-owners, under the designation of royalty. *Held*, that the royalty receivable by the plaintiff was part of the net annual profits of the mine within the meaning of Ss. 6 and 72 of Bengal Act IX of 1880 and that he had been properly assessed with cess thereon under the provisions of that Act.

Both in S. 6 and S. 72 the "net annual profits" have reference to the property and not to the individual. The inference is clear that the return required under S. 72 is not with regard to the mine-owner's profits but has reference to the general net profits of the property. The obligation to make the return is laid on the person most cognizant of the circumstances under which the mine is worked and of the profits derived from it. But that does not alter, in their Lordships' view, the character of the royalty received by the proprietor for his share of the profits of the mine (35).

The liability for the cess lies on both "occupier" and "owner" in the case of mines, etc., as in the case of land it lies on holders of estates or tenures and raiyats, the policy of the Act evidently being that all persons who benefit by the maintenance and construction of "roads and other means of communication" or "works of public utility" out of these cesses should bear the liability of paying the same (36). (*Mr. Ameer Ali.*) MANINDRA CHANDRA NANDI *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL.

(1910) 38 I. A. 31 = 38 C. 372 (376-7) =

8 A. L. J. 140 = 9 M. L. T. 196 = 15 C. W. N. 201 =

13 Bom. L. R. 82 = 9 I. C. 311 = 21 M. L. J. 365.

—S. 95—Road cess returns—Admissibility—Evidentiary value—Enhancement of rent—Suit by zemindar under S. 7 of Bengal Tenancy Act, 1885.

Road cess returns rendered under Bengal Act IX of 1880 are, by virtue of S. 95 of that Act, admissible in evidence against the person by or on whose behalf they were filed. The returns are no doubt not conclusive evidence; but where, so far as they go, they show that the taluqdars were

BENGAL ACTS—(Contd.)**Cess Act IX of 1880, S. 95—(Contd.)**

receiving from their sub-tenants a considerably higher rent relatively than that which they were paying to their superior landlord, they are *prima facie* evidence to support a claim for enhancement by the latter under S. 7 of the Bengal Tenancy Act, 1885, on the ground that the existing rate was consequently not "far and equitable" within the meaning of the Bengal Tenancy Act. Such evidence is sufficient to shift the onus to the defendants, in whose power it is, by producing their collection papers, to rebut any presumption raised against them by the road cess returns (180-1). (*Sir Andrew Scoble.*) **HEM CHUNDER CHOWDHURY v. KALI PROSUNNO BHADURI.** (1903) 30 I. A. 177 = 30 C. 1033 (1041) = 8 C. W. N. 1 = 8 Sar. 529.

Court of Wards Act IX of 1879.

—**Ss. 6 (a) and 27—Court of Wards—Sale of property under charge of—Suit by ward to set aside, and to recover possession of property sold—Limitation—Starting point—Limitation Act of 1908, Arts. 142, 144.**

For the purposes of limitation the property of a person declared to be a disqualified proprietor under Ss. 6 (a) and 27 of the Court of Wards Act, 1879, while it is under the charge of the Court of Wards, is in the possession of the proprietor; consequently time runs against a suit by him to set aside a sale of his property by the Court of Wards, and to recover possession, from the date when possession is given to the purchaser, and not from the date when the Court of Wards withdraws from the charge of the plaintiff's property.

The Limitation Act, it is true, recognises and enumerates certain conditions as legal disabilities entitling the persons affected by them to an extended period of limitation. But the disqualification of a proprietor under S. 6 (a) of the Bengal Court of Wards Act, 1879, is not one of them, and there is no provision by which the ordinary law of limitation could be suspended or modified in the case of a suit by such proprietor to recover property alienated by the Court of Wards while under management of his estate (63). (*Sir Lawrence Jenkins.*) **KUAR MANI MANDHATA v. NAWAB OF MURSHIDABAD.** (1918) 46 I. A. 60 = 46 C. 694 = 17 A. L. J. 202 = 23 C. W. N. 531 = 29 C. L. J. 355 = 25 M. L. T. 341 = 21 Bom. L. R. 611 = (1919) M. W. N. 318 = 50 I. C. 202 = 36 M. L. J. 210.

—**S. 40—Pre-emption—Formalities for assertion of right of—Manager under Court of Wards—Observance of formalities on behalf of ward—Right of, under Act—Right under general law.**

In a suit to establish plaintiff's right of pre-emption, it appeared that she was a "disqualified proprietor" under the Court of Wards Act (Bengal Act IX of 1879), having been declared to be incompetent to manage her property, and that her estate was in the charge of the Court of Wards. It further appeared that the formalities insisted upon by the Mussalman Law as essential preliminaries to the assertion of the right were duly performed by the manager of the plaintiff's estate appointed by the Court of Wards.

Held, that the manager of the plaintiff's estate was competent, independently of the provisions of S. 40 of the Bengal Court of Wards Act of 1879, to observe the formalities on her behalf (107-8).

The section (40), however, which defines the manager's duties appears to their Lordships to fully clothe him with authority to act as he did; the validity of his action, therefore, did not depend on its subsequent adoption by the Court of Wards (108). (*Mr. Ameer Ali.*) **JADU LAL SAHU v. JANKI KOER.** (1912) 39 I. A. 101 = 9 A. L. J. 525 = 16 C. W. N. 553 = 16 C. L. J. 483 = 15 I. C. 659.

—**S. 55 (2)—Authority by manager under, for institution of suit—What amounts to.**

BENGAL ACTS—(Contd.)**Court of Wards Act IX of 1879, S. 55 (2)—(Contd.)**

The appellants in the year 1879 were Wards of Court; and H had been appointed manager of their estate. On 17-11-1879, H wrote a letter to the plaintiff in the suit, B, authorising him to institute a suit on behalf of the wards at his own risk and responsibility, in order to prevent the application of limitation.

Held, that the letter was an authority of the manager under the second clause of S. 55 of the Bengal Court of Wards Act (IX of 1879) to B to institute a suit for the purpose of saving the time of limitation, and that the manager had the right to give B the authority, and that the suit was properly instituted (7). (*Lord Hobhouse.*) **KUMAR BISESWAR ROY v. KUMAR SHOSHI SIKHARESWAR ROY.** (1889) 17 I. A. 5 = 17 C. 688 = 5 Sar. 501.

—**Suit authorised by manager under—Sanction of Court of Wards to prosecution of—What amounts to—Letter by Court of Wards authorising plaintiff to act as next friend of ward—Effect.**

In a case in which the manager appointed under the Bengal Court of Wards Act IX of 1879 authorised B under the second clause of S. 55 of that Act to institute a suit on behalf of the wards for the purpose of saving the time of limitation, *held*, that a letter written by the Court of Wards authorising B to act as next friend of the wards would show that they authorised the prosecution of the suit within the meaning of S. 55 (7-8). (*Lord Hobhouse.*) **KUMAR BISESWAR ROY v. KUMAR SHIKHARESWAR ROY.** (1889) 17 I. A. 5 = 17 C. 688 = 5 Sar. 501.

—**S. 60—Hindu widow—Estate inherited from husband by—Management of, under Court of Wards—Surrender of estate by widow to next reversioner during period of—Validity—Sanction of Court of Wards—Necessity.**

Held, that a deed of surrender executed by a Hindu widow surrendering the estate inherited by her from her deceased husband in favour of the next reversioner, while the estate was under the management of the Court of Wards under the Bengal Court of Wards Act of 1879, was void under S. 60 of that Act because the permission of the Court of Wards had not been obtained for the execution of the deed (21-2). (*Sir John Edge.*) **MAN SINGH v. NOW-LAKHPATI.** (1925) 53 I. A. 11 = 5 P. 290 = 24 A. L. J. 250 = 43 C. L. J. 259 = 1926 M. W. N. 332 = 7 P. L. T. 223 = 28 Bom. L. R. 841 = 31 C. W. N. 49 = A. I. R. 1926 P. C. 2 = 94 I. C. 830 = 50 M. L. J. 332.

Estates Partition Act V of 1897.

—**S. 3, cl. 15—Assessment of rent under—Purpose and effect of.**

S. 3, cl. 15 of the Bengal Partition Act V of 1897 empowers the partitioning officer, for the purpose of equalising the allotment, to assess the rents on the lands allotted. This has nothing to do with the fixing or assessment of rent when a raiyati kasht falls within the allotment of a proprietor. That question appears to be dealt with by other sections (186). (*Mr. Ameer Ali.*) **RAJA DHAKESHWAR PRASAD NARAIN SINGH v. GULAB KUER.** (1926) 53 I. A. 176 = 5 Pat. 735 = 7 P. L. T. 483 = 97 I. C. 217 = A. I. R. 1926 P. C. 60.

—**S. 99—Applicability—Grant of share in specified mouzahs which are themselves only portions of estate held in common.**

Grants of a share in specified mouzahs which are themselves only portions of an estate held in common tenancy come under S. 99 of the Bengal Estates Partition Act of 1897 (203). (*Lord Phillimore.*) **BASIRAM SAHA ROY v. RAM RATAN ROY.** (1927) 54 I. A. 196 =

BENGAL ACTS—(Contd.)**Estates Partition Act V of 1897, S. 99—(Contd.)**

54 Cal. 586 = 1927 M.W.N. 437 = 31 C.W.N. 885 =
39 M.L.T. 170 = 26 L.W. 642 = 101 I. C. 359 (2) =
A. I. R. 1927 P. C. 117 = 53 M. L. J. 117.

———*Applicability—Putni of lessor's share in estate held in common but naming specific villages.*

Held, that S. 99 of the Bengal Estates Partition Act of 1897 applied to a putni which, though it named specific villages, purported to be of the share of the lessors, where it appeared that the named villages were to be enjoyed merely as representing the lessor's share. (*Lord Phillimore.*) **BASIRAM SAHA ROY v. RAM RATAN ROY.**

(1927) 54 I.A. 196 = 54 C. 586 = 1927 M.W.N. 437 =
31 C.W.N. 885 = 39 M.L.T. 170 = 26 L.W. 642 =
101 I. C. 359 (2) = A.I.R. 1927 P.C. 117 =
53 M.L.J. 117.

———*Lease of share or portion of estate held in common—Lease of certain specified mouzahs therein—Distinction—Test—Lease—Construction.*

The lease purports to be a lease of that share in the estate (held in common tenancy) which belongs to the lessors. It is true that it specifically applies to certain mouzahs of which the lessors have the enjoyment as representing their share, but it is obvious from the subsequent proceedings that this enjoyment was by convention only and subject to revocation and that as against their lessors, the lessees were entitled to say: "Give us your share, if it be not in these villages, then in those which you get instead." The lease is, therefore, a lease of a share or portion of the estate held in common within the meaning of S. 99 of the Bengal Estates Partition Act of 1897, and not a lease of certain specified mouzahs of which the lessors had control and some form of possession at the time where the leases were made (202-3). (*Lord Phillimore.*) **BASIRAM SAHA ROY v. RAM RATAN ROY.**

(1927) 54 I.A. 196 =
54 Cal. 586 = 1927 M.W.N. 437 = 31 C.W.N. 885 =
39 M.L.T. 170 = 26 L.W. 642 = 101 I.C. 359 (2) =
A.I.R. 1927 P.C. 117 = 53 M.L.J. 117.

———**Ss. 99, 47—Tertium quid between common tenancy and several holding—Possibility of.**

The view of the High Court is that there is some *tertium quid* between common tenancy and several holding, and that when this *tertium quid* exists, if any formal partition supervenes, it does not affect or interfere with the arrangement under which land-owners who are in some respects still tenants in common may yet have specific shares of the estate allotted to their exclusive enjoyment. The Bengal Estates Partition Act of 1897 does not apparently contemplate any such cases as being possible. If they were to exist, it would be strange if a formal partition could take away the possession of estates thus enjoyed from former possessors (201-2). (*Lord Phillimore.*) **BASIRAM SAHA ROY v. RAM RATAN ROY.**

(1927) 54 I.A. 196 =
54 Cal. 586 = 1927 M.W.N. 437 = 31 C.W.N. 885 =
39 M.L.T. 170 = 26 L.W. 642 = 101 I.C. 359 (2) =
A. I. R. 1927 P.C. 117 = 53 M. L. J. 117.

Landlord and Tenant Procedure Act VIII of 1869.

———*Occupancy right—Acquisition of—Ijara for term—Holding as ijaradar prior to and during—Acquisition by.*

An ijara in favour of the defendants, which was for a term of five years, provided that they were to be in possession of the chur land included therein as a jote; and that upon the expiration of the term of 5 years the defendants were to be entitled to a renewal of the lease of the said chur land at a rent to be fixed according to the measurement of the land to be made at that time and to the productive powers of the land. The defendants however took no measures to obtain a renewal and three years after the expiration of the term of five years fixed by the ijara, the

BENGAL ACTS—(Contd.)**Landlord and Tenant Procedure Act VIII of 1869—(Contd.)**

landlord served a notice upon them to come to a new settlement with him and the next year sued to recover possession. On a plea being raised by the defendants that they acquired a right of occupancy under Bengal Act VIII of 1869 or under Act X of 1859, *held*, that the defendants' holding as ijaradars prior to and during the ijara did not create in them a right of occupancy, that, under the ijara, plaintiff had a right to turn the defendants out of possession at the expiration of the term thereof except so far as that right was qualified by the stipulation for a renewal; that the defendants at the expiration of that lease had an equitable right to a renewal according to the stipulations in the agreement; but that it was too late for them to rely upon their title to a renewal of the lease which, if it had been granted, would now have expired; and that the defendants had, therefore, no equity to resist the plaintiff's claim to recover possession of the land (170). (*Sir Barnes Peacock.*) **JARDINE, SKINNER & CO. v. RANI SURAT SOONDARI DEBI.**

(1878) 5 I.A. 164 = 3 C.L.R. 140 = Bald. 168 =
3 Suth. 550 = 3 Sar. 847.

———*Leases each for term—Lessee cultivating land and paying rent continuously for more than 12 years under—Acquisition by—Re-entry—Express stipulation for—Absence of.*

Under Bengal Act VIII of 1869, and under Act X of 1859 previously in force, a raiyat who has held or cultivated a piece of land continuously for more than 12 years, but under several written leases or pottahs each for a specific term of years, in which there is no express stipulation for re-entry, is entitled to claim a right of occupancy in that land (34).

Where, therefore, in an action of ejectment in which the defendant was holding over after expiration of a lease granted by the plaintiffs, it appeared that as to part of the land leased the defendant had held it continuously for more than twelve years under prior leases for the purpose of cultivating it as a ryot in which there had been no stipulation for re-entry, *held*, that the defendant had a right of occupancy, and could not be ejected (33-4). (*Sir Richard Couch.*) **CHUNDRABATI KOERI v. HARRINGTON.**

(1891) 18 I.A. 27 = 18 C. 349 (357) = 5 Sar. 481.

———*Rent sale under—Suit to set aside—Laches—Presumption adverse from. See LACHES—PRESUMPTION ADVERSE FROM—RENT SALE. ETC.*

(1869) 13 M. I. A. 160 (169).

———**S. 14—Applicability—Lease of chur land—Accretion of new chur contiguous to land leased—Measurement of accreted chur and assessment of rent to be paid for it—Suit for—Jurisdiction.**

A kabuliyat, dated 23-4-1850, executed by the then tenants under a howaldari tenure, of certain lands comprised in "the chur to the east of M," forming part of the zemindary belonging to the respondent, contained the following stipulations:—

"If a new chur accretes contiguous to the aforesaid howla, and as *hakiat* of the aforesaid (toru), and no revenue is assessed thereon by the Government, then, when the said chur becomes fit for cultivation, a fresh measurement shall be made of the land of the said chur and of the aforesaid howla; and, after a deduction of the aforesaid 13-6-16 gundahs of land, we shall pay rent at the rate of Rs. 2-7-7 for the excess of land up to five drones, and at the *sara* (prevailing) *pergunnah* rates for lands exceeding that quantity. If we fail to do so, the rent will be realised according to the law for the realisation of rent, with interest on lapsed instalments according to the demands of the *towzi* of the said *pergunnah*; or at the close of the year you will serve on the spot, and on some conspicuous place

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S. 14—(Contd.)**

n the *mahaknama* (headquarters) of any hakim, an *itla nama* (notice) to our address, requiring us to take a settlement of the said excess land, and to file a *kabuliyat*, and fixing the time at fifteen days: if, thereupon, we do not appear before you and take a settlement and fix a *kabuliyat*, you will settle the said excess lands with others."

The respondent measured the howla and accreted chur without notice to the appellants, the registered tenants of the howla, and in their absence, and thereafter served on them a notice thereof, and of the increased rent demanded, requiring them to appear within fifteen days and file a *kabuliyat* for the said amount of land and rent, or that he would take khas possession. The appellants paid no attention to the notice, and thereupon the respondent instituted the suit out of which the appeal arose, praying (1) that the Court should direct a measurement of the excess land and give him khas possession thereof; or otherwise, (2) that the Court should, in the event of its declining to give him possession, assess the rent of the excess land payable under the *kabuliyat*.

The Sub-Judge held that the suit, so far as it prayed for assessment of rent, could not lie, inasmuch as the case was regulated by S. 14 of the Rent Act.

Held, that the Sub-Judge erred in holding that the provisions of S. 14 of the Rent Act applied to the additional rent, which was stipulated in the *kabuliyat* of 1850 (119).

There is nothing in the terms of that document, or of S. 14 of the Rent Act, which can oust the jurisdiction of the Court, either in regard to the measurement of the excess land, or the assessment of the rent which is to be paid for it (119-20). (*Lord Watson.*) **RAMCOOMAR GHOSE v. KALI KRISHNA TAGORE.**

(1886) 13 I.A. 116 = 14 C. 99 (105-6) = 4 Sar. 737.

—S. 29—Rent—Arrears of—Suit for—Limitation—Litigation preventing time from running against landlord—What amounts to.

The claim was for rent from April 1865 to June 1872. The question was whether it was barred by limitation under Bengal Act VIII of 1869, S. 29.

It was admitted that the suit was not instituted within three years from the end of the year when the last rent became due within the meaning of S. 29, and therefore *prima facie* it was barred by the law of limitation. The plaintiff attempted to get over the bar by saying that in 1874, that is to say, two years after the last instalment of the rent sued for had accrued due, the statute ceased to operate, because he instituted a litigation which had the effect of preventing it from running, and that therefore a portion at least of his claim was not barred. That litigation was this: He brought three suits in the year 1874 against the tenants with respect to whose arrears of rent the suit out of which the appeal arose was brought, for the purpose of ejecting them from their holdings, which were called *chuckdari* holdings, in a certain *zemindary* of which he was possessed. Those suits were dismissed by the First Court, and on the 25th of July, 1876, by the Appeal Court, on the ground of limitation. On the 7th of September, 1876, the appellant commenced the suit out of which the appeal arose, concurrently with which he prosecuted an appeal to Her Majesty in Council from the decree of the 25th of July, 1876. His appeal was dismissed on the 26th of May, 1881. The plaintiff contended that the statute did not run against his claim for rent after the year 1874, when he commenced those suits.

Held, that there was no period of time in which the rent could not have been recovered, and there was no period of time in which, therefore, the statute might not have run,

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S. 29—(Contd.)**

and that the suit was therefore barred. (*Sir Robert P. Collier.*) **HURRO PERSHAD ROY CHOWDHURY v. GOPAL CHUNDER DUTT.**

(1882) 9 I.A. 82 = 9 C. 255 = 13 C. L. R. 129.

—Ss. 31, 46, 47—Enhanced rent—Suit for—Limitation—Deposit of rent in Court before it accrued due—Suit brought more than six months after.

In a suit brought for enhanced rent of the suit property for three years the defence was that the old rent and cesses for each of the three years were tendered to the plaintiff in proper time, and she not having accepted them they were deposited in Court under Bengal Act VIII of 1869, and the plaintiff brought no suit within 6 months of the date of the deposit, and so the claim for rent at an enhanced rate was barred by the special law of limitation prescribed by S. 31 of Act VIII of 1869.

The rent for the first of the three years became due on 12-4-1883; for the second on 11-4-1884; and for the third on 12-4-1885. The deposits were made on 10-4-1883, 8-4-1884 and 11-4-1885, all before the expiration of the year when the rent became due.

Held, that the suit was not barred by S. 31 of Act VIII of 1869 (29).

The words of the Act are plain that the deposit must be of rent which accrued due prior to the date of the deposit. They do not admit of any other construction (29). (*Sir Richard Couch.*) **RAJA SURJA KANT ACHARYA v. RANI HEMANTA KUMARI DEBI.**

(1892) 20 I.A. 25 = 20 C. 498 (504) = 6 Sar. 279.

—Ss. 59, 60, 66—Sale of tenure under—Execution sale under C.P.C.—Purchaser's rights under—Distinction.

In attaching the property of a judgment-debtor whether in an under-tenure or in any ordinary leasehold interest, under C. P. C. of 1859, the decree-holder can only attach and sell the right and title and interest of the judgment-debtor; but if the decree-holder proceeds to sell a tenure under S. 59 of Bengal Act VIII of 1869, the tenure itself can be sold; and by virtue of S. 66 of the same Act, the purchaser, under the provisions of Ss. 59 and 60 of the Act, acquires it free of all incumbrances which may have accrued thereon by any act of any holder of the said under-tenure, his representatives, or assignees, unless the right of making such incumbrances shall have been expressly vested in the holder by the written engagement (54).

Where a decree-holder, entitled to apply for the sale of a tenure under Bengal Act VIII of 1869, applied for the attachment and sale thereof under the provisions of C.P.C. of 1859, and both the *perwannah* and the notice of sale issued upon that application, as well as the certificate of sale, gave express notice to the purchasers that nothing would be sold, and that nothing was sold to them, save and except the rights and interests of the judgment-debtor, *held*, that the sale was subject to the incidents of a sale under the Code of 1859 and not to those of a sale under Bengal Act VIII of 1869 (52-3). (*Sir Barnes Peacock.*) **DOOLAR CHAND SAHOO v. LALLA CHABEEL CHAND.**

(1878) 6 I.A. 47 = 3 C.L.R. 564 = 3 Sar. 885 = Bald. 182 = 3 Suth. 577.

—S. 64—Sale of tenure under—Procedure special for—Omission to follow—Execution sale ordinary under C.P.C.—Purchaser's rights—Distinction.

Under S. 64 of the Bengal Tenancy Act to make the tenure itself liable to sale in execution of a decree for arrears of rent the special procedure required by the Act would be necessary, and all the co-sharers would have to be made parties to the suit. Where that course is not followed, and the execution sale is made under the ordinary

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conditions imposed by the Code of Civil Procedure, the execution sale passes only the right, title and interest of the judgment-debtor in the property sold (87). (*Sir Andrew Scoble.*) **JIBAN KRISHNA ROY v. BROJO LAL SEN.**

(1903) 30 I. A. 81 = 30 C. 550 = 7 C. W. N. 425 =
5 Bom. L. R. 428 = 8 Sar. 444.

—Ss. 64, 59—*Hindu Law—Widow—Rent decree against—Sale in execution of—Interest conveyed—Special procedure of Act not adopted—Effect.*

The suit was brought by the respondent as next heir to the estate of R according to the Hindu Law in force in Bengal to recover possession of an estate known as Chuck Bele Doorganugger, which was originally the estate of R. The estate was an under-tenure of a zemindari which was not specifically named, and in which there were several co-sharers. In 1883-4, I, a daughter of R, held a half-share in that estate. In that year suits for arrears of rent were brought against her. To those suits only some of the co-sharers were parties, and, although, in one of them, the plaintiffs prayed that the amount decreed might be "recovered by the sale of the property in arrears," the decrees given were for money only. In execution of those decrees the estate in question was sold, the execution sale being made under the ordinary conditions imposed by the Code of Civil Procedure, and was purchased by the appellant.

Held, that the appellant acquired by his purchase only the limited interest of I in the estate.

The suit for rent was brought against I alone and in respect of arrears which accrued due after her father's death, and as she was in enjoyment of the rents and profits of the chuck, the liability for rent ought to be regarded as her personal liability, and ought not to be held as attaching to the reversion unless the landlords proceeded to bring the tenure itself to sale under the special provisions of the rent law (87-8). (*Sir Andrew Scoble.*) **JIBAN KRISHNA ROY v. BROJO LAL SEN.** (1903) 30 I. A. 81 = 30 C. 550 = 7 C. W. N. 425 = 5 Bom. L. R. 428 = 8 Sar. 444.

—S. 66—*Default—Meaning.*

"Default" which prevents S. 66 of the Bengal Tenancy Act of 1869 from applying does not necessarily imply any moral obliquity or any breach of contractual obligation. It simply means non-payment, failure or omission to pay. (*Lord Macnaghten.*) **FAKIR CHUNDER DUTT v. RAM KUMAR CHATTERJI.** (1904) 31 I. A. 195 = 31 C. 901 (908) = 8 C. W. N. 721 = 6 Bom. L. R. 741 = 1 A. L. J. 420.

—"Previous holder through whose default the tenure was brought to sale"—*Meaning.*

The expression "previous holder thereof through whose default the tenure was brought to sale" in the last clause of S. 66 of the Bengal Tenancy Act of 1869 includes a person beneficially interested in a tenure who is in a position to protect his interest by paying the rent into Court, and yet omits to do so, with the result that the tenure is brought to sale by the superior landlord.

That he is not a registered tenant, or is only interested in a portion of the tenure, or that he is not liable directly to the zemindar, is not sufficient to prevent the last clause of the section from applying to him. (*Lord Macnaghten.*) **FAKIR CHUNDER DUTT v. RAM KUMAR CHATTERJI.**

(1904) 31 I. A. 195 = 31 C. 901 = 8 C. W. N. 721 = 6 Bom. L. R. 741 = 1 A. L. J. 420.

—*Rent sale—Purchase by defaulting share-holder—Intermediate tenure—Avoidance of—Purchaser's right of.*

A purchaser of a mokuraree lease at a sale in execution of a rent decree, who is himself beneficially interested in the said lease to the extent of 11½ annas share, cannot avoid

BENGAL ACTS—(Contd.)**Landlord and Tenant Procedure Act VIII of 1869,
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intermediate tenures by proceedings under S. 66 of Act VIII of 1869. (*Lord Macnaghten.*) **FAKIR CHUNDER DUTT v. RAM KUMAR CHATTERJI.** (1904) 31 I. A. 195 = 31 C. 901 = 8 C. W. N. 721 = 6 Bom. L. R. 741 = 1 A. L. J. 420.

Land Registration Act VII of 1876.

—General register in form prescribed by—Entries in—Evidentiary value of—Bengal Act XI of 1859—Sale under—Interest passing under—Value as regards. *See* BENGAL ACTS—LAND REVENUE SALES ACT XI OF 1859—SALE UNDER—INTEREST PASSING UNDER—EVIDENCE.

(1928) 55 M. L. J. 54 (62-63).

—S. 4—*Mahalwar register kept under—Entries in—Admissibility in evidence.*

An attested copy of entries in Mahalwar registers kept under S. 4 of Act VII of 1876 (Bengal), showing the revenue assessed on each of two mouzas comprising a revenue-paying estate is admissible in evidence. The mere fact that the register bore the signature of the Superintendent of Survey on one corner does not make it a document kept by that officer. (*Lord Shaw.*) **SHEIKH HAJI MUTASADDI MIAN v. MAHOMED IDRIS.**

(1915) 19 C. W. N. 764 = 34 I. C. 283.

—S. 7—*Partition of chuckla among members of a joint family—Area and boundaries of property given in—Conflict between—Area found to be less than that stated in deed—Rights of parties in case of—Division of property in case of—Mode of.*

The appellants were the plaintiffs in the suit and the plaint stated that upon a partition between the members of a joint Hindu family of property of which a chuckla known as Pathurghati formed part, and the entire 16 annas of which chuckla was 1,040 bighas, 1 cottah, 2 dhoors; 503 bighas, 7 cottahs, 12 dhoors, 12 rains of jungle-land fell to the share of N, the ancestor of the plaintiffs, and the remaining 536 bighas, 13 cottahs, 9 dhoors, 8 rains of jungle-land of the chuckla went to the share of the predecessor in interest of the defendants. The plaint further stated that upon petition of the plaintiffs and defendants for registration of names under Bengal Act VII of 1876, an order for registration of names of the plaintiffs in respect of the 503 bighas, etc., was made by the Dy. Collector; but on appeal the Collector reversed that order, and directed the names of defendants 1 and 2 to be recorded in regard to two-thirds of the entire chuckla, and that order was confirmed by the Commissioner, and in accordance with it the name of the 2nd defendant was also registered in respect of one-third. The plaint prayed for an order for registration of the plaintiffs' names in respect of the 503 bighas, etc., out of the 1,040 bighas, etc., and for the registration of the defendants' names only in respect of the remaining 536 bighas, etc., and for other relief giving boundaries of the 503 bighas.

The defendants said that the boundaries given in the plaint did not comprise 503 bighas of land; that the entire area of Chuckla Pathurghati was not 1,040 bighas, and the boundaries given by the plaintiffs were wrong.

The Sub-Judge made a decree that the names of the plaintiffs should be registered in respect of that portion of the lands which was called Pathurghati Phagu Sirdar, the boundary of which had been given in the plaint and that the names of the defendants in respect of that share should be expunged, and that portion of the order of the Mutation Department which was prejudicial to the interests of the plaintiffs should be set aside.

On appeal the High Court considered that the partition was made as stated, but they felt that the boundaries given

BENGAL ACTS—(Contd.)**Land Registration Act VII of 1876, S. 7—(Contd.)**

in the plaint upon which the plaintiffs' case had been decreed were indefinite. They therefore requested the District Judge to direct a competent Amin to prepare a map, after proper inquiry, showing the boundary as stated in the plaint, and to measure the area falling within the boundaries as so ascertained by the Amin.

The Amin appointed by the District Judge in pursuance of the order of the High Court made his report. In that he stated that the servants of the plaintiffs and defendants had pointed out the land which they said was in the possession of their masters, and it was measured; but the lands as pointed out when added together did not tally with the amount of land specified in the partition, and was deficient by 256 bighas, 2 cottahs, 14 dhoors. He then said that in order to ascertain why the amount of land had decreased, as well as to know the boundary limit of Chuckla Pathurghati, he summoned several persons; but they only stated that the lands appertaining to mouza B, named in the plaint as on the west of the 503 bighas claimed, were on the western limit of Chuckla Pathurghati. After that he called for a survey map made in 1847, which had been filed on behalf of the plaintiffs, and using that and taking a point on the east side where Pathurghati joined two mouzas, which was pointed out and admitted by the agents of both parties and the servant of the proprietor of those mouzas, he fixed the boundary of B further to the west than the point which had been pointed out to him by the agents of the plaintiffs as on the western limits of Pathurghati, so as to include the 256 bighas which were deficient. That was done in the absence of any representative of the proprietor of B. The Amin evidently thought he was bound to fix the boundaries of Pathurghati so as to give an area which exactly tallied with that in the partition. But it was not his duty to do that, and the defendants had denied that the entire area of the chuckla was 1,040 bighas.

The case came again before the High Court, the plaintiffs having filed objections in which they said that as the partition did not take place with reference to the survey map, the Amin was wrong in calling for the survey map, and in finding that the chuckla extended more on the west, contrary to the allegations of both parties. But the Court adopted the boundaries found by the Amin, and decided to give to the defendants the full amount of 536 bighas, the portion being that which lay to the extreme east, and to give to the plaintiffs only the remainder. The result of the High Court's decree was that the defendants would obtain possession of 536 bighas, that the plaintiffs would get considerably less than 503 bighas, and that if they wanted more they might to have engage in a suit with the proprietors of B.

Held, that, that was not a just division, that the boundaries of the land to be divided should be taken to be those pointed out by the servants of the parties, and that the proper decree would be that the land within those boundaries should be divided in the proportion of 503 to 536, the plaintiffs obtaining possession of the land lying on the western and the defendants of the land lying on the eastern sides. (*Sir Richard Couch.*) **HEMMUNI SINGH v. CAUTY.** (1889) 17 C. 304 = 5 Sar. 429.

Land Revenue Sales Act (or Revenue Sale Law Act) XI of 1859.

—Construction of—Bengal Act VII of 1868 to be read with, and taken as part of.

Bengal Act VII of 1868 must be read with and taken as part of Bengal Act XI of 1859. So *held* in a case in which the question was as to the meaning of the word "estates" in Act XI of 1859 (223). (*Sir Lancelot Sanderson.*) **NARAYAN DAS KHETTRY v. JATINDRA**

BENGAL ACTS - (Contd.)**Land Revenue Sales Act (or Revenue Sale Law Act) XI of 1859—(Contd.)**

NATH ROY CHOWDHURY. (1927) 54 I. A. 218 = 54 C. 669 = 1927 M. W. N. 461 = 102 I. C. 198 (2) = 29 Bom. L. R. 1143 = 46 C. L. J. 1 = 26 A. L. J. 1 = 31 C. W. N. 965 = 8 P. L. T. 663 = 26 L. W. 848 = A. I. R. 1927 P. C. 135 = 53 M. L. J. 158.

—Revenue—Payment of—Default in—Ownership of estate—Effect on. See REVENUE—PAYMENT OF—DEFAULT IN—EFFECT OF, ON OWNERSHIP OF ESTATE. (1904) 31 I. A. 176 = 32 C. 27 (38).

SALE UNDER.

—Estate not in arrear—Sale of—Validity. See UNDER THIS ACT, S. 3—ESTATE NOT IN ARREAR.

—Estate to be put up for—Registered proprietor—Estate of.

Act XI of 1859 appears to contemplate that the estate should be put up for sale, and that the person whose interest should be nominally sold should be the registered proprietor (615). (*Sir James W. Colville.*) **GENERAL MANAGER OF THE RAJ DURBHANGA v. MAHARAJAH COOMAR RAMAPUT SINGH.** (1872) 14 M. I. A. 605 = 17 W. R. 459 = 10 B. L. R. 294 = 2 Suth. 575 = 3 Sar. 117.

—Interest passing under—Defaulting owner—Interest of, or interest of Crown subject to payment of Government assessment.

On the failure of an owner to pay the Government assessment, his estate or interest in the land is forfeited, or rather determined, and under a sale for arrears of Government revenue what is sold is not the interest of the defaulting owner, but the interest of the Crown, subject to the payment of the Government assessment. (*Lord Atkinson.*) **MAHARAJA SURJA ACHARYA BAHADUR v. SARAT CHANDRA ROY CHOWDHURY.** (1914) 18 C. W. N. 1281 = 16 M. L. T. 290 = 1 L. W. 807 = (1914) M. W. N. 757 = 25 I. C. 309 = 16 Bom. L. R. 925 = 20 C. L. J. 563 = 27 M. L. J. 365 (368).

—On the failure of an owner to pay the Government assessment, his estate or interest in the land is forfeited or rather determined, and by a sale held under Bengal Act XI of 1859, what is sold is not the interest of the defaulting owner, but the interest of the Crown, subject to the payment of the Government assessment (223). (*Sir Lancelot Sanderson.*) **NARAYAN DAS KHETTRY v. JATINDRA NATH ROY CHOWDHURY.** (1927) 54 I. A. 218 = 54 C. 669 = 1927 M. W. N. 461 = 102 I. C. 198 (2) = 29 Bom. L. R. 1143 = 46 C. L. J. 1 = 31 C. W. N. 965 = 8 P. L. T. 663 = 26 L. W. 848 = 26 A. L. J. 1 = A. I. R. 1927 P. C. 135 = 53 M. L. J. 158.

—Interest passing under—Evidence—Bengal Land Registration Act VII of 1876—General Register of revenue-paying estates—Entries in—Conclusive nature of—Ambiguity in entries—Effect.

Quære, whether ordinarily the entries in the General Register of revenue-paying estates are to be treated as conclusive as to what passes to the purchaser at a sale for arrears of revenue under Act XI of 1859.

Held, that in the case before their Lordships the entries in the said General Register were so ambiguous that in order to ascertain their meaning reference to other documents and evidence was necessary, and that it was not possible to hold that the entries in the said General Register were in themselves conclusive as to what passed at the revenue sales to the purchasers. (*Sir Lancelot Sanderson.*) **JAIGOBIND PANDEY v. RAMANANDAN SAHAI.**

(1928) 32 C. W. N. 650 = 48 C. L. J. 1 = 109 I. C. 392 = 30 Bom. L. R. 1343 = 12 R. D. 537 = 28 L. W. 807 = A. I. R. 1928 P. C. 130 = 55 M. L. J. 56 (62, 63).

BENGAL ACTS—(Contd.)**Land Revenue Sales Act (or Revenue Sale Law Act) XI of 1859—(Contd.)****SALE UNDER—(Contd.)**

—Land with building on it—Sale of—Ownership of building if passes to purchaser. *See* BENGAL ACTS—LAND REVENUE SALES ACT XI OF 1859, S. 3—ESTATE. (1927) 54 I. A. 218 (224-5) = 54 C. 669.

—Setting aside of—Suit by defaulter for. *See* BENGAL ACTS—LAND REVENUE SALES ACT of 1859, S. 33—SUIT BY DEFAULTER TO SET ASIDE SALE.

—Validity—Bengal Cess Act of 1880—Prohibitory order of Collector under, for road cess in arrear—Sale for arrears of revenue while estate subject to. *See* BENGAL ACTS—LAND REVENUE SALES ACT OF 1859, S. 17.

(1893) 20 I. A. 165 (171) = 21 C. 70 (79-80).

—Validity of—Misdescription of property—Effect. *See* BENGAL ACTS—LAND REVENUE SALES ACT OF 1859, S. 33—SUIT BY DEFAULTER TO SET ASIDE SALE—GROUNDS—MISDESCRIPTION OF PROPERTY IF ONE.

(1926) 53 I. A. 246 (251-2) = 6 Pat. 200.

—Validity of—Notice under S. 5—Arrears accrued due subsequent to—Sale also for.

A sale under the provisions of Act XI of 1859 is not bad because the arrears for which the estate was actually sold included, besides arrears specified in a notice under S. 5 of that Act, arrears which accrued due subsequently to the issue of such notice. (*Lord Macnaghten.*) MAHARAJA KUMAR BAGESWARI PERSHAD SINGH v. KHAJA MAHOMED GOWHAR ALI KHAN. (1903) 31 I. A. 52 =

31 C. 256 (260) = 8 C. W. N. 649 = 8 Sar. 610.

—S. 2—Land Revenue—Malikana if—Bengal Act VII of 1868, S. 1—Act XI of 1859, S. 5—Notice under—Necessity—Malikana arrears and land revenue—Sale for—Notice separate for malikana—Necessity.

Malikana comes under the definition of "Land Revenue" given in S. 2 of Act XI of 1859 and S. 1 of Bengal Act VII of 1868. The revenue authorities are entitled to calculate them together; and where part of the arrears for which a sale takes place under Act XI of 1859 is malikana, no separate notice under S. 5 of the Act in respect of such portion is necessary. (*Lord Macnaghten.*) MAHARAJA KUMAR BAGESWARI PERSHAD SINGH v. KHAJA MAHOMED GOWHAR ALI KHAN. (1903) 31 I. A. 52 =

31 C. 256 (258) = 8 C. W. N. 649 = 8 Sar. 610.

—Revenue—Arrear—Revenue when becomes an—Procedure for realising—Bengal Land Revenue Sales Act VII of 1868, S. 30—Distinction.

It was contended that there was some distinction to be made with reference to procedure and with reference to what constituted "arrears" between the Act of 1859 and the Act of 1868. This contention is without foundation. The Act of 1868 extends the word "revenue" so as to include "every sum annually paid to Government by the proprietor of any estate or tenure in respect thereof". As to the attempt to differentiate procedure under the two statutes, the answer to that seems sufficiently contained in S. 30 of the later Act, which provides that it shall be read with, and taken as part of, the former. The date when a past due payment is to be considered arrears is accordingly settled by S. 2 of Act XI of 1859. (*Lord Shaw.*) HAJI BUKSH ELAHI v. DULAV CHANDRA KAR.

(1912) 39 I. A. 177 = 39 C. 981 (991) =

16 C. W. N. 842 = 23 M. L. J. 206.

—Ss. 2 and 3—Revenue—Arrear of—Jumma when becomes an—Kabuliyat fixing date of annual payment—Proclamation under S. 3 fixing same date—Date of revenue becoming in arrear in case of—Settlement—Settlement

BENGAL ACTS—(Contd.)**Land Revenue Sales Act (or Revenue Sale Law Act) XI of 1859, Ss. 2 and 3—(Contd.)**

Manual—Contract of parties—Date of arrear if can be affected by.

The appellant was the holder of a tenure in Dibi Panchanagaram, to which, by virtue of Act VII of 1868, Act XI of 1859 was applicable. The kabuliyat under which he held stipulated as follows:—"I shall pay the said jumma in the Collectorate within the 28th day of June every year." The payment was an annual payment. The notification published by the Board of Revenue in compliance with S. 3 of Act XI of 1859 "fixed the 28th of June of each respective year as the latest date of payment of the rents of all descriptions of tenures in Khasmahal Panchannagaram, in default of which payment on or previous to that date tenures in arrears in that mahal will be sold." The revenue remaining unpaid on 28-6-1902, the tenure was sold for arrears of revenue on 16-3-1903.

Held, that the jumma in question in the case was not in arrear until the 1st of July, 1902, that the 28th of June, 1903, was the first date under the proclamation and the statute when there had arisen such a default as would enable the "tenure in arrears" to be sold; and that, consequently, the sale in March, 1903, was invalid.

The date when a past due payment was to be considered arrears having been settled by S. 2 of the Act of 1859, their Lordships cannot agree with the judgment of the High Court, which introduces a reference to "the settlement" having been made on 18th February. Therefore, say the learned judges:—

"In the case of an ordinary contract of lease, the annual jumma would be payable on 18th February in each successive year; but under Rule 7 of Part III, C. 16, of the Survey and Settlement Manual, a settlement of revenue should ordinarily take effect from the beginning of the financial year next after that in which the proceedings of the settlement officer have been completed. If that rule be applied, the settlement dated from 1st April, 1874, and the jumma would ordinarily be payable on 1st April each year."

These considerations do not bear upon the present case. Whatever might be the ordinary date of payment, or secondly, whatever might be the date when "the settlement" is made, or thirdly, whatever be the provisions of the Survey and Settlement Manual, it is not legitimate, by reason of any one or all of these things, to vary the actual date of payment in the kabuliyat, which is 28th June, or the actual date when a past due payment should be considered as an arrear, which is by Act XI of 1859, 1st July, 1902. (*Lord Shaw.*) HAJI BUKSH ELAHI v. DULAV CHANDRA KAR.

(1912) 39 I. A. 177 = 39 C. 981 = 16 C. W. N. 842 = 23 M. L. J. 206.

—Revenue Board rules—Revenue—Date of payment of—When becomes an arrear.

Their Lordships entirely accept the contention that, if revenue in fact became payable on 7-6-1917, it did not become an arrear under S. 2 of Act XI of 1859 until the 1st July, and that in that case the latest date for payment under S. 3 of the Act and the rule made by the Board of Revenue was on the 28th September, so that a sale on the 24th September for the alleged arrear was irregular (249). (*Lord Chancellor.*) JAGADISHWAR NARAYAN v. MAHOMED HAZIQ HUSSAIN. (1926) 53 I. A. 246 = 6 Pat. 200 =

31 C. W. N. 107 = A. I. R. 1926 P. C. 126 =

44 C. L. J. 515 = 38 M. L. T. (P. C.) 5 = 8 P. L. T. 1 =

98 I. C. 930 = 51 M. L. J. 815 (818).

—S. 3—Estate—Meaning of—Land with building on it—Sale under Act of—Ownership of building if passes to purchaser under.

BENGAL ACTS—(Contd.)**Land Revenue Sales Act (or Revenue Sale Law Act)
XI of 1859, S. 3—(Contd.)**

The word "estate" in the Bengal Act XI of 1859 must be taken to have a more limited meaning than it would have in the English law, and the Government's power of sale for arrears of revenue *prima facie* is limited to the land, which is subject to the payment to the Government of the annual revenue, and in respect of which the proprietor is entered in the general register of revenue-paying estates, and having special regard to the view held in India respecting the separation of the ownership of buildings from the ownership of the land, and to the recognition by the Courts in India that there is no rule of law that whatever is affixed or built on the soil becomes a part of it and is subjected to the same rights of property as the soil itself, their Lordships are of opinion that in order to make a house erected upon the land, as well as the land itself, subject to the Government power of sale for arrears of revenue, special words indicating the intention of the Legislature to make the building subject to the sale would be necessary (224).

S was the proprietor of the holding in question which was sold under the provisions of Beng. Act XI of 1859 and was purchased by the plaintiff. There was a residential house, which had been erected by S and which was standing on the land at the time of the plaintiffs' purchase. But it was only the land, and not also the building on it, which had been entered on the register of revenue-paying estates prepared under Act XI of 1859.

Held, that the building on the land did not pass to the plaintiff by reason of the revenue sale (224-5). (*Sir Lancelot Sanderson.*) **NARAYAN DAS KHETTRY v. JATINDRA NATH ROY CHOWDHURY.** (1927) 54 I. A. 218 = 54 C. 669 = 1927 M. W. N. 461 = 102 I. C. 198 (2) = 29 Bom. L. R. 1143 = 46 C. L. J. 1 = 31 C. W. N. 965 = 26 A. L. J. 1 = 8 P. L. T. 663 = 26 L. W. 848 = A. I. R. 1927 P. C. 135 = 53 M. L. J. 158.

—Estate not in arrear—Sale of—Validity.

S. 3 of Act XI of 1859 provides that, in default of payment of revenue, within the time appointed for each district by the Board of Revenue, the "estate in arrear" in those districts "shall be sold at public auction to the highest bidder." The Act does not sanction, and by implication forbids, the sale of any estate which is not at the time in arrear of Government revenue. The whole clauses of the Act of 1859, in so far as these relate to sales or to their challenge at the instance of the proprietor, as well as the provisions of S. 3 of Act VII of 1878 (Bengal), are framed upon the express footing that they are to be applicable to the sale of estates which are in arrear of duty. The enactments of 1859 and of 1868 are obviously intended to apply to cases in which, if the irregularity or illegality of the sale proceedings alleged by the objector be negatived, the sale will remain valid. They are inapplicable to a case in which there were no arrears of revenue due in respect of an estate, and the Collector had therefore no jurisdiction to sell the same (158-9). (*Lord Watson.*) **BALKISHEN DAS v. SIMPSON.** (1898) 25 I. A. 151 = 25 C. 833 (842) = 2 C. W. N. 513 = 7 Sar. 363.

—Estate not in arrear—Sale of—Validity.

Bengal Act XI of 1859 does not sanction, and by plain implication forbids, the sale of any estate which is not at the time in arrear of Government revenue. The whole clauses of Act XI of 1859 as well as the provisions of S. 2 of Bengal Act VII of 1868 are framed upon the express footing that they were to be applicable to the sale of estates which are in arrear of duty (180). (*Lord Shaw.*) **Haji BUKSH ELAHI v. DURLAV CHANDRA KAR.**

(1912) 39 I. A. 177 = 39 C. 981 (992-3) = 16 C. W. N. 842 = 23 M. L. J. 206.

BENGAL ACTS—(Contd.)**Land Revenue Sales Act (or Revenue Sale Law Act)
XI of 1859—(Contd.)**

—S. 5—*Embankment charges due under Act II of 1882—Sale for, as for arrears of revenue—Notifications under S. 5 of Act XI of 1859—Necessity—Procedure by certificate—Effect.*

An estate being in arrear in the payment of the kist due, notifications were issued under S. 6 of the Bengal Land Revenue Sales Act (XI of 1859) for the sale of a portion thereof. Subsequently a certificate was filed under Ss. 7 and 9, sub-S. 3, of the Bengal Public Demands Recovery Act I of 1895, as amended by Bengal Act I of 1897, for arrears of embankment charges due under the Bengal Embankment Act (II of 1882) in respect of the same lands. Before the date fixed for the sale the amount due for land revenue, but not that due for the embankment charges, was paid and an acknowledgment given. The Collector ordered the sale to proceed in respect of the embankment charges, but no notifications under S. 5 of the Act of 1859 were issued, and the sale took place on the date originally fixed. *Held* (affirming the decision of the High Court), that the sale was invalid since the Collector having acknowledged payment of the land revenue for which the sale was notified and having proceeded by certificate in respect of the embankment charges, the latter arrears could not be treated as arrears of land revenue without notifications under S. 5 of the Act of 1859. (*Lord Dunedin.*) **HIRAJ CHANDRA BOSE v. HARI DASI DEBI.** (1914) 42 I. A. 58 = 42 C. 765 = 19 C. W. N. 507 = 2 L. W. 422 = 29 I. C. 290 = 28 M. L. J. 480.

—Notice under—Arrears accrued due subsequent to—Sale also for—Validity of sale in case of. *See* BENGAL ACTS—LAND REVENUE SALES ACT XI OF 1859—SALE UNDER—VALIDITY OF. (1903) 31 I. A. 52 = 31 C. 256 (260).

—Notice under—Malikana and land-revenue—Sale for—Notice separate in respect of malikana—Necessity. *See* BENGAL ACTS—LAND REVENUE SALES ACT XI OF 1859, S. 2—LAND REVENUE.

(1903) 31 I. A. 52 = 31 C. 256 (258).

—Notice under—Necessity—Estate or share thereof under attachment in execution of Civil Court decree—Revenue sale of.

Held, that where an estate, or a share in an estate, not severed for the purposes of revenue, was under attachment by order of a Civil Court in execution of a decree, such estate or share could not, under S. 5 of Bengal Act XI of 1859, be sold for arrears of revenue without the notice required by S. 5 of that Act. (*Sir James W. Colville.*) **BUNWAREE LALL SAHOO v. MOHABEER PROSHAD SINGH.** (1873) 1 I. A. 89 = 12 B. L. R. 297 = 3 Sar. 338.

—Notice under—Service of—Objection to sale on ground of—Maintainability—Sale certificate obtained by purchaser—Effect—Bengal Act VII of 1868, S. 8. *See* BENGAL ACTS—LAND REVENUE SALES ACT VII OF 1868, S. 8. (1903) 31 I. A. 52 = 31 C. 256 (260).

—Cl. (3)—Applicability—Estate portion of which is not under attachment.

It has been argued that the words "arrears of estates under attachment" in Cl. 3 of S. 5 of Act XI of 1859 must refer to estates the whole of which are under attachment, and that if any portion or any share of an estate, however small, is not under an attachment, the clause does not apply. In their Lordships' opinion, this would be to place an unduly narrow construction and to limit the meaning of plain words. It appears to their Lordships that an estate any portion of which is under attachment cannot be said to be free from

BENGAL ACTS—(Contd.)**Land Revenue Sales Act (or Revenue Sale Law Act) XI of 1859, S. 5, Cl. (3)—(Contd.)**

attachment, and is, in fact, subject to attachment. The reasons why the Legislature should direct information to be given to a creditor would apply as much to the case of the creditor having a lien on a small, as to one having a lien on the whole or a large part of the estate (105). (*Sir James W. Colville.*) **BUNWAREE LALL SAHOO v. MOHABEER PROSHAD SINGH.** (1873) 1 I. A. 89 =

12 B. L. R. 297 = 3 Sar. 338.

—*Estate under attachment by judicial authority under C. P. C.—Applicability to.*

It has been argued that S. 5, Cl. (3) of Act XI of 1859 applies only to the case of estates being held under attachment by the Collector. To place such a construction upon the words of the Act would unduly limit their plain meaning. The words of the Act are, "arrears of estates under attachment by order of any judicial authority." These words would *prima facie* apply to all attachments by judicial authority under Act VIII of 1859, which had been passed some two months before in the same session of the Legislature; and it is difficult to suppose that the Legislature having passed that Act should in a subsequent statute referring to attachments intend to omit a reference to attachments which their previous legislation had regulated.

But it has been said that the second portion of this sentence must limit the construction of the first. That the words "or managed by the Collector in accordance with such order" must refer to attachments as well as to the mere management by the Collector of estates. No such construction necessarily follows.

The first part of the clause, "arrears of estates under attachment by order of any judicial authority," should be read by itself. The terms "managed by the Collector in accordance with such order" would refer to cases in which the Collector may manage estates by an order of judicial authority, which may or may not be an order for an attachment. By this construction both parts of the sentence would co-here. The latter words do not narrow the plain and obvious meaning of the former. (*Sir James W. Colville.*) **BUNWAREE LALL SAHOO v. MOHABEER PROSHAD SINGH.** (1873) 1 I. A. 89 (104-5) = 12 B. L. R. 297 = 3 Sar. 338.

—**Ss. 5 & 17—Prohibitory order of Collector under Bengal Cess Act, 1880, for levy of road cess in arrear—Sale for arrears of revenue while estate subject to—Validity.** See **BENGAL ACTS—LAND REVENUE SALES ACT, 1859, S. 17—ATTACHMENT—PROHIBITORY ORDER OF COLLECTOR UNDER BENGAL CESS ACT, 1880, FOR LEVY OF ROAD CESS IN ARREAR.** (1893) 20 I. A. 165 (171) = 21 C. 70 (79-80).

NOTIFICATION OF SALE—PUBLICATION OF.

—**S. 6—Calcutta Gazette—Publication in—Object of.**

The Calcutta Gazette is the official Gazette prescribed in Act XI of 1859 (Bengal). The publication of the notice in that Gazette is prescribed with the object of inviting purchasers from other quarters and thus not confining the bidding to speculative money-lenders and mukhtars of the neighbourhood, which is likely to be the case where the notification gives little or no particulars in respect of the property advertised for sale (86). (*Mr. Ameer Ali.*) **RAVENESHWAR PRASAD SINGH v. BAIJNATH RAM GOENKA.** (1914) 42 I. A. 79 = 42 C. 897 (911) = 19 C. W. N. 481 = (1915) M. W. N. 559 = 2 L. W. 355 = 21 C. L. J. 412 = 17 Bom. L. R. 442 = 13 A. L. J. 501 = 17 M. L. T. 321 = 28 I. C. 699 = 28 M. L. J. 583.

—**Government Vernacular Gazette—Failure to publish in—Annulment of sale on ground of—Conditions.** See

BENGAL ACTS—(Contd.)**Land Revenue Sales Act (or Revenue Sale Law Act) XI of 1859, S. 6—(Contd.)****NOTIFICATION OF SALE—PUBLICATION OF—(Contd.)**

BENGAL ACTS—LAND REVENUE SALES ACT OF 1859, SS. 33, 6. (1918) 45 I. A. 205 = 46 C. 255.

—*Object of—Specification of property—Sufficiency—Test—Shares of estate—Specification in case of.*

Act XI of 1859 is a stringent enactment for the realization of arrears of revenue; at the same time it provides certain safeguards for the protection of the interests of the defaulter so that he may not be unnecessarily prejudiced. Among these safeguards are the provisions of Ss. 5 and 6 for the issue of notifications of sales specifying the properties to be sold, and their due publication in accordance with the law. An exact compliance with the requirements of the Act is considered so important by the Government that the Board of Revenue has issued special rules, with forms of notification necessary in the case of estates or shares of estates advertised for sale. The object of the law requiring specification of the properties to be sold, as well as of the Board's rules, is clearly to enable likely purchasers among the public to know exactly what is going to be sold, and to ensure thereby reasonable competition. When an estate is advertised for sale it is not difficult to specify it; in the case of shares of estates the work of specification requires care and attention. No hard and fast rule can be laid down with regard to its sufficiency (85). Each case must depend upon its own particular facts; what has to be considered is whether, having regard to all the circumstances, the specification was sufficiently definite and clear to induce likely buyers to appear and bid at the sale. It is not enough that they may go and obtain the requisite information from the Collector's office. The particulars in the notice should be sufficient in themselves to tell purchasers what they are invited to bid for (86-7). (*Mr. Ameer Ali.*) **RAVENESHWAR PRASAD SINGH v. BAIJNATH RAM GOENKA.** (1914) 42 I. A. 79 = 42 C. 897 (910) = 28 I. C. 699 = 19 C. W. N. 481 = (1915) M. W. N. 559 = 2 L. W. 355 = 21 C. L. J. 412 = 17 Bom. L. R. 442 = 13 A. L. J. 501 = 17 M. L. T. 321 = 28 M. L. J. 583.

—*Official Gazette—Meaning of.* See **UNDER THIS ACT, SS. 33, 6.** (1918) 45 I. A. 205 = 46 C. 255.

—**Ss. 6, 10, 11—Ijmali share—Sale of—Validity—Notification—Specification in, of property advertised for sale insufficient—Sale for gross under-value in consequence—Effect.**

A 15 annas 6 dams share of Mahal B, which was in existence as an independent fiscal unit for a considerable time, included 360 villages, and in the Collector's register was entered as bearing tanjib No. 336, which marked its position as a separate revenue-paying estate. 148 owners of specific but undivided shares in the Mahal applied for and obtained from the Collector separation of accounts. This left, however, a large residue, commonly called the *ijmali* or joint share, the owners of which remained jointly liable for the revenue due in respect thereof. This *ijmali* share was found to be in arrears for the March and June kist or instalment of Government revenue, amounting to Rs. 604, and it was advertised for sale on September 9, 1901.

An application to the Collector for postponement of the sale was refused, and the sale was held on the advertised date, when the property was purchased by the respondent. An appeal to the Commissioner of the division, preferred under S. 25 of Bengal Act XI of 1859, was dismissed.

The notification under Ss. 6 and 13 of the Act was affixed in the Collector's office and in the Court of the Judge of the district; and as the revenue payable in respect of the *ijmali* share exceeded Rs. 500, it was also published in the Calcutta Gazette. In this notification what purported to be a specification of the share to be sold was in these terms: "Ijmali

BENGAL ACTS—(Contd.)**Land Revenue Sales Act (or Revenue Sale Law Act) XI of 1859, Ss. 6, 10 & 11—(Contd.)**

share which cannot be specified excluding the separate accounts number” Then followed a long list of the 148 separate accounts already referred to, and at the end the following words occurred: “All other shares besides that specified are excluded from the sale.”

In the sale notification issued on August 6, 1901, which was apparently the one affixed in the Collector's office, the entry in column 5 (the specification column) was as follows: “The ijmal share cannot be particularised owing to separate accounts having been opened.”

The share to be sold are those (sic) given in a separate sheet after excluding the share in respect of which the separate accounts have been opened.” Admittedly there was no specification of the share to be sold beyond that mentioned above.

Held, that the notification in the case was insufficient and irregular and not in compliance with the requirements of the law, and that as, in consequence of the defectiveness of the notice, the property was sold at a gross under-value, the sale was liable to be set aside (86-7).

The intending purchaser was left to gather for himself by going through an elaborate process of elimination the property that was advertised for sale, and for which he was expected to bid (86). (*Mr. Ameer Ali.*) RAVENESH-WAR PRASAD SINGH v. BAIJNATH RAM GOENKA.

(1914) 42 I. A. 79 = 42 C. 897 (911-2) =
19 C. W. N. 481 = (1915) M. W. N. 559 = 28 I. C. 699 =
2 L. W. 355 = 21 C. L. J. 412 = 17 Bom. L. R. 442 =
13 A. L. J. 501 = 17 M. L. T. 321 = 28 M. L. J. 583.

—S. 8—*Applicability—No default by owners—All moneys paid by them correctly credited—Alleged default based on erroneous debit entries in Collector's books.*

S. 8 of Act XI of 1859 contemplates two cases only. In the second case, it is enacted that the Collector's possession of money belonging to the defaulter shall afford no answer to the default, unless the money stood in the defaulter's name alone and without dispute, or the Collector has failed, after application by the defaulter, to impute his money towards payment of the revenue. The enactment has no application, except there be (1) default in payment of the revenue, and (2) possession by the Collector of money of the defaulter not indisputably placed to his credit. The section can have no application to a case in which the owners of the estate sold were not in default, all moneys paid by them had been correctly credited; and their alleged default, which was a pure fiction, was based upon erroneous debit entries to which they were not parties (159-60). (*Lord Watson.*) BALKISHEN DAS v. SIMPSON.

(1898) 25 I. A. 151 = 25 C. 833 (843) =
2 C. W. N. 513 = 7 Sar. 363.

—S. 14—*Arrears incorrectly shown in Collector's books as due on separate account—Sale of whole estate for—Requisition to co-sharers to purchase share because bids did not reach amount due—Re-sale on co-sharer's failure to purchase—Closing accounts of whole estate—No arrears due on date of sale for kist of period for which sale held—Validity of sale.*

A revenue-paying estate was put up for sale under S. 14 of the Bengal Land Revenue Sales Act for arrears due on a separated share, which was entered in a separate account in the Collector's books. The sale was ostensibly held for arrears of the March kist, but the bids not having reached the amount due, the Collector intimated to the co-sharers that they were at liberty to purchase the share within June 17, 1904, by paying the arrears due under S. 14 of Act XI of 1859. The co-sharers not having purchased the share, the Collector again put up the whole estate for sale on

BENGAL ACTS—(Contd.)**Land Revenue Sales Act (or Revenue Sale Law Act) XI of 1859, S. 14—(Contd.)**

19—9—1904 as for the March kist. Meantime, payments were made, in consequence whereof the March kist was not in arrear though an arrear of Rs. 2 and odd was due for the June kist.

Held, that the sale of the entire estate under S. 14 of the Bengal Land Revenue Sales Act was void, and that the Collector was bound to close the separate accounts on 17th June 1904, and as on that date there was no arrear in respect of the March kist, a sale as for the March kist was *ultra vires*. (*Lord Shaw.*) SHEIKH HAJI MUTSADDI MIAN v. MAHOMED IDRIS. (1915) 19 C. W. N. 764 = 34 I. C. 283.

—S. 17—*Attachment—Prohibitory order of Collector under Bengal Cess Act, 1880 for levy of road cess in arrear if an—Sale for arrears of revenue while estate subject to—Validity—Ss. 17, 5 of Act XI of 1859.*

The question was whether the courts below were right in holding that a sale of an estate for arrears of Government revenue was contrary to the provisions of S. 5 and S. 17 of Act XI of 1859.

The estate was sold for arrears which accrued while it was subject to an order issued by the Collector under the Cess Act, 1880, for the levy of road cess in arrear. That order, which was termed a “prohibitory order,” forbade payment of rent to any person but the Collector until the amount due for road cess was satisfied, and gave priority to the claim for road cess over any demand or claim other than the demand of Government revenue.

Held, that such a prohibitory order was an attachment both in form and substance, and an attachment within the letter and meaning of S. 17 of Act XI of 1859, and that the sale was therefore contrary to the provisions of that section (171).

Quære whether the sale was also contrary to the provisions of S. 5 of Act XI of 1859 (171). (*Lord Macnaghten.*) RAJAH GOBIND LAL ROY v. RAMJANAM MISSER.

(1893) 20 I. A. 165 = 21 C. 70 (79-80) = 6 Sar. 356.

—“*Held under attachment*”—*If refers to attachment by revenue officer.*

Semble the words “held under attachment” in S. 17 of Act XI of 1859, may refer to “held under attachment by a revenue officer” (104). (*Sir James W. Colville.*) BUNWAREE LALL SAHOO v. MOHABEER PROSHAD SINGH.

(1873) 1 I. A. 89 = 12 B. L. R. 297 = 3 Sar. 338.

—S. 18—*Order exempting estate from sale under—Validity—Condition—Exemption must be absolute.*

A Collector's order, under S. 18 of Act XI of 1859, for exempting an estate from sale for arrears of revenue, must be an absolute exemption, not an order which may have effect as an exemption or not according to what may happen or be done afterwards. The section says it shall be competent to the Collector or other officer, at any time before the sale, to exempt the estate from sale. The Collector is to record in a proceeding the reason for giving exemption. Although this may be done at any time, the reason should exist at the time the exemption is granted, and not be a fact which may happen afterwards, or an act which may or may not be performed (60).

The High Court held that an order the effect of which was “I exempt this estate from sale, provided the arrears are paid before sale” was an order for exemption under S. 18 of Act XI of 1859. *Held*, that the order was not such an order as was intended by S. 18 (59-60). (*Sir Richard Couch.*) LALA GOWRI SANKAR LAL v. JANKI PERSHAD.

(1889) 17 I. A. 57 = 17 C. 809 (812) = 5 Sar. 518.

BENGAL ACTS—(Contd.)**Land Revenue Sales Act (or Revenue Sale Law Act) XI of 1859—(Contd.)**

—S. 25—*Appeal to Commissioner under—Fraud—Charge of—Jurisdiction of Commissioner to inquire into.*

The Board have not been referred to any authority to show that, on an appeal to the Commissioner from an order of the Collector, declaring a particular person the purchaser at a sale held by him under the provisions of the Bengal Revenue Sales Act XI of 1859, the Commissioner would have jurisdiction to inquire into a charge of fraud. (*Lord Atkinson.*) SATISH CHANDRA CHATTERJI v. KUMAR SATISH KANTHA ROY. (1923) 33 M. L. T. 325 (P.C.) = 73 I. C. 391 = (1923) P. C. 73 = 45 M. L. J. 363 (366).

—*Grounds not mentioned in—Maintainability—Grounds mentioned unsound.*

Quære, whether in an appeal to the Commissioner under S. 25 of Act XI of 1859 the appellant is not tied down to the grounds alleged in his petition, and whether after the time for appealing has passed, he may bring forward sound objections so long as an appeal on grounds that are unsound is pending. (*Lord Macnaghten.*) RAJAH GOBIND LAL ROY v. RAMJANAM MISSER. (1893) 20 I. A. 165 (175) = 21 C. 70 (84) = 6 Sar. 356.

—S. 28 and Sch. A—*Revenue sale—Date of—Day after date of default in payment of revenue—Date of actual sale.*

It is true that under S. 28 and Schedule A of Bengal Act XI of 1859 the sale certificate is to specify, as the date from which title is to be deemed to have vested in the purchaser, the day after that fixed as the last date of payment, and that that is the date from which the purchaser becomes entitled to the rents and profits on the one hand, and liable to pay the revenue on the other. But it would be a strained construction in any sense to say that that is the date to be looked at in saying whether a purchaser was a proprietor when he purchased. And when the act is considered as a whole it seems clear that when sale or purchase is spoken of in connection with time, the time meant is that at which the sale takes place in fact, not that to which its operation is carried back by relation. This is apparent from Ss. 18, 20, 21, 23 and 27. (*Sir Arthur Wilson.*) SHYAM KUMARI v. RAMESWAR SINGH.

(1904) 31 I. A. 176 = 32 C. 27 (39) = 8 C. W. N. 786 = 6 Bom. L. R. 754 = 8 Sar. 688.

—S. 31—*Revenue sale—Incumbrances on property sold—Effect on—Incumbrancers—Rights of.*

S. 31 of the Bengal Land Revenue Sales Act XI of 1859 nowhere transfers the charges to which property sold at a revenue sale is subject from the property to the proceeds of the sale; but, as the sale by the Government conveys a title free from encumbrances to the purchaser, the mortgagees are clearly entitled to claim the same as creditors under the section referred to, and the Court would undoubtedly direct that such claims, in due order of priority, should be satisfied out of the sums in Court. (*Lord Buckmaster.*) TARINI CHARAN SARKAR v. BISHUN CHAND.

(1917) 23 M. L. T. 147 = 7 L. W. 315 = 27 C. L. J. 303 = 22 C. W. N. 505 = (1918) M. W. N. 295 = 4 P. L. W. 249 = 16 A. L. J. 271 = 20 Bom. L. R. 553 = 44 I. C. 304 = 34 M. L. J. 361 (367).

—S. 33—*Effect.*

The effect of S. 33 of Act XI of 1859 is that, in order that a sale may be annulled by the Court, a plaintiff must prove (1) that the sale was made contrary to the provisions of the Act, (2) that he had sustained substantial injury by reason of the irregularity complained of, and (3) that he specified the irregularity in question in his appeal to the Commissioner (251). (*Lord Chancellor.*) JAGADISHWAR

BENGAL ACTS—(Contd.)**Land Revenue Sales Act (or Revenue Sale Law Act) XI of 1859, S. 33—(Contd.)**

NARAYAN v. MD. HAZIQ HUSSAIN.

(1926) 53 I. A. 246 = 6 Pat. 200 = 31 C. W. N. 107 = A. I. R. 1926 P. C. 126 = 44 C. L. J. 515 = 38 M. L. T. (P. C.) 5 = 8 P. L. T. 1 = 98 I. C. 930 = 51 M. L. J. 815 (819-20).

—*Sale contrary to provisions of Act—Inaccurate description—Sale under—If a sale contrary to provisions of Act.*

Quære, whether a sale under an inaccurate description is contrary to the provisions of Act XI of 1859 within the meaning of S. 33 thereof (250). (*Lord Chancellor.*) JAGADISHWAR NARAYAN v. MD. HAZIQ HUSSAIN.

(1926) 53 I. A. 246 = 6 Pat. 200 = 31 C. W. N. 107 = A. I. R. 1926 P. C. 126 = 44 C. L. J. 515 = 38 M. L. T. (P. C.) 5 = 8 P. L. T. 1 = 98 I. C. 930 = 51 M. L. J. 815 (820).

SUIT BY DEFAULTER TO SET ASIDE SALE.

—*Decree in favour of plaintiff in—Not res judicata inter se between defendants Secretary of State and purchaser at the sale.*

When to a suit instituted to set aside the sale of an estate under Bengal Act XI of 1859 the Secretary of State for India and the purchaser of the estate at the said sale are made parties, a decree obtained by the plaintiffs in the suit against the Secretary of State would not constitute *res judicata* in any question or proceeding between that Minister and the purchaser (160). (*Lord Watson.*) BALKISHEN DAS v. SIMPSON.

(1898) 25 I. A. 151 = 25 C. 833 (843-4) = 2 C. W. N. 513 = 7 Sar. 363.

—*Grounds—Appeal to Commissioner—Grounds not "declared and specified" in—Maintainability of.*

S. 33 of Act XI of 1859 enacts that no sale shall be annulled by a Court of Justice upon the ground of its having been made contrary to the provisions of the Act, unless the ground shall have been declared and specified in an appeal made to the Commissioner.

The suit was to set aside a sale of an estate for arrears of revenue due from the plaintiffs, made by the Collector of Sarun under the provisions of Act XI of 1859. The High Court decided in favour of the plaintiffs on the ground that there was a special order for exemption, dated the 22nd of September, 1883, under S. 18 of Act XI of 1859 exempting the estate from sale, provided the arrears were paid before sale, that the plaintiffs had complied with that order, and that the sale had therefore been conducted contrary to the provisions of the Act. It appeared, however, that the plaintiffs had previously appealed to the Commissioner, that in their grounds of appeal they said that the Collector, on the 24th of September, passed a general order for exemption, and they complied with it, and that they did not mention any order of the 22nd of September.

Held, that the suit was barred by S. 33 of the Act (60-1). (*Sir Richard Couch.*) LAJLA GOWRI SUNKER LAL v. JANKI PERSHAD.

(1889) 17 I. A. 57 = 17 C. 809 (813-4) = 5 Sar. 518.

—The question was whether in cases of illegality, as distinguished from cases of irregularity properly so called, a suit might be brought to set aside a sale under Act XI of 1859 on grounds not "declared and specified" in an appeal to the Commissioner.

Held, in view of the scheme of Act XI of 1859 and the express direction contained in S. 33 thereof, that in every case where a sale for arrears of revenue was impeached as being "contrary to the provisions" of Act XI of 1859, no grounds of objection were open to the plaintiff which had

BENGAL ACTS—(Contd.)**Land Revenue Sales Act (or Revenue Sale Law Act) XI of 1859, S. 33—(Contd.)****SUIT BY DEFAULTER TO SET ASIDE SALE—(Contd.)**

not been declared and specified in an appeal to the Commissioner (174).

In the opinion of their Lordships, a sale is a sale made under the Act XI of 1859 within the meaning of that Act when it is a sale for arrears of Government revenue, held by the Collector or other officer authorised to hold sales under the Act, although it may be contrary to the provisions of the Act either by reason of some irregularity in publishing or conducting the sale, or in consequence of some express provision for exemption having been directly contravened (174).

The only reference to irregularity in S. 33 occurs in the sentence "And then only on proof that the plaintiff has sustained substantial injury by reason of the irregularity complained of," and that sentence is not to be found in the earlier Acts of 1841 and 1845. It is difficult to suppose that the introduction of that sentence into the Act of 1859 could have been intended to have the effect of excluding from S. 33 all cases of illegality as distinguished from irregularity (174). (*Lord Macnaghten.*) **RAJAH GOBIND LAL ROY v. RAMJANAM MISSER.**

(1893) 20 I. A. 165 = 21 C. 70 (82-3) = 6 Sar. 356.

—See also under this very section and sub-heading.

(1926) 53 I. A. 246 (251-2) = 6 Pat. 200.

—Grounds—Misdescription of property if one—Objection to sale based on—Omission to raise in appeal to Commissioner—Maintainability of, in suit.

An estate belonged to a number of proprietors in several shares. In respect of some of the shares separate accounts had been opened under S. 11 of Act XI of 1859, leaving a residue belonging to the respondents jointly. The revenue due in respect of the residuary share of the estate belonging to the respondents jointly being in arrear and unpaid, the Collector sold the said *ijmali* (or joint) share under the Act for the said arrear. While the property offered for sale, namely, the *ijmali* share which formed the residue of the estate, was correctly described on the face of the notice of sale, and the revenue payable in respect of it was correctly given, there was an error in the details of the area of the property noted on the reverse side of the notice, that error amounting to about $1\frac{1}{2}$ bighas out of a total of 158 bighas. It was not alleged or proved that the price given for the property was affected by the misdescription, nor was the point raised on the appeal to the Commissioner. Nevertheless, in a suit brought by the defaulting proprietor to set aside the sale, the High Court held, on the authority of 2 Pat. L. J. 402 (F. B.), that the misdescription was sufficient to invalidate the sale.

Held, that the decision of the Full Bench relied upon was wrong, that the misdescription was an error in the exercise of the Collector's powers and had no effect on his jurisdiction, that the error might have been made the subject of an appeal to the Commissioner, and that the omission to specify the point as a ground for that appeal was a bar to its being raised in the suit (251-2). (*Lord Chancellor.*) **JAGADISHWAR NARAYAN v. MD. HAZIQ HUSSAIN.**

(1926) 53 I. A. 246 = 6 Pat. 200 = 44 C. L. J. 515 = 8 P. L. T. 1 = 38 M. L. T. (P. C.) 5 = 31 C. W. N. 107 = A. I. R. 1926 P. C. 126 = 98 I. C. 930 = 51 M. L. J. 815 (819-21).

—Grounds—Premature—Sale being, if one—Omission to raise ground in appeal to Commissioner—Maintainability of, in suit.

Quære whether, in a case in which the objection that a sale under Act XI of 1859 was premature was not taken on

BENGAL ACTS—(Contd.)**Land Revenue Sales Act (or Revenue Sale Law Act) XI of 1859, S. 33—(Contd.)****SUIT BY DEFAULTER TO SET ASIDE SALE—(Contd.)**

the appeal to the Commissioner for Revenue, S. 33 of the Act would be a bar to the objection being relied upon in the suit brought to set aside the sale (250). (*Lord Chancellor.*) **JAGADISHWAR NARAYAN v. MD. HAZIQ HUSSAIN.**

(1926) 53 I. A. 246 = 6 Pat. 200 = 31 C. W. N. 107 = A. I. R. 1926 P. C. 126 = 44 C. L. J. 515 = 38 M. L. T. (P. C.) 5 = 8 P. L. T. 1 = 98 I. C. 930 = 51 M. L. J. 815 (819).

—Grounds—Trivial errors.

It would be regrettable if the title of a purchaser under Act XI of 1859 were liable to be impeached by suit in respect of a trifling error which is not proved to have substantially affected the price given for the property. The first persons to suffer by such an interpretation of the Act would be the defaulting proprietors, for the effect would be to deter purchasers from bidding freely at a revenue sale (252). (*Lord Chancellor.*) **JAGADISHWAR NARAYAN v. MD. HAZIQ HUSSAIN.**

(1926) 53 I. A. 246 = 6 Pat. 200 = 31 C. W. N. 107 = A. I. R. 1926 P. C. 126 = 44 C. L. J. 515 = 38 M. L. T. (P. C.) 5 = 8 P. L. T. 1 = 98 I. C. 930 = 51 M. L. J. 815 (821).

—Object proper of.

Quære, whether the only object of a suit by a defaulter to set aside a sale of his estate for arrears of revenue under Bengal Act XI of 1859 is not to determine whether the statutory sale is to stand good, or is to be set aside upon the terms prescribed by the Statute (141-2). (*Sir James W. Colville.*) **RAM TUHUL SINGH v. BISESWAR LALL SAHOO.**

(1875) 2 I. A. 131 = 15 B. L. R. 208 = 23 W. R. 305 = 3 Sar. 477 = 3 Suth. 136.

—Parties—Secretary of State if one.

In a suit to set aside a revenue sale under the Bengal Revenue Sale Law (Act XI of 1859) on the ground that the estate was not in arrear and that the sale of it was therefore without jurisdiction, the Secretary of State for India was impleaded in the courts below. On appeal by the plaintiffs to the Privy Council, however, they did not join him as a party to the appeal. Upon that ground the respondent (purchaser at the revenue sale) pleaded *in limine* that the appeal to the Board was incompetent; and, at all events, that the hearing of the appeal ought to be delayed until the Secretary of State for India had been made a party to it. *Held*, rejecting the contention, that it was based upon the mistaken view that a decree obtained by the appellants in the suit against the Secretary of State would constitute *res judicata* in any question or proceeding between that Minister and the respondent (160).

The position of the Indian Secretary, in cases like the present, is correctly explained by Mitter, J., in 9 C. 276. (*Lord Watson.*) **BALKISHEN DAS v. SIMPSON.**

(1898) 25 I. A. 151 = 25 C. 833 (843-4) = 2 C. W. N. 513 = 7 Sar. 363.

—Parties—Surplus proceeds of sale—Execution purchaser of defaulter's interest in—If a necessary party.

Quære, whether, to a suit brought by the owner of property sold for arrears of revenue under Bengal Act XI of 1859 to set aside such sale, the purchasers of the surplus sale proceeds in the hands of the Collector at a sale held in execution of a money decree obtained against the plaintiff were necessary parties (141). (*Sir James W. Colville.*) **RAM TUHUL SINGH v. BISESWAR LALL SAHOO.**

(1875) 2 I. A. 131 = 15 B. L. R. 208 = 23 W. R. 305 = 3 Sar. 477 = 3 Suth. 136.

—Setting aside of sale in—Terms of—Surplus proceeds of sale—Execution purchaser of—Purchase-money

BENGAL ACTS—(Contd.)**Land Revenue Sales Act (or Revenue Sale Law Act) XI of 1859, S. 33—(Contd.)**

SUIT BY DEFAULTER TO SET ASIDE SALE—(Contd.)
paid by, and applied in payment of defaulter's debts—Refund of—Necessity.

An estate was sold for arrears of revenue under Bengal Act XI of 1859, and, after deducting the arrears of Government revenue and sale expenses, a certain sum remained as surplus proceeds in deposit in the hands of the Collector. The said surplus proceeds were attached and sold in execution of a money decree obtained against the defaulter and were purchased by the respondents. The purchase-money paid by the respondents were applied in part in satisfaction of the decree under execution, and the residue was drawn out by other judgment-creditors of the defaulter, and similarly applied by them.

In a suit brought by the defaulter to set aside the revenue sale, *quære*, whether, assuming that the respondents were made parties to the suit, they could insist upon the sale being set aside only on condition of the defaulter paying the purchase-money which was paid by them and which was applied in satisfaction of his debts (141-2). (*Sir James W. Colville.*) **RAM TUHUL SINGH v. BISESWAR LALL SAHOO.** (1875) 2 I. A. 131 = 15 B. L. R. 208 = 23 W. R. 305 = 3 Sar. 477 = 3 Suth. 136.

———**Ss. 33, 3—Sale of estate not in arrear—Suit to set aside—Civil Court—Jurisdiction to entertain suit—Objection to sale not considered and disposed of by Commissioner.**

Under Act XI of 1859 the Collector has no jurisdiction to sell an estate not in arrear, and the whole proceedings of the Collector with a view to the sale of such an estate, are beyond his jurisdiction, and are not entitled to the protection given him by the Act in cases where sale is authorised, although it may be attended with some irregularity or illegality. The Civil Court has jurisdiction to entertain a suit to set aside a sale under Act XI of 1859 on the ground that the estate sold was not in arrear at all at the time, and it can give effect to the objection, although the point had not been considered and disposed of by the Commissioner (159). (*Lord Watson.*) **BALKISHEN DAS v. SIMPSON.** (1898) 25 I. A. 151 = 25 C. 833 (842) = 2 C. W. N. 513 = 7 Sar. 363.

———**Ss. 33, 6—Revenue sale—Notification of—Government Vernacular Gazette—Failure to publish in—Annulment of sale on ground of—Conditions.**

An estate in Orissa was put up for sale for arrears of Government revenue, a notification of the sale having been published in the Calcutta Gazette. In a suit to set aside the sale on the ground that a notification of the sale in the Government Vernacular Gazette for Urya was necessary under S. 6 of Bengal Act XI of 1859, *held*, (1) that the omission to notify the sale in the Urya Gazette did not make the sale one "contrary to the provisions of this Act" within the meaning of S. 33 of the Act, and (2) that, even if the omission was an irregularity, the sale could not be set aside in the absence of proof of substantial injury having arisen in consequence of that irregularity.

The expression "Official Gazette" in S. 6 of the Act means the Official Gazette published in Calcutta. (*Lord Shaw.*) **SHARFUDDIN HOSSAIN v. RADHA CHARAN DAS.** (1918) 45 I. A. 205 = 46 C. 255 = 23 C. W. N. 369 = 29 C. L. J. 498 = 25 M. L. T. 80 = 21 Bom. L. R. 544 = 16 A. L. J. 915 = 47 I. C. 995 = 35 M. L. J. 644.

———**S. 37—Applicability—Conditions.**

To bring a case within the words of S. 37 of Bengal Act XI of 1859 three things must concur: There must be a sale, *first*, of an entire estate; *secondly*, in the permanently settled districts; *thirdly*, for its own arrears. (*Sir Arthur*

BENGAL ACTS—(Contd.)**Land Revenue Sales Act (or Revenue Sale Law Act) XI of 1859, S. 37—(Contd.)**

Wilson.) **SHYAM KUMARI v. RAMESWAR SINGH.**

(1904) 31 I. A. 176 = 32 C. 27 (37) = 8 C. W. N. 786 = 6 Bom. L. R. 754 = 8 Sar. 688.

———*Permanently settled estate—Portion of, acquired by adverse possession—No separate assessment to land revenue of—Liability of, for whole land revenue of estate.*

Where persons acquire title by adverse possession to a portion of a permanently settled estate, it is open to them, if they so desire, to have the portion so acquired by them separately assessed to land revenue; but, if they omit to do so, it continues to form part of the security for the whole land revenue of the estate and to be liable to be sold under S. 37 of Bengal Act XI of 1859. (*Sir John Wallis.*) **KRISHNA PROMADA DAS v. DHIRENDRA NATH GHOSH.**

(1928) 56 I. A. 74 (76) = 33 C. W. N. 289 = 49 C. L. J. 112 = I. D. (1929) P. C. 25 = 113 I. C. 465 = A. I. R. 1929 P. C. 50.

———**Exception (iv)—Gardens—Meaning.**

The gardens of the fourth exception of S. 37 of Act XI of 1859 mean permanent gardens. (*Sir John Edge.*) **MAHOMED SOLAIMAN v. BIRENDRA CHANDRA SINGH.**

(1922) 50 I. A. 247 (254) = 50 C. 243 (251) = 32 M. L. T. 115 = 27 C. W. N. 749 = 37 C. L. J. 561 = A. I. R. 1922 P. C. 405 = 74 I. C. 906 = 44 M. L. J. 388.

———**S. 53—Proprietors—Meaning—Defaulting proprietors only if included.**

The proprietors mentioned in S. 53 of Bengal Act XI of 1859, and upon whom the disability is imposed, should not be restricted to defaulting proprietors. (*Sir Arthur Wilson.*) **SHYAM KUMARI v. RAMESWAR SINGH.**

(1904) 31 I. A. 176 = 32 C. 27 (38-9) = 8 C. W. N. 786 = 6 Bom. L. R. 754 = 8 Sar. 688.

———*Proviso to S. 37 if a.*

S. 53 of Bengal Act XI of 1859 cannot be construed in any such way that it shall not operate as a proviso to, or qualification of, S. 37 of the Act. (*Sir Arthur Wilson.*) **SHYAM KUMARI v. RAMESWAR SINGH.**

(1904) 31 I. A. 176 = 32 C. 27 (38) = 8 C. W. N. 786 = 6 Bom. L. R. 754 = 8 Sar. 688.

———*Revenue sale—Purchase at—Incumbrances on property sold—Purchase if subject to—Execution sale of property after default in payment of revenue thereon—Revenue sale of property subsequent to—Purchase at, by execution sale purchaser—Effect.*

In a case in which the order of the events was as follows: *First*, default in payment of Government revenue in respect of an estate; *secondly*, sale of that estate in execution by a civil court; *thirdly*, sale of the estate at revenue sale for the default in payment, and purchase by the same person who had bought at the execution sale, the question arose whether by reason of S. 53 of Bengal Act XI of 1859, the latter (revenue) purchase was subject to incumbrances.

Held, that the revenue sale purchaser when he purchased at the revenue sale the same property which he had previously purchased at the execution sale was a proprietor purchasing an estate of which he was proprietor within the meaning of S. 53 of Bengal Act XI of 1859 and that he purchased it subject to the incumbrances existing on it at the time of sale.

Neither the fact that the sale by the civil court was subsequent in date to the default for arrears of revenue nor the circumstance that under the revenue sale certificate the purchase related back beyond the actual date of the sale and took effect from the day after that on which the default had occurred altered the ownership of the estate

BENGAL ACTS—(Contd.)**Land Revenue Sales Act (or Revenue Sale Law Act) XI of 1859, S. 53—(Contd.)**

nor made the revenue sale purchaser any the less a proprietor when he bought at the revenue sale. The proprietors mentioned in S. 53, and upon whom the disability is imposed, should not be restricted to defaulting proprietors. (*Sir Arthur Wilson.*) **SHYAM KUMARI v. RAMESWAR SINGH.** (1904) 31 I. A. 176 = 32 C. 27 (38-9) = 8 C. W. N. 786 = 6 Bom. L. R. 754 = 8 Sar. 688.

—*Revenue sale—Purchase by recorded proprietor—Effect on encumbrances on property—Sale caused and purchase made to defeat encumbrancers—Effect in case of, not different, and encumbrancers' rights no higher.*

S. 53 of Bengal Act XI of 1859 regulates what happens when the property is bought by the recorded proprietor, and in that case it is enacted that the estate is acquired subject to all its encumbrances existing at the time of the sale. In such a case, therefore, the encumbrances are left entirely unaffected; the transaction of sale has merely provided money for payment of the Government claims, and the estate remains as it was before. Were such a purchase honestly and openly made, the claims against the purchase-money could not remain in addition to the claim against the estate. *Held*, that the position was exactly the same even in a case in which the sale was caused and the purchase was made by the recorded proprietor for the purpose of defeating the mortgagees.

It is impossible to see how the position has been aggravated by the fact that the sale was effected for the purpose of defeating the mortgagees. The Act distinctly contemplates the purchase of property by a recorded proprietor, and the rights that arise in such a case are those which have been already mentioned. Their Lordships are unable to see why those rights should be increased against the purchaser because of the motives which led him to cause the sale or the purchase. The only effect of the statute is that, so far as the encumbrances are concerned, the sale is of no effect. (*Lord Buckmaster.*) **TARINI CHARAN SARKAR v. BISHUN CHAND.** (1917) 23 M. L. T. 147 = 7 L. W. 315 = 20 Bom. L. R. 553 = 27 C. L. J. 303 = 22 C. W. N. 505 = (1918) M. W. N. 295 = 4 P. L. W. 249 = 16 A. L. J. 271 = 44 I. C. 304 = 34 M. L. J. 361 (367-8).

—**S. 54—Mortgaged property—Purchase by mortgagee of, in execution of decree on mortgage, prior to revenue on property falling into arrear—Subsequent revenue sale thereof—Rights of mortgagee and of revenue sale purchaser—Former if can use mortgage as a shield against latter.**

Property subject to a mortgage was on 19-3-1900 sold in execution of a decree on foot of the mortgage, and was purchased by the mortgagee himself. That sale was confirmed on 23-4-1900, the certificate of sale stating that the mortgagee was declared purchaser on 19-3-1900. The Government revenue due in respect of that property fell into arrear on 28-3-1900, and the property was sold for such arrears on 6-6-1900, and was purchased by a third party.

Held, that by his purchase the mortgagee became as from 19-3-1900 owner of the property itself; that the property which fell into arrear of revenue on 29-3-1900 was the property of the mortgagee himself, and of no other; and that the mortgagee-purchaser was not in a position to maintain as against himself, or as against third parties unconnected with mortgage transactions upon the property, such as the revenue purchaser, that his mortgage still remained an incumbrance thereon (234-5).

The High Court erred in thinking that it was possible for the mortgagee to maintain the ownership of the property in himself with an incumbrance which he should use to defeat, or to employ as a "shield against", the rights of third

BENGAL ACTS—(Contd.)**Land Revenue Sales Act (or Revenue Sale Law Act) IX of 1859, S. 54—(Contd.)**

parties. It is clearly unsafe to apply considerations as to the rights of prior and subsequent mortgagees to questions like the present, because, in the present case, no question arises as between a first and succeeding mortgagee, and no right or duty emerges with regard to the avoidance of an equitable priority alleged to arise inferentially by acquisition of the estate. On 19-3-1900, the crucial date in question, there were no interests of any kind to enter into account or consideration so as to impede the full and complete transfer of ownership of the estate as such.

Further, S. 54 of Act XI of 1859 appears (1) to confirm the view that what is taken by a revenue vendee is nothing less or more than what belonged to the former owner, and (2) to negative the idea that it is open to an owner to protect himself as by "a shield" against the consequences of that full transfer by keeping incumbrances alive against the revenue vendee. (*Lord Shaw.*) **BHAWANI KUMAR v. MATHURA PRASAD SINGH.** (1912) 39 I. A. 228 =

40 C. 89 = 16 C. W. N. 985 = 12 M. L. T. 352 =

(1912) M. W. N. 944 = 14 Bom. L. R. 1046 =

16 C. L. J. 606 = 16 I. C. 210 = 23 M. L. J. 311.

Land Revenue Sales Act VII of 1868.

—**Revenue—Arrear—Revenue when becomes an—Procedure for realising—Bengal Act XI of 1859—Distinction.** See **BENGAL ACTS—LAND REVENUE SALES ACT XI OF 1859, S. 2—REVENUE—ARREAR.**

(1912) 39 I. A. 177 = 37 C. 981 (991).

—**S. 1—Land revenue—Malikana if.** See **BENGAL ACTS—LAND REVENUE SALES ACT XI OF 1859 S. 2—LAND REVENUE.** (1903) 31 I. A. 52 = 31 C. 256 (258).

—**S. 2—Revenue Commissioner—Order annulling revenue sale—Finality of—Review of order—Jurisdiction.**

The Bengal Land Revenue Act, 1868, by S. 2, provides that the order of the Commissioner, upon an appeal to him under that Act, shall be "final". A Commissioner, upon such an appeal, made an order annulling the sale in question. Afterwards, being of opinion that this order was wrong in law, he reviewed it, and made an order upholding the sale:—

Held, that the Commissioner had no power so to review his order. (*Lord Atkinson.*) **BAIJNATH RAM GOENKA v. NAND KUMAR SINGH.** (1913) 40 I. A. 54 = 40 C. 552 =

17 C. W. N. 485 = 13 M. L. T. 487 =

15 Bom. L. R. 500 = 17 C. L. J. 583 =

18 I. C. 956 = (1913) M. W. N. 553.

—**S. 8—Sale under Act XI of 1859 (Bengal)—Validity—Objection to, on ground of service of notice—Maintainability—Sale certificate obtained by purchaser—Effect.**

When the purchaser at a revenue sale held under Act XI of 1859 has got a certificate of sale from the Collector, under S. 8 of Bengal Act VII of 1868 no objection as to the service of notice can be raised. (*Lord Macnaghten.*) **MAHARAJA KUMAR BAGESWARI PERSHAD SINGH v. KHAJA MAHOMED GOWHAR ALI KHAN.** (1903) 31 I. A. 52 = 31 C. 256 (260) = 8 C. W. N. 649 = 8 Sar. 610.

Limitation Act XIII of 1848.

—**Applicability—Awards of Collectors under Regulations VII of 1822, IX of 1825 and IX of 1833.**

The operation of Act XIII of 1848 is limited to awards made by the Collectors under the Regulations VII of 1822, IX of 1825 and IX of 1833, which gave to the revenue authorities judicial power to determine certain questions of possession and other matters, with a right of appeal to the regular Courts against their awards. That right of appeal is by the Act of 1848 subjected to the three years' limitation

BENGAL ACTS—(Contd.)**Limitation Act XIII of 1848—(Contd.)**

(534-5). (*Sir Edward V. Williams.*) **JOWALA BUKSH v. DHARUM SINGH.** (1866) 10 M. I. A. 511=2 Sar. 189.

—Mutation of names in Collector's register—Order for—Three years' bar inapplicable to.

An order for the mutation of names in the Collector's register is not an award of the same nature with those contemplated by Bengal Act XIII of 1848, and the three years' bar provided by that Act is inapplicable to such an order (535). (*Sir Edward V. Williams.*) **JOWALA BUKSH v. DHARUM SINGH.** (1866) 10 M. I. A. 511=2 Sar. 189.

—Thakbust proceedings under Bengal Regulation VII of 1822—Award in—Suit to contest—Limitation. See **BENGAL REGULATIONS—LAND REVENUE SETTLEMENT REGULATION VII OF 1822—AWARD OF THAKBUST, ETC.** (1869) 12 M.I.A. 292 (335-6).

Minors' Act XL of 1858.

—Ss. 2 and 3—Hindu Law—Joint Mitakshara family—Manager of—Minor members—Suits in respect of estate of—Manager's authority to institute and defend—Certificate under Act—Necessity.

The manager of an ancestral family estate subject to the Mitakshara law, although he may have the power to manage the estate, is not the guardian of infant co-proprietors of that estate for the purpose of binding them by a bond, or for the purpose of defending suits against them in respect of money advanced with reference to the estate. S. 2 of Act XL of 1858 shows that a person, though a co-proprietor and manager of the estate, is not the guardian of the infant co-proprietors, who, according to the Act, are subject to the jurisdiction of the Civil Courts. And S. 3 of the Act shows that, unless he obtains a certificate of administration, he is not entitled to institute or defend any suit connected with the estate (29-30). (*Sir Barnes Peacock.*) **DOORGA PERSAD v. KESHO PERSAD SINGH.**

(1882) 9 I. A. 27=8 C. 656 (661-2)=
11 C.L.R. 210=4 Sar. 332.

—S. 3—Hindu father—C. P. C. of 1859, S. 327—Proceedings under—Representation of minor son in—Certificate under S. 3 of this Act—Necessity.

Quære, whether a Hindu father could represent his minor son under proceedings under S. 327 of the Code of 1859 without a certificate under S. 3 of Act XL of 1858 (39-40). (*Mr. Ameer Ali.*) **AMRIT NARAYAN SINGH v. GAYA SINGH.**

(1917) 45 I.A. 35=45 C. 590 (604)=
23 M. L. T. 142=22 C. W. N. 409=

27 C. L. J. 296=4 Pat. L. W. 221=16 A. L. J. 265=

(1918) M. W. N. 306=20 Bom. L. R. 546=

7 L. W. 581=44 I. C. 408=34 M. L. J. 298.

—Male minor—Guardianship of—Law as to.

The law is clear upon the subject of guardianship of male minors. By Act XL of 1858 it was enacted that the case of the persons of all minors (not being European British subjects), and the charge of their property, shall be subject to the jurisdiction of the Civil Court; and by S. 3 it is enacted that where the property is of small value the Court having jurisdiction may allow any relative of a minor to institute or defend a suit in his behalf. In other cases a certificate of administration is necessary (164). (*Sir Barnes Peacock.*) **SREE NARAIN MITTER v. SREEMUTHY KISHEN SOONDERY DASSEE.**

(1873) Sup. I.A. 149=11 B.L.R. 171=
19 W. R. 133=3 Sar. 203=2 Suth. 774.

—S. 18—Loan by guardian—Order authorizing raising of—Effect—Necessity for loan—Lender's duty to inquire into—Fraud or underhand dealing by him—Effect.

When an order of the Court has been made authorising the guardian of an infant to raise a loan on the security of the infant's estate the lender of the money is entitled to

BENGAL ACTS—(Contd.)**Minors' Act XL of 1858, S. 18—(Contd.)**

trust to that order, and he is not bound to inquire as to the expediency or necessity of the loan for the benefit of the infant's estate. If any fraud or underhand dealing is brought home to him that would be a different matter; but apart from any charge of that kind their Lordships think he is entitled to rest upon the order (49-50). (*Sir Arthur Hobhouse.*) **GUNGAPERSHAD SAHU v. MAHARANI BIBI.** (1884) 12 I. A. 47=11 C. 379 (383-4)=4 Sar. 621.
—Loan by guardian—Order authorizing raising of—Interest on loan—Omission to specify—Guardian's power in case of.

The fact that an order of Court authorising the raising of a loan by a guardian under S. 18 of Act XL of 1858 does not specify the rate of interest or the maximum rate of interest at which the loan should be raised cannot give to the guardian the power of raising the authorised loan at any rate of interest that the guardian thinks fit. On an order of this kind, which authorises the raising of a principal sum but says nothing about the interest, their Lordships think that the proper construction or, at all events, the most favourable construction to the lender, is that it authorises a loan at a reasonable rate of interest (49). (*Sir Arthur Hobhouse.*) **GUNGAPERSHAD SAHU v. MAHARANI BIBI.**

(1884) 12 I. A. 47=11 C. 379 (383)=4 Sar. 621

—Loan by guardian—Order authorizing raising of—Interest on loan—Omission to specify—Interest in excess of ruling rate—Mortgage with—Validity.

An order under S. 18 of Act XL of 1858 authorising the raising of a loan by a guardian on the security of immoveable property of the infant said nothing about interest on the amount to be raised. The guardian executed a mortgage bond undertaking to pay interest at the rate of 18 per cent. per annum. The lender failed to show that interest at the said rate was either necessary or was for the benefit of the infant's estate. And it appeared that the ordinary rate of interest ruling in that part of the country upon loans on good security was 12 per cent.

Held, in a suit to enforce the mortgage, that the High Court was right in allowing interest only at the said ruling rate (49-50). (*Sir Arthur Hobhouse.*) **GUNGAPERSHAD SAHU v. MAHARANI BIBI.**

(1884) 12 I. A. 47=11 C. 379 (383-4)=4 Sar. 621.

—Loan by guardian—Order authorizing raising of—Interest on loan—Omission to specify—Rate stipulated for in case of—Necessity for—Onus of proof of.

A lender who chooses to lend his money to a guardian on an order of Court which authorises him to raise a loan but which says nothing whatever about interest on the principal is under a duty to show that the rate of interest at which he advanced the loan was necessary or was for the benefit of the infant's estate (50). (*Sir Arthur Hobhouse.*) **GUNGAPERSHAD SAHU v. MAHARANI BIBI.**

(1884) 12 I.A. 47=11 C. 379 (383-4)=4 Sar. 621.

—Loan by guardian—Order authorizing raising of—Interest on loan—Specification of—Court's duty.

It would certainly seem desirable that a Court which has thrown upon it the responsibility of authorizing loans to be raised upon the security of infants' estates should, where possible, specify the rate of interest or the maximum rate of interest at which the loan should be raised, especially in India, where the rate of interest bears so very large a proportion to the principal advanced. There may sometimes be difficulties in doing so (49).

N.B.—The above observation was made with reference to a case in which a Court which authorized the raising of a loan by a guardian under S. 18 of Act XL of 1858 said nothing whatever about interest on the loan. (*Sir Arthur Hobhouse.*) **GUNGAPERSHAD SAHU v. MAHARANI BIBI.** (1884) 12 I.A. 47=11 C. 379 (383)=4 Sar. 621.

BENGAL ACTS—(Contd.)**Municipal Act III of 1884.****—S. 101—Proviso—Machinery—Meaning.**

The question in the appeal was whether a tank belonging to the appellants and used in connection with the supply of water to Calcutta, was "machinery" within the meaning of S. 101 of the Bengal Municipal Act so as to be excluded in assessing the holding upon which it was for the purpose of Municipal rates under that Act.

Held, affirming the High Court, that the tank was not "machinery" within the meaning of S. 101.

A completed machine or a number of completed machines may, of course, according to the ordinary use of language, be properly described as "machinery", so may those parts or members of a machine which, when assembled as it is styled, form a complete machine; so also may some of such of those parts which, when assembled with the other necessary parts, would form a complete machine be styled "machinery" (443).

The word "machinery" must mean something more than a collection of ordinary tools. It must mean something more than a solid structure built upon the ground, whose parts either do not move at all, or if they do move, do not move the one with or upon the other in interdependent action with the object of producing a specific and definite result (444-5). (*Lord Atkinson.*) **CORPORATION OF CALCUTTA v. COSSIPORE AND CHITPORE MUNICIPALITY.** (1921) 48 I. A. 435 = 49 C. 190 (201-2) = 15 L. W. 253 = 26 C.W.N. 761 = 67 I. C. 926 =

(1922) P.C. 27.

North-Western Provinces and Assam Civil Courts Act XII of 1887.**—S. 37—Mahomedan Law—Inheritance—Law of—Custom at variance with—Evidence of—Admissibility.**

In a case in which the question was whether appellants, who were Mahomedans, were entitled to adduce evidence of a special family custom, "that female descendants could not inherit in the presence of male descendants," the courts below refused to receive evidence of the custom, acting on the view that, where the parties to a suit were Mahomedans, they in regard to the matters mentioned in S. 37 of the Bengal Civil Courts Act XII of 1887, were governed by the ordinary rules of Mahomedan Law, and that evidence was inadmissible to prove a custom of succession at variance with that law.

Held, on appeal, that the case should be remanded to enable the parties to file evidence as to the family custom set up. (*Lord Macnaghten.*) **MUHAMMAD ISMAIL KHAN v. SHEOMUKH RAI.** (1912) 18 I.C. 571 =

15 Bom. L.R. 76 = 17 C.L.J. 143 = 12 M.L.T. 644 = 17 C.W.N. 97 = (1913) M.W.N. 27.

Public Demands Recovery Act VII of 1880.**—Certificate of demand and steps of procedure following upon it—Person not shown as defaulter in—Sale of property of—Validity.**

The provisions of Act VII of 1880 only authorise the attachment and sale of property of the persons who, on the face of them, are described as the judgment-debtors. The Act gives no authority to attach and sell the estate of any other person in satisfaction of the arrears due by the judgment-debtors (74-5).

In a case in which G had purchased three villages from three Mahomedan ladies and had been entered as proprietor in the land register kept for the district, the ladies continued to be treated by the collectorate as the proprietors liable for road cess. The road cess due in respect of some instalments being in arrear, the tahsildar submitted a report to the Collector mentioning the ladies as proprietors. The statutory certificate of demand, the notice in the statutory form annexed to the certificate, the memorandum of bids used at the

BENGAL ACTS—(Contd.)**Public Demands Recovery Act VII of 1880—(Contd.)**

sale, and the certificate of sale, all mentioned the defaulters as the three ladies, and described the property sold as the interest owned by the ladies in the property purchased by G.

Held, that, assuming that the certificate, and the steps of procedure which followed upon it, were authenticated in terms of the Act VII of 1880, and had been duly intimated to G, they could not in any way affect his right of property in the three villages for which arrears of cess were due (74-5).

The certificate could not have the force and effect of a decree of a Civil Court for the purpose of execution, except against the three ladies. If, on the other hand, the property sold in execution of the certificate was merely the interest of the three ladies, G's title and proprietary possession remain unimpaired (75). (*Lord Watson.*) **MAHOMED ABDOOL HAI v. GUJRAJ SAHAI.** (1893) 20 I. A. 70 = 20 C. 826 (831-2) = 6 Sar. 291.

—Sale in execution of certificate—Order of Revenue authorities setting aside—Order made without hearing purchaser—Remedy of purchaser.

A purchaser at a sale held under the provisions of Bengal Act VII of 1880 who is prejudiced by an order of the Revenue authorities setting aside the sale made in his absence must apply to those authorities for a re-hearing. If he omits to do so, he cannot, in an appeal to the P. C. against the decree in a civil suit setting aside the sale and awarding possession to the owner of the property, ask for a remand on the ground that the order of the Revenue authorities on the basis of which the decree appealed against was passed was made in his absence. It will be too late for him to ask for a remand on that ground. (*Sir Andrew Scoble.*) **LALITESWAR SINGH v. MOHUNT GANESH DAS.**

(1906) 33 I. A. 134 (138-9) = 33 C. 1178 (1182) = 10 C. W. N. 969 = 4 C. L. J. 177 = 8 Bom. L. R. 719 = 3 A. L. J. 689 = 1 M. L. T. 308 = 16 M.L.J. 365.

—Sale under Act—Power of—Foundation of—Certificate not in conformity with Act—Validity of sale in case of.

According to the true construction of S. 7 of Bengal Act VII of 1880, there is no foundation for a sale thereunder until a certificate has been made by the Collector strictly in manner prescribed thereby, specifying the sum due and the person to whom it is due. The authority to proceed to the sale is based on the certificate which has the effect of a judgment or decree, and if no judgment or decree is given, and no certificate is filed having the force or effect of a judgment or decree, there can be no valid sale at all. (*Lord Davey.*) **BAIJNATH SAHAI v. RAMDUT SINGH.**

(1896) 23 I. A. 45 (53-4) = 23 C. 775 (787-8) = 7 Sar. 1.

—Ss. 12, 16 and 17—Commissioner—Appeal—Revision—Limitation.

The period of limitation prescribed by Ss. 12 and 16 of Bengal Act VII of 1880, is inapplicable to the exercise of the revisional jurisdiction conferred by S. 17 of the Act.

It would defeat the object of the Legislature if the periods of limitation applicable in ordinary cases were held binding upon the Commissioner when he acts in the exercise of his revisional jurisdiction under S. 17. (*Sir Andrew Scoble.*) **LALITESWAR SINGH v. MOHUNT GANESH SINGH.** (1906) 33 I.A. 134 (138) =

33 C. 1178 (1182) = 10 C. W. N. 969 = 4 C. L. J. 177 = 8 Bom. L. R. 719 = 3 A. L. J. 689 = 1 M. L. T. 308 = 16 M. L. J. 365.

—S. 17—Applicability—Order made after as well as before sales in execution of certificates issued under Act.

S. 17 of Bengal Act VII of 1880 applies to orders made after as well as before sales in execution of certificates

BENGAL ACTS—(Contd.)**Public Demands Recovery Act VII of 1880, S. 17**
—(Contd.)

issued under the Act. (*Sir Andrew Scoble.*) **LALITESWAR SINGH v. MOHUNT GANESH DAS.**

(1906) 33 I.A. 134 (137) = 33 C. 1178 (1181) =
10 C. W. N. 969 = 4 C. L. J. 177 = 8 Bom. L. R. 719 =
3 A. L. J. 689 = 1 M. L. T. 308 = 16 M. L. J. 365.

—Ss. 17 and 24—Sale in execution of certificate—Jurisdiction of higher revenue authorities—Extent of.

The jurisdiction conferred by Bengal Act VII of 1880 upon the higher Revenue authorities over the proceedings of their subordinate officers is of the widest possible character. These extensive powers were no doubt given to prevent any abuse of authority under the extremely stringent and summary procedure authorized by the Act.

Plaintiff's property was sold, under the provisions of Bengal Act VII of 1880, in execution of a certificate granted by a Dy. Collector in respect of a fine imposed on the plaintiff for failure to comply with a notice issued under S. 16 of Bengal Act IX of 1880—the Cess Act, and the purchaser was put in possession of the property.

On an application subsequently made by the plaintiff the Board of Revenue decided that the fine was unjust and set aside the certificate, and thereafter the Commissioner annulled the sale.

In a suit by the plaintiff against the purchaser to set aside the sale and recover possession, *held*, that the Board of Revenue and the Commissioner had jurisdiction to make the orders setting aside the certificate and annulling the sale. (*Sir Andrew Scoble.*) **LALITESWAR SINGH v. MOHUNT GANESH DAS.** (1906) 33 I. A. 134 (137-8) = 33 C. 1178 (1181) = 10 C. W. N. 969 = 4 C. L. J. 177 = 8 Bom. L. R. 719 = 3 A. L. J. 689 = 1 M. L. T. 308 = 16 M. L. J. 365.

—S. 22—Arrear of cess specified in the certificate—Payment of, before date of sale proceedings—Evidence.

In a case in which three villages had been sold in auction on 15-4-1886 under Act VII of 1880 for arrears of road cess, the question was whether the sale was illegal by reason of the arrear having been previously paid to the Collector.

The respondent was the owner of the property in respect of which the arrear was due. The receipt was proved to have been delivered to the respondent's *mokhtar*, in exchange for the money, by L, who at that time was admittedly one of the *tahsildars* employed in the collection of cess. The money was paid into the treasury by L, accompanied by a *chalan* under his hand, dated the 1st of February, 1886, which stated the payment to be on account of cess of the property in question, remitted by one of the judgment-debtors. The payment thus made was entered in the register of receipts of the treasurer of the treasury of the place in which the property in question was situated for the month of February, 1886, reference being made to the *chalan* for particulars. It was thus clear that, more than 6 weeks before the auction sale, the money was paid into the Government treasury, along with a distinct statement that it applied to the arrears of cess for the property in question.

Held, affirming the High Court, that the respondent had proved payment of the arrear of cess specified in the certificate before the date of the sale proceedings (76).

Whether L had or had not proper authority to collect the arrear is really a matter of no consequence (76). (*Lord Watson.*) **MAHOMED ABDOOL HAI v. GUJRAJ SAHAI.**

(1893) 20 I. A. 70 = 20 C. 826 (833) = 6 Sar. 291.

—S. 22 (b)—Arrear of cess—Payment into treasury of—Satisfaction upon certificate—Collector's duty.

Upon the arrear specified in the statutory certificate of demand being paid into the treasury, it becomes the statutory duty of the Collector, under S. 22 (b) of Act VII of

BENGAL ACTS—(Contd.)**Public Demands Recovery Act VII of 1880, S. 22**
(b)—(Contd.)

1880, to enter satisfaction upon the certificate under his hand and signature (76). (*Lord Watson.*) **MAHOMED ABDOOL HAI v. GUJRAJ SAHAI.**

(1893) 20 I. A. 70 = 20 C. 826 (833) = 6 Sar. 291.

—Satisfaction upon certificate—Collector's neglect to enter—Sale in consequence—Validity.

Though the arrear of cess specified in the statutory certificate of demand was paid into the Government treasury more than 6 weeks before the date of the sale proceedings, the Collector failed to fulfil his statutory duty of entering satisfaction upon the certificate under his hand and signature, and the property in respect of which the arrear was due was sold in auction in consequence. It was urged that, there being no entry of satisfaction upon the certificate, the sale was valid.

In over-ruling the contention, their Lordships observed : " It would be a singular result if a Collector's neglect of his statutory duty gave him statutory power to sell in execution the property of a person who owned nothing to the Government. That such was not the intention of the Legislature is abundantly clear. By the terms of the notice served upon the judgment-debtor along with a copy of the certificate, all that the debtor is required to do, in order to prevent execution of the certificate, is to pay the amount of arrears demanded into the office of the Collector (76-7). (*Lord Watson.*) **MAHOMED ABDOOL HAI v. GUJRAJ SAHAI.**

(1893) 20 I. A. 70 = 20 C. 826 (833) = 6 Sar. 291.

Rent Act X of 1859.

—Hindu widow—Rent decree against—Sale in execution of—Interest passing under.

The appellant instituted a suit in the Collector's Court under Act X of 1859 for the recovery of arrears of rent due from the estate of G, deceased. The suit was against C, as the widow of G, and the guardian of her infant son, H. The defendant successfully opposed the plea that H had been adopted into another family and was therefore no longer the heir of G, and that C was accordingly his sole heiress and representative; and a decree was therefore passed against C, in that capacity. The decree, no doubt, declared that H was not liable but showed that it was made against the heir and representative of G. In a civil suit subsequently brought by the appellant himself it was declared that H was the heir of G. In execution of the appellant's decree under Act X of 1859, the estate in question was sold under the Collector's order and purchased by the appellant himself.

Held, reversing the High Court, that under the said sale the estate of G itself and not merely the interest of C passed and that the interest of H, if he had any, therefore also passed by that sale (615).

The proceedings took place under Act X of 1859, and that Act appears to contemplate that the estate should be put up for sale, and that the person whose interest should be nominally sold should be the registered proprietor. In this case, so far as the proceedings show, it appears that the widow was the registered proprietor. But the case does not rest there, because in the certificate of sale there is a distinct reference to the decree obtained by the appellant from the Civil Court, and, therefore, the whole proceeding, if fairly looked at, amounts to this,—that the estate of G was sold under that decree in execution for his debt, and that the interest of his widow, the registered proprietor and ostensible owner of the estate, and also the interest of his son, if he had any interest, was bound by that decree. The respondent can claim only what interest remained in H, and substantially the proceedings resulting in the sale to the appellant would be a bar to any claim on the part of H (615-6). (*Sir James W. Col-*

BENGAL ACTS—(Contd.)**Rent Act X of 1859—(Contd.)**

vile.) GENERAL MANAGER OF THE RAJ DURBHANGA
v. MAHARAJAH COOMAR RAMAPUT SINGH.

(1872) 14 M.I.A. 605 = 17 W. R. 459 =
10 B. L. R. 294 = 2 Suth. 575 = 3 Sar. 117.

—Occupancy right—Acquisition of.

(1) Ijara for term—Holding as ijaradar prior to and during—Acquisition by.

(2) Leases each for term—Lessee holding land under, and paying rent continuously for 12 years—Acquisition by. See BENGAL ACTS—LANDLORD AND TENANT PROCEDURE ACT VIII OF 1869—OCCUPANCY RIGHT.

—Rent decree under—Execution—Transfer into another district for—Jurisdiction of Collector—C. P. C. of 1859, S. 284—Rent Court if a Civil Court under.

The Rent Courts established by Act X of 1859 are Civil Courts within C. P. C. of 1859, and the Collector has, under S. 284 of C. P. C. of 1859, the power of transferring his decrees for execution into another district.

It must be allowed that in S. 77 and the kindred sections of Act X of 1859 there is a certain distinction between the Civil Courts there spoken of and the Rent Courts established by the Act, and that the Civil Courts referred to in S. 77, and the kindred sections mean Civil Courts exercising all the powers of Civil Courts as distinguished from the Rent Courts which only exercise powers over suits of a limited class. In that sense there is a distinction between the terms; but it is entirely another question whether the Rent Court does not remain a Civil Court in the sense that it is deciding on purely civil questions between persons seeking their civil rights, and whether being a Civil Court in that sense, it does not fall within the provisions of C. P. C. of 1859 (178-9). (Sir Arthur Hobhouse.) RAJAH NILMONI SINGH DEO BAHADUR v. TARANATH MOOKERJEE.

(1882) 9 I. A. 174 = 9 C. 295 (300-1) =
12 C. L. R. 361 = 4 Sar. 392.

—Rent decree under—Execution—Transfer into another district for—Validity—Question as to—Revision under Charter Act—Jurisdiction of High Court to entertain.

The High Court has jurisdiction, under S. 15 of the Charter Act, to entertain in revision the question as to whether a Revenue Court under Act X of 1859 has power to transfer a decree of its own made under Act X of 1859 for execution into another district (177-8). (Sir Arthur Hobhouse.) RAJAH NILMONI SINGH DEO BAHADUR v. TARANATH MOOKERJEE. (1882) 9 I. A. 174 = 9 C. 295. (299-300) = 12 C. L. R. 361 = 4 Sar. 392.

—S. 6—Chur land within zemindary—Ijara settlement of—Occupancy right—Ijaradar's right to—Lease—Construction.

The respondent, a zemindar, sued for khas possession of certain reformed and accreted chur lands which were admittedly within his zemindary and of which the appellants were in possession under the terms of a patta and kabuliyat of 1864. The appellants pleaded that they were occupancy tenants and as such entitled to maintain possession under the terms of the Bengal Rent Act X of 1859.

Prior to 1864, the firm of Jardine, Skinner & Co. (appellants' predecessors in interest) were in occupancy of the lands. In that year the respondent's father, the then zemindar, raised an action against J., S. & Co. claiming the lands in question. That suit was compromised. At the same time J., S. & Co. took a lease of the whole taluk within which the lands were situated. Patta and muchilika were executed, those under which the respondents were in possession.

The kabuliyat executed by the manager of J., S. & Co. ran as follows:—"I having applied for a temporary ijara

BENGAL ACTS—(Contd.)**Rent Act X of 1859, S. 6—(Contd.)**

settlement of all the mahals, etc., appertaining to your zemindari and putni taluk. . . You grant me an ijara settlement and an ijara pottah for 8 years, fixing Rs. 7,500 as the annual rent, exclusive of collection charges." The kabuliyat then proceeded to incorporate the settlement as follows: "You have instituted against me a suit claiming a . . . share of" the lands in question. "Creating a jote of the same and fixing Rs. 1,300 as its yearly rent, you include the same also in the aforesaid ijara rent. In respect of the same, the stipulation is that after the expiry of the term of this ijara, pottah and kabuliyat will be given and taken, settling the rent of the aforesaid chur land in your *nij* share, at a fair rate, according to the proper rate prevailing in the villages, either amicably and (or) by suit; that until you settle the rent in the aforesaid method, according to the proper rate prevailing in the villages, I will pay up to that time the aforesaid yearly rent of Rs. 1,300 in twelve monthly instalments as per kistbandi, and in default of any kist, I will pay interest at Re. 1 per cent. per month, and that if after the fair rent is settled according to the proper rate prevailing in the villages I refuse to pay that rent, then you will bring the lands under your khas possession by evicting me therefrom; and I shall not be able to make any objection to the same."

Held, that upon the true construction of the ijara the appellants had not a permanent right of occupation of the chur land, and that the zemindar was entitled to possession.

The special covenant in the kabuliyat fixing the old rent of Rs. 1,300 as the rent to be paid on holding over till such time as a new rent is fixed is nothing more than an expression of what the law would hold without it and cannot alter the general construction of the document.

"Jote" is a general term, and it is not necessarily equivalent to "raiyaati jote." The expression "jote" is little suited to the recognition of a pre-existing right (56). (Lord Dunedin.) MIDNAPUR ZAMINDARI CO., LTD. v. NARESH NARAIN ROY. (1920) 48 I. A. 49 = 48 C. 460 = 14 L. W. 265 = 30 M. L. T. 279 = 64 I. C. 231 = (1922) P. C. 241.

—S. 7—Supersession or repeal of, by S. 178 of Bengal Act VIII of 1885.

S. 7 of Act X of 1859 is superseded, if not wholly repealed, by S. 178 of Act VIII of 1885. (Lord Watson.) BENGAL INDIGO COMPANY, LTD. v. MOHUNT ROGHUBUR. (1896) 23 I. A. 158 = 24 C. 272 (280) = 1 C. W. N. 83 = 7 Sar. 94.

—S. 15—Applicability—Tenure which was or has become hereditary and transferable—Rent not changed from time of perpetual settlement—Case of—Exception to section—Applicability of—"Terminable lease"—Meaning.

Where, in a suit brought under Act X of 1859 for the enhancement of the rent of lands within plaintiff's zemindary, it appears that the tenure of the defendants was or has become hereditary and transferable, and that the rent has not been changed from the time of the perpetual settlement, the case falls within the protection of the 15th section of Act X of 1859. Whatever be the interpretation to be given to the somewhat loose and ambiguous expression "a terminable lease," it is clear that a tenure under which the tenant can no longer be dispossessed by his superior cannot be brought within that exception (467). (Sir Richard Kindersley.) BABOO DHUMPUT SINGH v. GOOMAN SINGH.

(1867) 11 M. I. A. 433 = 9 W. R. P. C. 3 = 2 Suth. 92 = 2 Sar. 309.

—Construction—Wards—Fixed rent—Meaning.

The term "fixed rent" in S. 15 of Act X of 1859 cannot mean a rent so permanently fixed that it cannot be enhanced

BENGAL ACTS—(Contd.)**Rent Act X of 1859, S. 15—(Contd.)**

under any circumstances (204). (*Sir Barnes Peacock.*)
HURRONATH ROY v. GOBIND CHUNDER DUTT.

(1875) 2 I. A. 193 = 15 B. L. R. 120 =
 23 W. R. 352 = 3 Sar. 466 = 3 Suth. 116.

—*Dependent talookdar—Applicability to—Conditions.*

To bring the case within S. 15 of Act X of 1859, the dependent talookdar must hold his tenure otherwise than under a terminable lease, and he must also hold at a fixed rent, which has not been changed from the time of the permanent settlement (196). (*Sir Barnes Peacock.*)
HURRONATH ROY v. GOBIND CHUNDER DUTT.

(1875) 2 I. A. 193 = 15 B. L. R. 120 =
 23 W. R. 352 = 3 Sar. 466 = 3 Suth. 116.

—*Enhancement of rent—Azumabadi rupees and sicca rupees—Conversion into Company's rupees of—If an enhancement.*

Defendant, representing the grantees of a talook under a Sanad made in 1775, when the rent reserved was Azumabadi Rs. 2,599, was sued by the auction-purchaser, for enhancement of rent to Co.'s Rs. 8,465.

The High Court held that, under Act X of 1859, the purchaser was not entitled to enhance, as from the time of the permanent settlement (1802) down to 1835, when sicca rupees were converted into Co.'s rupees, defendant and his predecessor had paid sicca Rs. 2,107 in lieu of Azumabadi Rs. 2,599; but they allowed the Azumabadi rupees to be converted into Co.'s rupees according to a fresh calculation, i.e., at a higher rate than Rs. 2,248 at which the conversion had been made when sicca rupees ceased to be a legal tender. *Held*, that, as the case was before the High Court in special appeal, they had nothing to do with the evidence. There was no evidence upon which it could be found that Azumabadi Rs. 2,599 was of a higher value than Co.'s Rs. 2,248; but even if the High Court had the power of finding, and had found such fact, yet, as the parties had agreed from a period antecedent to the permanent settlement that the Azumabadi Rs. 2,599 should be converted into sicca rupees at the rate which had been paid down to 1835, and which had been converted into Co.'s rupees, the High Court was wrong in overruling the decision of the judge who had tried the issues and dismissed the plaintiff's suit (6). (*Sir Barnes Peacock.*) **MEER MAHOMED HOSSEIN v. FORBES.**

(1874) 2 I. A. 1 =
 22 W. R. 316 (P. C.) = 3 Sar. 402 = 3 Suth. 32.

—*Enhancement of rent—Exemption from, of tenures mentioned in section—Fixed rent—Tenure held at—If enough by itself.*

It should be remarked that a rent may be a fixed rent though liable under certain conditions to be enhanced. That position is fully borne out by S. 15 of Bengal Rent Act X of 1859. The section does not merely say that the tenures therein described shall not be liable to enhancement "if held at a fixed rent," but "if held at a fixed rent which has not been changed from the time of the permanent settlement." If the mere fact of holding at a fixed rent was a bar to enhancement, the section would have been unnecessary (203-4). (*Sir Barnes Peacock.*) **HURRONATH ROY v. GOBIND CHUNDER DUTT.**

(1875) 2 I. A. 193 =
 15 B. L. R. 120 = 23 W. R. 352 = 3 Sar. 466 =
 3 Suth. 116.

—*Enhancement of rent—Liability of dependent talook for—Talook created before decennial settlement and held at fixed unvarying rent since permanent settlement—Decree of rent courts declaring plaintiffs' right to enhance.*

The suit was brought to recover rent at an enhanced rate after notice of enhancement for a dependent talook comprised within the plaintiffs' (appellants') zemindary. The suit was brought in the Revenue Court under Bengal Act X

BENGAL ACTS—(Contd.)**Rent Act X of 1859, S. 15—(Contd.)**

of 1859. The grounds on which the plaintiffs sought to enhance the rent were, that there was in the defendants' possession an excess of land on a deficient jumma, and that the productive powers of that land had increased. The High Court on appeal held that, the rent admittedly never having varied, the defendant was, under the provisions of S. 15 of Act X of 1859, protected from enhancement.

It appeared that the talook had been created before the decennial settlement, and was held at a fixed rent, and that such rent had not been changed from the time of the permanent settlement. A decree of 1821, in a rent suit, however, had declared that the jumma should be fixed at pergunnah rates; or, according to the construction put upon it by the decree of 1860, that the plaintiff was entitled to enhance. But the rent never was assessed at pergunnah rates, and never was enhanced. Admittedly, the rent had never varied. Similarly in 1860 the decree in an enhancement suit had held that the plaintiffs were entitled to enhance. But, again, there was no change in the actual rate of rent paid.

Held, affirming the High Court, that the rent was not liable to enhancement (204).

It is unnecessary to determine what would have been the effect of the decrees of 1821 and 1860, so long as they were unreversed, if Act X of 1859 had not been passed. Their Lordships concur entirely with the High Court that the effect of those decrees did not put the plaintiffs in a better position than other landlords who, previously to the passing of Act X, had a good right to enhance, but whose right, if not exercised from the time of the permanent settlement, was taken away by S. 15 of that Act (204). (*Sir Barnes Peacock.*) **HURRONATH ROY v. GOBIND CHUNDER DUTT.**

(1875) 2 I. A. 193 = 15 B. L. R. 120 =
 23 W. R. 352 = 3 Sar. 466 = 3 Suth. 116.

—*Enhancement of rent—Liability of dependent talook for—Talookdars exempted by S. 51 of Reg. VIII of 1793.*

It should be remarked that S. 15 of Act X of 1859 does not render liable to enhancement dependent talookdars, who were exempted by S. 51 of Reg. VIII of 1793, but exempts from enhancement, amongst others, dependent talookdars who, under the provisions of that section, might otherwise be liable to enhancement (196-7). (*Sir Barnes Peacock.*) **HURRONATH ROY v. GOBIND CHUNDER DUTT.**

(1875) 2 I. A. 193 = 15 B. L. R. 120 =
 23 W. R. 352 = 3 Sar. 466 = 3 Suth. 116.

—*Enhancement of rent—Suit for, on foot of defendants being ryots—Decree on foot of their being intermediate tenants—Propriety.*

The appellant sued the respondents under Act X of 1859 for enhancement of rent on the footing that they were occupying ryots, liable for the rents assessed upon them in that character. The High Court held that, considered as ryots, the respondents were protected by the 3rd and 4th sections of Act X of 1859. Thereupon the appellant, shifting his ground and treating the respondents not as ryots, but as tenants intermediate between him and the ryots, obtained an order for review.

Held, that if the respondents were tenants intermediate between the proprietor and the ryot, that fact raised objections both of form and of substance fatal to the maintenance of the suit as framed.

The notice on which the suit was founded did not in the view that the respondents were tenants intermediate between the proprietor and the ryot accurately specify "the ground on which enhancement of rent was desired;" and the assessment on which the sum sued for was calculated, was improperly made. Where the suit is against an intermediate tenant, the enhancement ought to be made according to the

BENGAL ACTS—(Contd.)**Rent Act X of 1859, S. 15—(Contd.)**

pergunnah rate of the rents payable; not by ryots, but by the holders of similar tenures. To assess such an intermediate tenant according to the rents paid by ryots, must necessarily deprive him of all beneficial interest in his tenure (467-8). (*Sir Richard Kindersley.*) **BABOO DHUNPUT SINGH v. GOOMAN SINGH.**

(1867) 11 M. I. A. 433 = 9 W. R. P. C. 3 =
2 Suth. 92 = 2 Sar. 309.

—**Ss. 15 & 16—Enhancement of rent—Suit for—Intermediate tenure—Enhancement of—Onus of proof in case of—Shifting of—Unchanged rent for 126 years before suit—Proof by defendant of—Effect.**

Where, in a suit for enhancement of rent of an intermediate tenure, the defence was that the land had been held at a uniform rent from the decennial settlement, *held*, that, on proof by the defendant that the rent at which the talook had been held had not been changed for a period of 20 years before the commencement of the suit he was entitled to avail himself of the presumption under Ss. 15 and 16 of Act X of 1859, and the onus was cast on the plaintiff of proving that the rent had been fixed at some later period than the decennial settlement. **NUFFER CHUNDER PAUL CHOWDRY v. JONATHAN POULSON.**

(1873) 2 Suth. 798 =
19 W. R. 175 = 12 B. L. R. 53 = 3 Sar. 234.

—**Enhancement of rent—Suit for—Presumption under S. 16—Evidence rebutting—Decree of High Court of 1863 declaring landlord's right to enhance—Effect.**

In a suit for enhancement of rent of an intermediate tenure, the defence was that the land had been held at a uniform rent from the decennial settlement. The defendant adduced evidence which established that the rent at which the talook had been held had not been changed for a period of 20 years before the commencement of the suit. The question was whether the plaintiff established "the contrary," *i.e.*, that the rent had been fixed at some later period than the decennial settlement. The proof consisted in this: that in 1860 a suit was brought, which was decided in 1863 by the High Court by the plaintiff or his predecessor in title against the defendant's father, under whom the defendant claimed, for enhancement of rent. Though the defendant in that suit could, under the then state of the law, have defended himself by showing an ancient tenure, going back 12 years before the decennial settlement, he made no case of the kind. He made a case of *mokurraree* tenure established by pottahs in 1824. That case was found against; and the High Court, while holding that the notice was not sufficient, decided that the plaintiff had a right to enhance.

Held, that the decree of the High Court in 1863 did amount to proof sufficient to rebut the presumption, referred to in S. 16 of Act X of 1859, arising from 20 years' uniform payment of rent, that that uniform payment had extended to the time of the decennial settlement, and that it almost amounted to proof that the rent was fixed at some later date. **NUFFER CHUNDER PAUL CHOWDRY v. JONATHAN POULSON.**

(1873) 2 Suth. 798 = 19 W. R. 175 =
12 B. L. R. 53 = 3 Sar. 234.

—**Enhancement of rent—Suit for—Under-tenures created by former zemindar—Validity—Presumption—Onus of proof of invalidity—Plaintiff mere purchaser in execution of decree for money—Revenue sale purchaser—Case of—Distinction.**

The plaintiff, in a suit brought under Act X of 1859 for the enhancement of the rent of lands within his zemindary, was the representative of B, who, in 1851, had purchased the zemindary at a sale in execution of the decree in a mere civil suit for moneys instituted by the Government.

Held, that under his purchase B took merely the right, title, and interest of the judgment-debtor, and, therefore,

BENGAL ACTS—(Contd.)**Rent Act X of 1859, Ss. 15 & 16—(Contd.)**

subject to whatever subsisting interest in the lands had been effectually granted or created by any former zemindar, and that the appellant could not, like an auction-purchaser under the Revenue Laws, throw upon the tenant the burden of showing that his tenure would have been valid against a zemindar, unfettered by any personal engagement, at the time of the perpetual settlement.

He is bound by the engagement and acts of his predecessors in the zemindary (465). (*Sir Richard Kindersley.*) **BABOO DHUNPUT SINGH v. GOOMAN SINGH.**

(1867) 11 M. I. A. 433 = 9 W. R. P. C. 3 =
2 Suth. 92 = 2 Sar. 309.

—**S. 17—Dependent talook created before the Decennial Settlement—Enhancement of rent of—Grounds.**

Where, in a suit brought to recover rent at an enhanced rate after notice of enhancement for a dependent talook within the plaintiffs' zemindary, it appeared that the ground upon which the plaintiffs sought to enhance the rent was, that there was in the defendant's possession an excess of land on a deficient jumma, and that the productive powers of that land had increased, *held*, that those were grounds, though not accurately expressed, upon which the rents of ryots having rights of occupancy were liable to enhancement under S. 17 of Act X of 1859; but that they were not applicable to a dependent talook like the suit one, which was created before the decennial settlement. Talooks of that description are protected by S. 51 of Reg. VIII of 1793, from enhancement, except under the circumstances therein mentioned. See also Reg. XLIV of 1793, S. 7 (196). (*Sir Barnes Peacock.*) **HURRONATH ROY v. GOBIND CHUNDER DUTT.**

(1875) 2 I. A. 193 = 15 B. L. R. 120 = 23 W. R. 352 =
3 Sar. 466 = 3 Suth. 116.

—**Middleman—Enhancement of rent—Liability for—Construction of kabuliyat.**

In a suit for arrears of rent in pursuance of a notice of enhancement, it was admitted that the defendant was entitled to a permanent right of occupancy so long as he paid the proper rent, and that he was a middleman and not a cultivator of the land. It further appeared from the *kabuliyat* that a *howuldare amulnamah* had been granted at defendant's request, without any rent for the first year, at varying rates less than Rs. 5 a *kane* up to 1264, and at the fixed rate of Rs. 5 a *kane* in and after that year.

Held, affirming the High Court, that it could not have been intended that Rs. 5 should be the rent for the year 1264 only, but that the more reasonable construction was that that was to be the rent per annum during the remainder of the holding, and that consequently the rent was not liable to enhancement beyond Rs. 5 a *kane*. **SOORA-SOONDAREE DABIA v. GOLAM ALI.**

(1873) 19 W. R. 141 (144) = 15 B. L. R. 125 =
2 Suth. 794.

—**Middleman—Lands added by alluvion—Enhancement of rent on ground of—Liability for—Rate of enhanced rent.**

In the case of a person who was a middleman, and not a ryot, having a right of occupancy within the meaning of S. 17 of Bengal Act X of 1859, the rent payable was sought to be enhanced on the ground that the quantity of land held by him was greater than the quantity for which rent had been previously paid by him. The excess alleged consisted in part of land subsequently added by alluvion.

Held, that, though the middleman might be liable under Regulation XI of 1825, cl. (1) of S. 4, to pay rent for the lands gained by alluvion, he was not liable to enhancement under S. 17 of Act X of 1859.

Held, further, that, if liable to enhancement at all, he could only be enhanced according to the *pergunnah* rate of

BENGAL ACTS—(Contd.)**Rent Act X of 1859, S. 17—(Contd.)**

the rents payable by similar holders. SOORASOONDAREE DEBIA *v.* GOLAM ALI. (1873) 19 W. R. 141 (144) = 15 B. L. R. 125 = 2 Suth. 794.

—S. 23—Mocurrari lease—Suit for arrears of rent under, and for cancellation of, for breach of condition—S. 78 of Act—Benefit of—Lessee's right to. See BENGAL ACTS—RENT ACT X OF 1859, S. 78—BENEFIT OF—LESSEE UNDER, ETC. (1872) 12 B. L. R. 439.

—Under-tenants—Tenants intermediate between proprietor and ryots—Rent—Arrears of—Determination of rate of rent—Suits for—Collector—Jurisdiction.

In a suit by the appellant under Act X of 1859 for the enhancement of the rent of lands within his zemindary, it was contended for the first time before their Lordships that as the respondents were not ryots, but tenants intermediate between the proprietor and the ryots, they were not subject to the jurisdiction of the Collector under Act X of 1859, and that their tenure, if it could be made the subject of enhancement of rent at all, could be made so only by suit in the civil court.

Held, that the Collector had jurisdiction to entertain the suit.

Act X of 1859 throughout contemplates under-tenants as distinct from ryots, and contains provisions relating to both classes. And their Lordships think that the 23rd section of the Act, by which exclusive jurisdiction is given to the Collector over the suits therein mentioned, embraces such a suit as this, whether it be treated as what it substantially is, *viz.*, "a suit for the determination of the rate of rent at which a pottah and khabooliat should be given," or as what it is in form, a suit for "arrears of rent due on account of land" (461-2). (*Sir Richard Kindersley.*) BABOO DHUNPUT SINGH *v.* GOOMAN SINGH.

(1867) 11 M. I. A. 433 = 9 W. R. P. C. 3 = 2 Suth. 92 = 2 Sar. 309.

—Cl. (5) and S. 78—Lease—Forfeiture—Covenant for cancellation of lease for non-payment of certain instalments of rent—Suit for cancellation for breach of—Benefit of S. 78—Lessee's right to—Remedial statute—Construction—Principle.

Where in a perpetual lease there was a condition that, on default being made in payment of a certain number of instalments of rent, the lease should be void, *held*, that in a suit under cl. 5, S. 23 of Act X of 1859, for cancellation of the lease on account of a breach of the condition, the lessee was entitled to the benefit of S. 78, even though the defence set up was false in fact.

It was contended that the latter part of S. 78 only applied to cases where the statutory power was given by this Act to cancel leases, and not to cases where the right to cancellation accrued in consequence of covenants in the lease itself. But that would be placing too narrow a construction upon an Act which may be termed, upon the whole, a remedial one. DULI CHAND *v.* MEHER CHAND SAHU.

(1872) 12 B. L. R. 439.

—Cl. (6)—Suit under—Maintainability—Under-tenants dispossessed of their lands—Claim of right to possession by—Zemindar disputing their right of possession—Suit in case of.

The suit being one between under-tenants claiming a right to the possession of lands of which they have been dispossessed, and their zemindar who disputes their right of possession, has been properly brought under S. 23, cl. (6) of Act X of 1859 (332). (*Sir James Colville.*) KHAJAH ASSANÖOLLAH *v.* OBHOY CHUNDER ROY.

(1870) 13 M. I. A. 318 = 13 W. R. P. C. 24 = 2 Suth. 306 = 2 Sar. 535.

BENGAL ACTS—(Contd.)**Rent Act X of 1859—(Contd.)**

—S. 32—Arrears of rent—Suit for—Limitation—Starting point—Sale for same arrears under Reg. VIII of 1819 set aside at instance of defaulter—Fresh suit for same arrears—Limitation for.

The sale of a putni talook for an arrear of rent under Regulation VIII of 1819 was set aside on the ground of irregularity in a suit brought for that purpose by the putnidars. The first judgment in the putnidar's suit was on 26—12—1860; the appellate judgment, the final judgment, therein, was on 30—6—1863. The effect of the judgment was, that the appellant (the zemindar) had to pay back the purchase-money to the purchaser, with interest; that the putnidars were again put into possession of the talook; and that they recovered the mesne profits, during the period in which they were out of possession, from the purchaser. The appellant thereupon instituted a suit on 5—10—1863 in the Collector's Court under Act X of 1859 for recovery of the arrears of rent due to her for the year 1857-8. The putnidars contended that the suit was barred by S. 32 of that Act, their contention being that it should have been brought within three years from the time on which the arrears first became due, *viz.*, the last day of the year for which the rents constituting them had accrued.

Held, that, upon the fair construction of S. 32 of Act X of 1859, the time had really not run (253).

Their Lordships' view of the case is this: that, upon the setting aside of this sale, and the restoration of the parties to possession, they took back the estate, subject to the obligation to pay the rent; and that the particular arrears of rent claimed in this action must be taken to have become due in the year in which that restoration to possession took place. It follows, that upon the language of S. 32 of Act X of 1859, the appellant was not barred from her remedy (253). Until the sale had been finally set aside, the appellant was in the position of a person whose claim had been satisfied; and her suit for the recovery of the arrears might have been successfully met by a plea to that effect (254). (*Sir James Colville.*) MUSSUMAT RANEE SURNOMOYEE *v.* SHOSHEE MOKHEE BURMONIA. (1868) 12 M. I. A. 244 = 11 W. R. P. C. 5 = 2 B. L. R. P. C. 10 = 2 Suth. 173 = 2 Sar. 424.

—Rent sale of putni under Reg. VIII of 1819—Setting aside of, for irregularity, in suit by putnidar for purpose—Zemindar's suit subsequent for recovery from putnidar of arrears of rent for which sale was held—Limitation—Cause of action.

The sale of a putnee for an arrear of rent under Reg. VIII of 1819 was set aside in a subsequent suit by the putneedars on the ground of irregularity. The putneedars were put into possession of the putnee and the purchaser at the sale had his purchase-money returned to him by the zemindar. The zemindar thereupon sued the putneedars to recover the arrears of rent for which the putnee had been sold, and was met by the defence that the suit was barred by S. 32 of Act X of 1859. The High Court held that plaintiff ought to have sued under that section within 3 years from the last day of the year for which the rent constituting the arrears had accrued, and that not having done so he was barred.

Held, reversing the High Court, that the suit was not barred.

If this case had arisen in an ordinary Court of Law, and the Statute of Limitations to be applied was Act XIV of 1859, there could be no doubt at all upon the question, because it is perfectly clear that the cause of action accrued at the time at which, the sale having been set aside, the obligation to pay this sum of money revived; and whether that time be taken to be the date of the original decree, or the date of the final decree, setting aside the sale, the

BENGAL ACTS—(Contd.)**Rent Act X of 1859, S. 32—(Contd.)**

present suit would, in either case, have been brought in time.

The suit is not also barred under S. 32 of Act X of 1859. Upon the setting aside of this sale and the restoration of the parties to possession, they took back the estate subject to the obligation to pay the rent; and the particular arrears of rent claimed in this action must be taken to have become due in the year in which that restoration to possession took place.

The zemindar could not have sued for these arrears pending the proceedings to set aside the sale of the putnee. Until the sale had been finally set aside, he was in the position of a person whose claim had been satisfied; and his suit might have been successfully met by a plea to that effect. *RANEE SURNOMOYEE v. SHOSHEE MOKHEE BURMONIA.* (1868) 2 **Suth.** 173.

—*Rent suit in Collector's Court under Act X of 1859—Limitation applicable to—Act X of 1859 if repealed by Limitation Act XIV of 1859.*

To an action for rent brought in the Collector's Court under the Bengal Rent Act X of 1859 the bar of limitation applicable is that provided by S. 32 of the said Act, and not that provided by Act XIV of 1859, passed six days later.

Their Lordships, upon a comparison of the two statutes in question, with reference to their objects, and considering that they were virtually contemporaneous Acts, have come to the conclusion that the intention to repeal the particular law is not made distinctly to appear, either by express words or necessary implication, and consequently, that the limitation of Act X remains in force (7). (*Sir Montague E. Smith.*) *UNNODA PERSAUD MOOKERJEE v. KRISTO COOMAR MOITRO.* (1872) 19 **W. R.** 5 = 15 **B. L. R.** 60 = 2 **Suth.** 740.

—**S. 78—'Applicability'—Cancellation—Accrual of right of, in consequence of covenants in lease itself.**

It was contended that the latter part of S. 78 of Act X of 1859 only applied to cases where the statutory power was given by this Act to cancel leases, and not to cases where the right to cancellation accrued in consequence of covenants in the lease itself. But their Lordships are of opinion that that would be placing too narrow a construction upon an Act which may be termed, upon the whole, a remedial one, and they see no sufficient reason for limiting what is the *prima facie* and natural meaning of its terms to the extent contended for (442). *DULI CHAND v. MEHER CHAND SAHU.* (1872) 12 **B. L. R.** 439 = 3 **Sar.** 215.

—*Applicability—Mokurraree lease—Cancellation of—Suit for.*

The words of S. 78 of Act X of 1859 apply to all cases of cancellation of leases. They *prima facie* certainly apply to a case of cancellation of a mokurrari lease (442). *DULI CHAND v. MEHER CHAND SAHU.*

(1872) 12 **B. L. R.** 439 = 3 **Sar.** 215.

—*Benefit of—Lessee under mokurrari lease—Right of, in suit under S. 23 of Act for arrears of rent and for cancellation of lease for breach of condition.*

In a mokurrari lease there was a condition that, on default being made in payment of a certain number of instalments of rent, the lease should be void. In a suit brought by the lessor under S. 23 of Act X of 1859 to recover arrears of rent and for cancellation of the lease on account of a breach of the condition, *held*, that the lessee was entitled to the benefit of S. 78 of that Act, even though the defence set up was false in fact. *DULI CHAND v. MEHER CHAND SAHU.*

(1872) 12 **B. L. R.** 439 = 3 **Sar.** 215.

—*Cancellation of lease—Suit for—Decree directing cancellation on non-payment of arrears within 15 days—What amounts to.*

BENGAL ACTS—(Contd.)**Rent Act X of 1859, S. 78—(Contd.)**

In a suit by the appellant against the respondents, who held under a mokurrari lease, for the purpose of recovering arrears of rent, and for the cancellation of the lease in consequence of a non-payment, in pursuance of an agreement contained in the lease itself to that effect, the High Court gave the plaintiff his arrears of rent, but, as regards the prayer for the cancellation of the lease, they held that S. 78 of Act X of 1859 applied. Their judgment was in these terms:—"It is ordered and decreed that this appeal be decreed, subject to the proviso under the terms of S. 78 of Act X of 1859, in favour of the defendants, respondents, that is to say, that the said defendants, respondents, be entitled to continue in possession of the mokurrari tenure, the subject of this suit, upon their paying into Court within 15 days from this date the amount decreed, namely, the sum of . . .," and so on.

Held, that the decree of the High Court, in effect, ordered that the lease was to be cancelled upon the non-payment of rent within the time allowed. *DULI CHAND v. MEHER CHAND SAHU.* (1872) 12 **B. L. R.** 439 = 3 **Sar.** 215.

—**S. 105—Construction—"According to the rules for the sale of under-tenures"—Meaning.**

It has been held, upon the construction of the words, "according to the rules for the sale of under-tenures" in S. 105 of Act X of 1859, that the effect of Reg. VIII of 1819 and I of 1820, is applicable to cases of sales under decrees of rent made under this S. 105 (189-90). (*Sir Barnes Peacock.*) *BRINDABUN CHUNDER SIRCAR CHOWDRY v. BRINDABUN CHUNDER DEV CHOWDRY.*

(1874) 1 **I. A.** 178 = 21 **W. R.** 324 = 12 **B. L. R.** 408 = 3 **Sar.** 365.

—*Putni talook—Rent sale of—Putni — Durputni—Incumbrances—Effect of sale upon—Bengal Putni Talooks Reg. VIII of 1819, Ss. 8 and 11—Bengal Putni Taluqs Reg. I of 1820—Effect.*

The suit was for possession and mesne profits of a durputnee mehal brought against the zemindar. The charge was that the zemindar in collusion with the heirs of R, who was said to be merely a benamee holder of the putnee taluq, obtained a decree against them for a certain sum as arrears of rent of the said putnee, and that under that decree he sold the putnee, and having purchased it in his own name entered upon the estate of the durputneedar, treating the durputnee as having ceased to exist upon the sale of the putnee. It was, however, found that there was no fraud in the case, and the question for decision was whether, upon the sale of the putnee, under the decree for rent, it was sold free from the incumbrances which had been created by the putneedar, or, in other words, whether it was sold free from the durputnee.

Held, reversing the High Court, that the sale in question was the sale of a talook transferable by sale, and upon which the right to sell for arrears of rent was reserved in the engagements entered into by the parties; that, consequently, according to the effect of S. 105 of Act X of 1859 and Ss. 8 and 11 of Reg. VIII of 1819, and probably also of Reg. I of 1820, the effect of the sale of the putnee talook was to destroy all incumbrances which had been created by the putneedar, and consequently to destroy the particular incumbrance which was mentioned in the plaint in the suit, namely, the durputnee of the plaintiff; and that the suit was, therefore, not maintainable.

It has been held, upon the construction of the words, "according to the rules for the sale of under-tenures" in S. 105 of Act X of 1859, that the effect of Reg. VIII of 1819 and I of 1820, is applicable to cases of sales under decrees of rent made under this S. 105.

BENGAL ACTS—(Contd.)**Rent Act X of 1859—(Contd.)**

The plaintiff in his plaint describes the tenure as a putnee talook, and his own tenure as a darputni and their Lordships are of opinion that under the description "putnee talook" and "darputnee talook" it must be *prima facie* intended that the tenure called a putnee tenure was a tenure transferable by sale, and upon the creation of which it was stipulated by the terms of the engagements interchanged that in case of an arrear accruing, the estate might be brought to sale. If so according to the terms of Reg. VIII of 1819, the tenure might not only be brought to sale, but it might be sold free from incumbrances (Ss. 8 and 11). (*Sir Barnes Peacock.*) **BRINDABUN CHUNDER SIRCAR CHOWDRY v. BRINDABUN CHUNDER DEY CHOWDRY.**

(1874) 1 I. A. 178 = 21 W. R. 324 = 12 B. L. R. 408 = 3 Sar. 365

Rent Act VIII of 1869.

—See BENGAL ACTS—LANDLORD AND TENANT PROCEDURE ACT VIII OF 1869.

Rent Recovery (Under-Tenures) Act VIII of 1865.

—S. 16—*Rent sale of under-tenure—Incumbrances—Effect on—Sale result of corrupt agreement between under-tenure-holder and purchaser at sale—Effect.*

If the sale of the under-tenure for default in payment of rent under Bengal Act VIII of 1865 had been the result of a corrupt agreement between the under-tenure-holder and the purchaser at the sale, the purchaser might no doubt lose the benefit of S. 16 of the Bengal Act of 1865; and especially if the default in payment of rent had been deliberately incurred in furtherance of such an agreement. (*Sir John Edge.*) **MIDNAPUR ZEMINDARY COMPANY, LTD. v. UMA CHARAN MANDAL.** (1919) 11 L. W. 371 = 17 A. L. J. 1004 = (1919) M. W. N. 817 = 26 M. L. T. 489 = 22 Bom. L. R. 7 = 24 C. W. N. 201 = 52 I. C. 497 = 37 M. L. J. 199 (205).

Rent Settlement Act VIII of 1879.

—S. 10—*Applicability and effect.*

Section 10 of the Bengal Rent Settlement Act of 1879 is plainly intended to fix for the future the liability of such under-tenants as may enter into possession (164). (*Lord Robertson.*) **PRIA NATH DAS v. RAM TARAN CHATTERJI.** (1903) 30 I. A. 159 = 30 C. 811 (820) = 7 C. W. N. 601 = 8 Sar. 497.

—Lease—Resumption of part of leased lands by Government and re-settlement thereof with lessor or his heirs—Rent in case of—Lessee's liability for—Rent fixed in original lease—Rent fixed by re-settlement. See LEASE—RESUMPTION OF PART OF LEASED LANDS BY GOVERNMENT. (1903) 30 I. A. 159 = 30 C. 811.

Revenue Sale Law Act XI of 1859.

—See BENGAL ACTS—LAND REVENUE SALES ACT (XI OF 1859.)

Tenancy Act VIII of 1869.

—See BENGAL ACTS—LANDLORD AND TENANT PROCEDURE ACT (VIII OF 1869).

Tenancy Act VIII of 1885.

—Non-occupancy raiyat under—Status and rights of—Mode of acquisition of.

It appears to their Lordships that it was only under Ch. VI of the Bengal Tenancy Act, 1885, that the status and rights of a non-occupancy raiyat could be acquired (89). (*Sir John Edge.*) **JAGARNATH DASS v. JANKI SINGH.** (1922) 49 I. A. 81 = 1 Pat. 340 (348) = 26 C. W. N. 833 = 3 Pat. L. T. 197 = 35 C. L. J. 506 = (1922) M. W. N. 410 = (1922) P. C. 142 = 31 M. L. T. (P. C.) 231 = 66 I. C. 337 = 43 M. L. J. 55.

—Occupancy right—Acquisition by gift of—Possibility of, under Act.

BENGAL ACTS—(Contd.)**Tenancy Act VIII of 1885—(Contd.)**

A right of occupancy under the Bengal Tenancy Act, 1885, appears to be a statutory right, and is not conferred by a gift from a proprietor (167). (*Sir John Edge.*) **BINDESHWARI PRASAD SINGH v. MAHARAJAH KESHO PRASAD SINGH.** (1926) 53 I. A. 164 =

5 Pat. 634 = 7 Pat. L. T. 553 = 31 C. W. N. 74 = 44 C. L. J. 86 = A. I. R. 1926 P. C. 79 = 95 I. C. 1025 = 51 M. L. J. 587.

—Rent payable monthly—Arrear of, accrued due after date of Act—Interest on—Monthly or quarterly.

With regard to the interest on the rent in arrear, in a case in which the rent was payable monthly and the arrears became due after the Bengal Tenancy Act, 1885, came into force, the Sub-Court held that interest was to be calculated monthly on the arrears; but the High Court held that under the provisions of that Act the interest should be calculated quarterly.

Held, reversing the High Court and restoring the Sub-Court, that interest ought to be calculated monthly (134).

The provision in S. 67 of the Act, on which the High Court relied, only applies to cases where the rent is payable quarterly. Here it is not disputed that the rent is payable monthly, and on rent in arrear that interest ought to be calculated monthly (134). (*Lord Macnaughten.*) **RANI HEMANTA KUMARI DEBI v. MAHARAJAH JAGADINDRA NATH ROY BAHADUR.** (1894) 21 I. A. 131 =

22 C. 214 = 6 Sar. 473.

—Tenant—Tenure-holder or raiyat under Act—Tests for determining.

In determining the status of a tenant, namely, whether he is a tenure-holder or a raiyat within the meaning of the Bengal Tenancy Act, two elements have to be borne in mind, first, the purpose for which the land was acquired; and, secondly, the extent of the tenure or holding. Both these elements are closely inter-related. The law assumes the raiyat to be the actual cultivator of the soil, either by his own labour or the labour of members of his family or by hired labourers, and it assumes also that ordinarily a larger area than 100 bighas would make cultivation by the personal agency of the tenant improbable. The presumption provided in sub-S. 5 of S. 5 of the Act is founded on that hypothesis (71-2). Fixity of rent is no criterion for determining whether a tenant is a tenure-holder or a raiyat (71). (*Mr. Ameer Ali.*) **DEBENDRA NATH DAS v. BIBUDHENDRA BHRAMARBAR ROY.** (1918) 45 I. A. 67 = 45 C. 805 = 22 C. W. N. 674 = 5 Pat. L. W. 1 = 16 A. L. J. 522 = 23 M. L. T. 384 = (1918) M. W. N. 379 = 27 C. L. J. 543 = 20 Bom. L. R. 743 = 45 I. C. 411 = 35 M. L. J. 214.

—Tenure-holder—Raiyat—Persons holding under—Status and rights of.

Persons holding under a tenure-holder within the definition of the Bengal Tenancy Act would have the status of raiyats and would be entitled to acquire, after a certain efflux of time, the right of occupancy under the Act; while persons holding under a raiyat would only be under-raiyats without the privileges or security afforded by the Act to raiyats (70-1). (*Mr. Ameer Ali.*) **DEBENDRA NATH DAS v. BIBUDHENDRA BHRAMARBAR ROY.**

(1918) 45 I. A. 67 = 45 C. 805 (812-3) = 22 C. W. N. 674 = 5 Pat. L. W. 1 = 16 A. L. J. 522 = 23 M. L. T. 384 = (1918) M. W. N. 379 = 27 C. L. J. 543 = 20 Bom. L. R. 743 = 45 I. C. 411 = 35 M. L. J. 214.

—Ss. 3 (3) and 4—Effect.

Section 3, sub-S. (3) and S. 4 of the Bengal Tenancy Act, 1885, did not separately or conjointly create or confer

BENGAL ACTS—(Contd.)**Tenancy Act VIII of 1885, Ss. 3 & 4—(Contd.)**

upon any one any status or any right (90). (*Sir John Edge.*)
JAGARNATH DASS *v.* JANKI SINGH.

(1922) 49 I. A. 81 = 1 Pat. 340 (349) =
26 C. W. N. 833 = 3 Pat. L. T. 197 = 35 C. L. J. 506 =
(1922) M. W. N. 410 = (1922) P. C. 142 =
31 M. L. T. (P. C.) 231 = 66 I. C. 337 = 43 M. L. J. 55.

—S. 4—Object and effect of.

S. 4 of the Act was merely a section specifying the classes of tenants to which the Act applied; it did not confer upon any tenant a status or any right; that was done by Chapters III, IV, V, VI and VII (90.) (*Sir John Edge*) JAGARNATH DASS *v.* JANKI SINGH.

(1922) 49 I. A. 81 = 1 Pat. 340 (349) =
26 C. W. N. 833 = 3 Pat. L. T. 197 = 35 C. L. J. 506 =
(1922) M. W. N. 410 = (1922) P. C. 142 =
31 M. L. T. (P. C.) 231 = 66 I. C. 337 = 43 M. L. J. 55.

—S. 5—Tenant—Tenure-holder or raiyat under Act—Tests for determining. See UNDER THIS ACT—TENANT.

(1918) 45 I. A. 67 = 45 C. 805.

—S. 5 (5)—Lessee of over 100 bighas of land—Tenure-holder or raiyat—Presumption under sub-section of tenure-holder—Evidence held insufficient to rebut.

By S. 5, sub-S. (5) of the Bengal Tenancy Act, 1885, it is enacted that where the area held by the tenant exceeds 100 standard bighas the tenant shall be presumed to be a tenure-holder until the contrary is shewn.

The subject-matter of the suit was a tract of land measuring 1174 bighas, of which the plaintiffs were the proprietors. The question for decision was whether the appellant become a "tenure-holder" only, or a "ryot having a right of occupancy" in the suit land within the meaning of the Bengal Tenancy Act.

The Government, claiming to be proprietors of the suit land, with other lands adjacent thereto, granted to the appellant 3,668 odd bighas, including the suit lands, at a rent of five annas a bigha for a period of nearly 12 years. The kabuliyat executed by the appellant was on a printed form in which it was described as "Form of kabuliyat for those cultivators who have not been recognised as having occupancy right", but on the other hand the holding was described in a note as a "taluk." A few years after the date of the grant to the appellant, the Government released the 1174 bighas to the predecessors in title of the plaintiffs, and the appellant thereupon became tenant thereof to those people on the terms mentioned in the kabuliyat.

Held, that, the grant to the appellant being of 3688 odd bighas, the presumption under S. 5, sub-S. (5) of the Bengal Tenancy Act was that he was a tenure-holder, and that the evidence adduced by the respondents had not established the contrary.

No importance is to be attached to the mere form of the kabuliyat, or to the use in it either of the word "cultivator" or of the word "taluk." It is only another instance of the usual mistake of adopting a printed form for a purpose to which it was not adopted. Nor does the receipt for rent given to the appellant in which he is described as "ryot" carry the matter any further. Prior to the date of that notice, the appellant had been served with a notice to quit treating him as a tenure-holder. It is a question of substance, not of form. (*Lord Davey.*) GOKUL MANDAR *v.* PUDMANUND SINGH.

(1902) 29 I. A. 196 (201) =
29 C. 707 (714-5) = 6 C. W. N. 825 =
4 Bom. L. R. 793 = 8 Sar. 323.

—Lessee of over 100 bighas of land—Record of rights—Entry as raiyat in—Presumption from—Evidence rebutting.

Held, that the defendant-appellant was a tenure-holder and not a raiyat, on the strength of the following circumstances:—

BENGAL ACTS—(Contd.)**Tenancy Act VIII of 1885 S. 5 (5)—(Contd.)**

(1) the land held by the defendant amounted to more than 250 acres;

(2) the lease under which the land was held was an ordinary reclamation lease; it leased the land permanently to the lessee at a fixed rent to cultivate the same, after making it fit for cultivation at his own expense and by his own efforts;

(3) though the land was leased for cultivation, that is, for agricultural purposes, the agency to be employed for the cultivation was left entirely to the option of the lessee; he had the power to establish raiyats or under-lease it to others, or cultivate it himself, if he could; it could not be said that the purpose was, primarily or otherwise, that the demised land should be cultivated by his personal agency;

(4) the person to whom the land was leased was a man of means who was a resident of another place.

In the circumstances the presumption arising under S. 103-B of the B. T. Act from an entry in the record of rights that the defendant was a raiyat was rightly held to have been rebutted. (*Mr. Ameer Ali.*) DEBENDRA NATH DAS *v.* BIBUDHENDRA BHRAMARBAR ROY.

(1918) 45 I. A. 67 = 45 C. 805 = 22 C. W. N. 674 =
5 Pat. L. W. 1 = 16 A. L. J. 522 = 23 M. L. T. 384 =
(1918) M. W. N. 379 = 27 C. L. J. 543 =
20 Bom. L. R. 743 = 45 I. C. 411 = 35 M. L. J. 214.

—Lessee of over 100 bighas of land—Zur-i-peshge lease in part intended as security for moneys advanced to tenant—Lessee under—Raiyat not a.

Appellants were owners of an indigo factory, which they acquired in April, 1890. The respondent was proprietor of the entire 16 annas of Mahal B, portions of which were occupied by the owners of the factory, from 14—9—1867 until September, 1890, under a series of leases from the respondent and his predecessors. Those were, (1) a ticca pottah of 105 bighas, 1 cottah, and 8 dhoors, for five years ending in September, 1872; (2) a peshgi patowa ticca, for nine years ending in September, 1881, of the 105 bighas 1 cottah, and 8 dhoors included in the preceding lease, together with additional land bringing up the total area to 240 bighas; (3) a ticca pottah of same date with the last, of 25 bighas for ten years ending in September, 1882; and (4) a zur-i-peshge ticca patowa pottah, of the whole 265 bighas included in the two previous leases, for an additional term ending in October 1890.

The first and third of those documents were in the ordinary terms of a lease for cultivation. The second and fourth of them had this peculiarity, that at their commencement, the tenants advanced to the lessor a lump sum for the liquidation of debts due to his creditors, the tenants being entitled to recover payment by retaining out of the rents payable by them, a yearly instalment of the sum advanced, with interest at the rate of six annas *per mensem*. The lands were cultivated for the purpose of growing indigo; and the leases contained an express obligation by the tenants to quit occupation at their expiry.

Held, that the second and fourth of the leases above-mentioned did not create a proper right of occupancy for purposes of cultivation, and could not be made the foundation of a claim to raiyat occupancy.

The leases in question were not mere contracts for the cultivation of the land let; they were also intended to constitute, and did constitute, real and valid security to the tenant for the principal sums which he had advanced, and interest thereon. The tenants' possession under them was, in part at least, not that of cultivators only, but that of creditors operating repayment of the debt due to them, by means of their security.

BENGAL ACTS—(Contd.)**Tenancy Act VIII of 1885, S. 5 (5)—(Contd.)**

Held further, that the land held in occupancy by the owners of the indigo factory, under the respondent and his predecessors in title, having from the first been in excess, and since 1872, largely in excess of the statutory limit prescribed by S. 5, sub-S. (5) of the Bengal Tenancy Act, 1885, the appellants were, therefore, not *raiya*ts, either "occupancy" or "non-occupancy" within the meaning of the Act of 1885. (*Lord Watson.*) **BENGAL INDIGO COMPANY, LTD. v. MOHUNT ROGHUBUR DAS.** 7 Sar. 94 =

(1896) 23 I. A. 158 = 24 C. 272 = 1 C. W. N. 83.
 ———*Lessee of over 100 bighas of land—Tenure-holder or raiyat—Presumption.* See UNDER THIS ACT, S. 103-B—RECORD OF RIGHTS. (1918) 45 I. A. 190 (192) = 46 C. 90 (99).

———**Ss. 5 and 104-H—Chur lands—Grantee of, for reclamation and letting at a profit to cultivators—Status of.**

R, the appellants' original predecessor in title, was not a cultivator. He was by caste a Kayastha and by occupation a petty Government Official. Before his time the Government had no tenant on the land in question, which had been diluviated and unoccupied. In the early thirties of the last century he found money with which he began to build embankments and other works to reclaim the chur lands then reforming in the river bed. The chur afterwards bore his name and eventually the land was brought into cultivation. At some later date, actual cultivation was done by peasants, who paid rent to R, as they did afterwards to his successors. There was no evidence that R or his sons or his servants ever actually cultivated a single bigha. He did not reside in the chur, but followed his avocation elsewhere.

Held, affirming the High Court, that R was neither a cultivator nor a raiyat, in the sense in which that term was used in the Bengal Tenancy Act, or in ordinary speech, and that the appellants' tenure, which was derived from him, was not a raiyati holding (193).

Whether the appellants are really raiyats ultimately depends on questions of fact; one must "look to the attendant circumstances to judge of the purpose" for which the land was acquired (192). (*Lord Sumner.*) **RAJANI KANTA GHOSE v. SECRETARY OF STATE FOR INDIA.**

(1918) 45 I. A. 190 = 46 C. 90 (100) = 23 C. W. N. 649 = 51 I. C. 226.

———**S. 7—Enhancement of rent under—Claim for—Evidence—Road cess returns rendered under Bengal Cess Act of 1880—Admissibility of—Value of.** See BENGAL ACTS—CESS ACT OF 1880, S. 95—ROAD CESS RETURNS.

(1903) 30 I. A. 177 (180-1) = 30 C. 1033 (1041).

———**S. 12—Permanent tenure—Transfer by registered deed of—Transferor's liability for rent after—Consideration for transfer—Absence of.**

Under S. 12 of the Bengal Tenancy Act, a transfer of a permanent tenure by a registered document is complete as soon as the document is registered. The transferor is no longer liable for rent, irrespective of the question whether there was or was not consideration for the transfer. (*Mr. Ameer Ali.*) **SURAPATI ROY v. RAM NARAYAN MUKERJI.**

(1923) 50 I. A. 155 (161-2) = 50 C. 680 (688) =

A. I. R. 1923 P. C. 88 = 33 M. L. T. 314 = 18 L. W. 681 = 39 C. L. J. 26 = 28 C. W. N. 517 =

73 I. C. 193 = 45 M. L. J. 219.

———**S. 19—Rights saved by—Nature of.**

S. 19 of the Bengal Tenancy Act saved rights, accrued and existing before it came into force, and no doubt the nature of those rights must be judged in accordance with the law as it stood when they arose, unless subsequent changes in the law have operated to alter them (194). (*Lord Sumner.*) **RAJANI KANTA GHOSE v. SECRETARY OF STATE FOR INDIA.** (1918) 45 I. A. 190 = 46 C. 90 (101-2) =

23 C. W. N. 649 = 51 I. C. 226.

BENGAL ACTS—(Contd.)**Tenancy Act VIII of 1885—(Contd.)**

———**S. 23—Agricultural holding—Rendering of land in, unfit for agricultural purposes—Indigo factory—Erection of, on part of land—Effect.**

The District Judge held that the erection of indigo buildings is also in conformity with the purposes for which an agricultural holding is let. On appeal, the High Court, which reversed the District Judge, stated the law thus: "Where, as in this case, land has been let out for agricultural purposes generally, the erection of an indigo factory on a part of such land must render it unfit for the purpose of the tenancy, because, the purpose of the tenancy being the cultivation of crops, that is agricultural purposes, the portion of the land built upon will evidently be unfit for such purposes."

Held, that the proposition of law was laid down broadly by the High Court, without reference to the circumstances of individual cases, without regard to the size of the holding, or of the area withdrawn from actual cultivation, or to the effect of such withdrawal upon the fitness of the holding, taken as a whole, for profitable cultivation (137). (*Sir Arthur Wilson.*) **HARI MOHUN MISSER v. SURENDRA NARAYAN SINGH.** (1907) 34 I. A. 133 =

34 C. 718 (721-2) = 2 M. L. T. 399 =

6 C. L. J. 19 = 11 C. W. N. 794 =

9 Bom. L. R. 750 = 9 Sar. 276 = 17 M. L. J. 361.

———**Agricultural holding—Rendering of land in unfit for agricultural purposes—Question as to—Finding of first appellate Court on—Interference with, in second appeal—Jurisdiction.**

The High Court cannot in second appeal interfere with the findings of the first appellate Court on the questions whether a raiyat has used land in his holding in any manner which does not materially impair the value of the land or render it unfit for the purpose of the tenancy within the meaning of S. 23 of the Act. (*Sir Arthur Wilson.*) **HARI MOHUN MISSER v. SURENDRA NARAYAN SINGH.**

(1907) 34 I. A. 133 (136-7) = 34 C. 718 (722-3) =

2 M. L. T. 399 = 6 C. L. J. 19 = 11 C. W. N. 794 =

9 Bom. L. R. 750 = 9 Sar. 276 = 17 M. L. J. 361.

———**S. 25—Raiyat—Zur-i-peshgi lease in part intended as security for repayment of sums advanced by tenant—Lessee under—Claim to occupancy right by—Maintainability.** See UNDER THIS ACT, S. 5 (5).

(1896) 23 I. A. 158 = 24 C. 272.

———**S. 45—Non-occupancy raiyat referred to in—Who was a.**

As S. 45 stood in Chapter VI of the Bengal Tenancy Act of 1885 before the repeal of the section by the Bengal Tenancy (Amendment) Act, 1907, no one could have doubted that the non-occupancy raiyat to whom it referred was a person who had obtained the status and rights of a non-occupancy raiyat by reason of his having been a person upon whom that status and those rights had been conferred by Chapter VI. (*Sir John Edge.*) **MAHANT JAGARNATH DAS v. JANKI SINGH.** (1922) 49 I. A. 81 (88) =

1 Pat. 340 (347-8) = 26 C. W. N. 833 =

3 Pat. L. T. 197 = 35 C. L. J. 506 =

(1922) M. W. N. 410 = (1922) P. C. 142 =

31 M. L. T. (P.C.) 231 = 66 I. C. 337 = 43 M. L. J. 55.

———**S. 50 (2)—Presumption under—Rebuttal of—Kabuliyat executed on basis of pre-existing tenure not sufficient.**

The question in the appeal was whether or no there had been proved in the suits out of which the appeals arose anything which would rebut the presumption established by S. 50, sub-S. (2) of the Bengal Tenancy Act, 1885. The presumption upon which the appellant relied was to be

BENGAL ACTS—(Contd.)**Tenancy Act VIII of 1885, S. 50 (2)—(Contd.)**

found in the form of the *kabuliyat* under which the respondents held their title.

Held, affirming the Courts below, that the *kabuliyat* undoubtedly proceeded upon the basis that there were pre-existing rights, and that consequently it could not be relied upon for the purpose of showing that there had been a change in the rent since the date of the permanent settlement. (*Lord Buckmaster.*) KUMAR PRASANNA DEB RAIKAT *v.* UDDHAB CHANDRA SHAHA.

(1923) 18 L. W. 147 = (1923) P. C. 86 =
33 M. L. T. 432 (P. C.) = 75 I. C. 556 =
28 C.W.N. 752 = (1923) M. W. N. 718 = 45 M. L. J. 779.

—Ss. 52, 179—*Diminution of area of holding—Abatement of rent—Tenant's right to—Land not within permanently settled area.*

The respondents, who were the holders of a lease from the appellant of land situated in the Sundarbans, sued to obtain a reduction of rent on the ground that a large portion of the holding had been washed away by the surrounding waters, and that the area leased had been reduced thereby to the extent of nearly a quarter. There was no doubt that there had been a diminution and no case was set up that there had been any previous increase of the holding without increase of rent so as to bring it under the latter part of clause (b) of sub-S. (1) of S. 52 of the Bengal Tenancy Act, 1885.

The case of the appellant, whose predecessor was a grantee from the Government of the holding part of which was leased to the respondents, was that the case came within S. 179 of the Bengal Tenancy Act, 1885, but he failed to establish that the lands were situated within a "permanently-settled area" within the meaning of that section.

Held, that S. 179 had no application to the holding, and that the respondents were entitled to the relief which they claimed under S. 52 of the Act. (*Lord Moulton.*) KHETRAMONI DAS *v.* JIBAN KRISHNA KUNDU.

(1920) 48 I. A. 39 = 48 C. 473 =
25 C. W. N. 361 = 14 L. W. 248 = 33 C. L. J. 214 =
30 M. L. T. 196 = 60 I. C. 1 = 40 M. L. J. 232.

—S. 65—Rent decree within meaning of—Decree obtained by person after he has parted with property in which tenancy is situate if a. *See UNDER THIS ACT*, S. 65—SALE UNDER. (1914) 41 I. A. 91 = 41 C. 926 (939-40).

—Sale under—Right to bring tenure or holding to—Person who obtains decree for rent after parting with property in which tenancy is situate—Right of.

Ss. 65 and 66 of the Act taken together cover practically the remedies provided by law for the landlord to recover arrears of rent. One section is the exact corollary of the other. The right to proceed to sale in one case, in the other to eject, is dependent on the existence of the relationship of landlord and tenant at the time when the remedy provided by law is sought to be enforced. A reference to S. 148, cl. (h) clearly shows that the right to apply for the execution of a decree for arrears was attached to the status of the decree-holder *qua* landlord. The prohibition contained in this section refers to decrees obtained by the landlord under S. 65. To acquire the right which the section gives, not only the person obtaining the decree must be the landlord at the time, but the person seeking to execute it by sale of the tenure must have the landlord's interests "vested" in him. In other words, the right to bring the tenure or holding, as the case may be, to sale exists so long as the relationship of landlord and tenant exists. The right to bring the tenure or holding to sale under S. 65 appertains, therefore, exclusively to the landlord; and a person to whom certain arrears are due, and who obtains a decree therefor after he has parted

BENGAL ACTS—(Contd.)**Tenancy Act VIII of 1885, S. 65—(Contd.)**

with the property in which the tenancy is situate, has no such right. (*Mr. Ameer Ali.*) FORBES *v.* BAHADUR SINGH.

(1914) 41 I. A. 91 = 41 C. 926 (939-40) =
12 A. L. J. 653 = 23 I. C. 632 = (1914) M. W. N. 397 =
15 M. L. T. 380 = 18 C. W. N. 747 = 1 L. W. 1059 =
27 M. L. J. 4.

—Ss. 65, 159 & 188—Co-sharer landlords—Suit by one or some of—Maintainability. *See BENGAL ACTS—TENANCY ACT OF 1885*, S. 188.

—S. 66—Right to eject under—Condition—Existence of relationship of landlord and tenant at the time if a. *See UNDER THIS ACT*, S. 65—SALE UNDER.

—S. 67—Applicability—Rent payable monthly.

The provision in S. 67 of the Act only applies to cases where the rent is payable quarterly. It is inapplicable to cases where the rent is payable monthly (134). (*Lord Macnaghten.*) RANI HEMANTA KUMARI DEBI *v.* MAHARAJAH JAGADINDRA NATH ROY.

(1894) 21 I. A. 131 = 22 C. 214 = 6 Sar. 473.

—S. 74—Lease for consolidated annual jumma—Some of items if not recoverable as being abwabs.

A lease of villages stated that they were at a consolidated annual jama of Rs. 15,581-5-0, being the malguzari, road and embankment cesses, dues of priests (mahal uprothi), and expenses for obtaining acquittance receipts (farag kharoch), etc., in addition to 515 maunds of paddy specified below payable annually at a uniform rate under a thika patta."

At the end of the document was a Schedule giving a list of the mouzahs let and stating in the case of each mouza the total annual "jama" and details of how it was made up. The list of payments in respect of each mouzah was as follows:—

Malguzari.
Road cess.
Embankment cess.
Costs of acquittance.
Dasahara and Chait nawmi farmaish.
Tika, Cheti, Guru Chati.
Batchapi, Jangla-isim-navisi.
Katiari.
Dewani dastur.
Mahal uprothi.
Paddy 515 maunds.

The total of the sums of Malguzari to Mahal uprothi thus arrived at was then treated as the "jama ekasala" (annual rent) and was divided into four kists.

The High Court held that the lessee undertook to pay the items from Embankment cess to Mahal uprothi above as abwabs, and not as part of the rent, which was taken to be the meaning of "malguzar" (the first item), and that under S. 74 of the Bengal Tenancy Act, the landlord was precluded from recovering the items held by the High Court to be abwabs.

Held, reversing the High Court that the landlord was entitled to recover all the items making up the consolidated annual jamma of Rs. 15,581-5-0, plus the 515 maunds of paddy.

"Malguzari" in the lease cannot be rendered as "rent" much less as "actual rent"; nor is there any evidence to show that the amount of the malguzari was the actual rent, as distinguished from abwabs, paid by the cultivating raiyats of the village. The only distinction apparent on the face of the lease is between cash rent and produce rent. So far as the former is concerned, it is impossible to take the first item as being actual rent, and the rest as abwabs, when they are all included in the total, which is expressly stated to be the annual rental payable in four equal kists, or instalments,

BENGAL ACTS—(Contd.)**Tenancy Act VIII of 1885, S. 741—(Contd.)**

specified in figures (435-6). (*Lord Sinha.*) CHATTRA KUMARI DEVI *v.* BROUCKE. (1927) 54 I. A. 432 =

7 P. 134 = 26 A. L. J. 19 = 32 C. W. N. 260 =

47 C. L. J. 90 = 8 Pat. L. T. 813 = I L. T. 40 P. 1 =

106 I. C. 571 = 27 L. W. 736 =

A. I. R. 1927 P. C. 250 = 54 M. L. J. 293.

—Object of.

S. 74 of the Bengal Tenancy Act, 1885, has a long legislative history behind it from 1791 to 1885, the object of the whole series of enactments from the Regulations of 1791 to Act VIII of 1885 being to prevent exactions from tenants beyond the rent specified in their patta, when there was one, and if there was no written engagement, beyond what was the rent actually payable, whether by verbal engagement or by virtue of custom (435.) (*Lord Sinha.*) CHATTRA KUMARI DEVI *v.* BROUCKE. (1927) 54 I. A. 432 =

7 P. 134 = 26 A. L. J. 19 = 32 C. W. N. 260 =

47 C. L. J. 90 = 8 Pat. L. T. 813 = I L. T. 40 P. 1 =

106 I. C. 571 = 27 L. W. 736 =

A. I. R. 1927 P. C. 250 = 54 M. L. J. 293.

—Rent or illegal imposition—Test.

In determining whether a sum claimed by a landlord is rent which he is entitled to recover, or is an illegal imposition which he is precluded by S. 74 of the Bengal Tenancy Act, from recovering, it has to be ascertained in each case whether the sum claimed is really part of the rent agreed upon to be paid as consideration for the lease (436). (*Lord Sinha.*) CHATTRA KUMARI DEVI *v.* BROUCKE.

(1927) 54 I. A. 432 = 7 P. 134 = 26 A. L. J. 19 =

32 C. W. N. 260 = 47 C. L. J. 90 = 8 Pat. L. T. 813 =

I L. T. 40 P. 1 = 106 I. C. 571 = 27 L. W. 736 =

A. I. R. 1927 P. C. 250 = 54 M. L. J. 293.

—Words—Actual rent—If equivalent to assul jama of old Regulations—*Quere.* (*Lord Sinha.*) CHATTRA KUMARI DEVI *v.* BROUCKE. (1927) 54 I. A. 432 =

7 P. 134 = 26 A. L. J. 19 = 32 C. W. N. 260 =

47 C. L. J. 90 = 8 Pat. L. T. 813 = I. L. T. 40 P. 1 =

106 I. C. 571 = 27 L. W. 736 =

A. I. R. 1927 P. C. 250 = 54 M. L. J. 293 (298).

—Words—Actual rent—Malguzari if can be rendered as, or as rent. *See* MALGUZARI—MEANING OF.

(1927) 54 I. A. 432 = 7 P. 134 =

54 M. L. J. 293 (296-7).

—Words—Actual rent—Meaning.

The words "actual rent" in the section cannot be taken to mean either "a fair and equitable rent" or "rent at customary or pargana rates" (437). (*Lord Sinha.*) CHATTRA KUMARI DEVI *v.* BROUCKE. (1927) 54 I. A. 432 =

7 P. 134 = 26 A. L. J. 19 = 32 C. W. N. 260 =

47 C. L. J. 90 = 8 Pat. L. T. 813 = I. L. T. 40 P. 1 =

106 I. C. 571 = 27 L. W. 736 =

A. I. R. 1927 P. C. 250 = 54 M. L. J. 293.

—S. 88—Tenure—Division into separate tenures—Consent of landlord in writing—Necessity.

Before the Bengal Regulations of 1799 the division of a single tenure into separate tenures as between the zemindar and the tenant could be made without the consent of the landlord in writing. Since the said Regulations such division can only validly take place with the consent of the superior landlord in writing. (*Lord Atkin.*) PRAFULLA NATH TAGORE *v.* SATYA BHUSAN DAS.

A. I. R. 1929 P. C. 171.

—Tenure—Division into separate tenures—Proof of.

Whether a tenure has been divided or not is a question mainly of fact in each case. In view of the prevailing joint ownership of property by both landlord and tenant and the

BENGAL ACTS—(Contd.)**Tenancy Act VIII of 1885, S. 88—(Contd.)**

prevailing system of partition, it is obvious that either party may accept the partition made by the others without necessarily intending to alter their legal relations *inter se*. Thus the separate shareholders in the landlord family may collect a separate share of the rent without either party intending to divide the tenure; and similarly the landlord may collect separate shares of the rent from separate shareholders in the tenant family without the legal position being altered. The question whether a sub-division has been made is really the question whether the parties have come to a fresh agreement, and must be determined by the familiar considerations which attach to such a problem.

Held, on the evidence, that the original tenure had been at a very early time divided into separate tenures. (*Lord Atkin.*) PRAFULLA NATH TAGORE *v.* SATYA BHUSAN DAS.

A. I. R. 1929 P. C. 171.

—Ss. 93, 98—Manager appointed under S. 93—Co-owners' power to deal with property in case of—Effect on.

While the properties are in the hands of a manager appointed under S. 93 of the Bengal Tenancy Act of 1885, no one of the co-owners has power to create a mortgage on the whole estate; but there is nothing in the Act to take away his power of dealing with his own share. The words of S. 98 (3) give to the manager "the same powers as the co-owners jointly might but for his appointment have exercised," and the co-owners are prohibited from exercising "any such power", that is, any power which they might jointly have exercised had no manager been appointed. The restraint upon them is co-extensive with the power conferred on the manager; it does not extend to the exercise of individual rights. (*Sir Andrew Scoble.*) AMAR CHANDRA KUNDU *v.* SHOSHI BHUSHUN ROY.

(1903) 31 I. A. 24 = 31 C. 305 (313) = 8 C. W. N. 225 = 8 Sar. 603.

—Manager appointed under S. 93—Powers of—Sale or mortgage of property by him—Validity—"For the purposes of management" in S. 98 (3)—Effect.

The powers and duties of a manager appointed under S. 93 of the Bengal Tenancy Act of 1885 are defined in S. 98 of the Act, sub-S. 3 of which section provides that "he shall subject to the control of the District Judge, have, for the purposes of management, the same powers as the co-owners jointly might but for his appointment have exercised." By S. 100 of the Act "the High Court may from time to time make rules defining the powers and duties of managers under the foregoing sections." Under this section the High Court made a rule that "no manager shall have power to sell or mortgage any property, nor shall he grant or renew any lease for any period exceeding three years, without the express sanction of the District Judge."

It was contended that this rule made by the High Court was *ultra vires*, sale and mortgage not being included in the terms "for the purposes of management" contained in S. 98 (3) of the Act.

Held, over-ruling the contention, that the powers given by S. 98 "for the purposes of management" included the power to mortgage or to sell the property.

Their Lordships agree with the High Court judges in the opinion that "to hold that the manager has no power to sell or mortgage would have the effect of frustrating the object for which, generally speaking, a common manager is appointed. In India, the management of a property carries with it the obligation of paying the dues accruing upon it; and for the payment of the dues which may accrue from time to time, it may become necessary either to sell, mortgage or grant a lease. To hold that a common manager may grant a lease, but may not sell or mortgage, would have, in our opinion, the effect of nullifying the provisions made by the

BENGAL ACTS—(Contd.)**Tenancy Act VIII of 1885, Ss. 93 & 98—(Contd.)**

Legislature for the purpose indicated in the Act. (*Sir Andrew Scoble.*) **AMAR CHANDRA KUNDU v. SHOSHI BHUSHUN ROY.** (1903) 31 I. A. 24 =

31 C. 305 (311) = 8 C. W. N. 225 = 8 Sar. 603.

—**S. 98 (3)**—Words—For the purposes of management—Meaning and effect of. See UNDER THIS ACT, SS. 93, 98—**MANAGER APPOINTED UNDER S. 93.**

(1903) 31 I. A. 24 = 31 C. 305 (311).

—**Ss. 102 & 103**—Settlement Officer's decision—Suit to set aside—Record of rights—Entry in—Error as to—Proof of—Onus on plaintiff.

S. 103 (b) of the Bengal Tenancy Act provides that :—
“A certificate, signed by the Revenue Officer, stating that a record of rights has been finally published under this chapter shall be conclusive evidence of such publication; and every entry in a record of rights so published shall be presumed to be correct until the contrary is proved.”

Held, accordingly, that in a suit brought to set aside the order of the Settlement Officer under S. 102 of the Tenancy Act, the onus is on the plaintiff to show that the entry in the record of rights was erroneous, and not on the defendant to show that it was correct (150). (*Mr. Ameer Ali.*) **SRINATH RAI v. PRATAP UDAI NATH SAHI DEO.**

(1923) 28 C. W. N. 145 = 33 M. L. T. 408 =

(1923) M. W. N. 702 = A. I. R. 1923 P. C. 217.

—**S. 103-B**—Record of rights—Entry in—Correctness of—Presumption—Raiyat—Entry of tenant as a. See UNDER THIS ACT, S. 5 (5).

(1918) 45 I. A. 67 = 45 C. 805.

—**Record of rights—Entry in—Correctness of—Presumption—Rent-free—Claim to land as being—Onus of proof of—Land proved to be within regularly assessed estate of proprietor.**

S. 103-B of the Act declares that “every entry in a record of rights so published” (namely, under the provisions of Chapter X) “shall be presumed to be correct until the contrary is proved.” Once, however, the landlord has proved that the land which is sought to be held rent free lies within his regularly assessed estate or mahal, the onus is shifted. In the present case, the lands in dispute lie within the ambit of the estate, which admittedly belongs to the plaintiffs and the *pro forma* defendants, and for which they pay the revenue assessed on the mauza. In these circumstances it lies upon those who claim to hold the lands free of the obligation to pay rent to show by satisfactory evidence that they have been relieved of this obligation, either by contract or by some old grant recognized by Government. This rule was pronounced as long ago as 1869, in 12 M. I. A. 286 at 331: “The appellant is the zamindar; as such he has a *prima facie* title to the gross collections from all the mauzas within his zemindary. It lay upon the respondents to defeat that right by proving the grant of an intermediate tenure.” (*Mr. Ameer Ali.*) **JAGDEO NARAIN SINGH v. BALDEO SINGH.** (1922) 49 I. A. 399 (408-9) = 2 P. 38 (48-9) =

32 M. L. T. 1 = (1923) M. W. N. 361 =

27 C. W. N. 925 = 71 I. C. 984 = 36 C. L. J. 499 =

3 Pat. L. T. 605 = A. I. R. 1922 P. C. 272 =

71 I. C. 984 = 45 M. L. J. 460.

—**Settlement Officer's decision—Suit to set aside—Onus on plaintiff in.** See UNDER THIS ACT, SS. 102, 103.

—**Survey Officer—Entry by, under cl. (3) of S. 103-B—Correctness of—Presumption.**

The entry made by the Survey Officer under S. 103-B, cl. (3) of the Bengal Tenancy Act is to be assumed to be correct until the contrary is proved, the onus of proof being

BENGAL ACTS—(Contd.)**Tenancy Act VIII of 1885, S. 103-B—(Contd.)**

or the person who challenges the correctness of the entry (184). (*Mr. Ameer Ali.*) **RAJA DHAKESHWAR PRASAD NARAIN SINGH v. GULAB KUER.**

(1926) 53 I. A. 176 = 5 Pat. 735 = 7 P. L. T. 483 =
97 I. C. 217 = A. I. R. 1926 P. C. 60.

—**Tenure-holder—Entry of person holding over 100 bighas of land as a—Correctness of—Presumption.**

A record of rights under Chapter 10 of the Bengal Tenancy Act, 1885, was published under which the appellants were entered as “tenure-holders” of a certain mauza. The rent, which had been payable under the previous settlement, was on this occasion considerably increased. The appellants thereupon brought a suit for a declaration that they were “raiyaats” and not “tenure-holders” and for a reduction of the rent to a fair and equitable sum under S. 104-H of the Act.

Held, that it lay upon the appellants to rebut the statutory presumption that the record of rights was correct (S. 103-B), and, as the holding exceeded 100 bighas, the further statutory presumption that the holders of it were “tenure-holders” (S. 5, sub-S. 5). (*Lord Sumner.*) **RAJANI KANTA GHOSE v. SECRETARY OF STATE FOR INDIA.** (1918) 45 I. A. 190 (192) = 46 C. 90 (99) =

51 I. C. 226 = 23 C. W. N. 649.

—**S. 104-H—Raiyat—Tenure-holder—Raiyati holding—Meaning of.**

It is contended that not only were the terms “raiyaat” and “tenure-holder” undefined by any statute before 1885, but that the definition then given to them did not reproduce the meaning which they had previously borne, and that, in fact, in the middle of the 19th century “raiyaat” would have been the term to apply to a person who reclaimed land merely in order that it might be cultivated by others paying rent to himself, and without any intention of cultivating on his own account, and that such a person would have acquired a raiyati holding, which, though not raiyati within the Bengal Tenancy Act for the purposes of the definition, would still be within it for the purpose of the relief given by S. 104-H. No decision was produced to that effect (194). (*Lord Sumner.*) **RAJANI KANTA GHOSE v. SECRETARY OF STATE FOR INDIA.**

(1918) 45 I. A. 190 = 46 C. 90 (102) =

51 I. C. 226 = 23 C. W. N. 649.

—**Ss. 104-H and 5—Char lands—Grantee of, for reclamation and letting at a profit to cultivators—Status of.** See UNDER THIS ACT, SS. 5 AND 104-H.

(1918) 45 I. A. 190 (192-3) = 46 C. 90 (100).

—**S. 105—Application under—Bar under S. 109 of Act by reason of—Condition.** See UNDER THIS ACT, S. 109—**BAR UNDER.** (1929) 33 C. W. N. 705.

—**S. 109—Bar under—Condition precedent to—S. 105 of Act—Application under—Withdrawal of, with or without permission of Court—Effect.**

If an application is made under S. 105 of the Bengal Tenancy Act and subsequently withdrawn, whether with or without the permission of the Court, a suit on the same subject-matter is barred by the provisions of S. 109 of the Tenancy Act. It is the making of the application that brings into play the prohibition of S. 109. (*Lord Salvesen.*) **RAJA RESHEE CASE LAW v. SATIS CHANDRA PAL.**

(1929) 33 C. W. N. 705 = A. I. R. 1929 P. C. 134 =

57 M. L. J. 43.

—**Policy of.**

The policy of S. 109 of the Tenancy Act is to prevent multiplication of procedures by enacting that where an application is made in one or other of the competent Courts it shall be presented in that Court and in no other. (*Lord*

BENGAL ACTS—(Contd.)**Tenancy Act VIII of 1885, S. 109—(Contd.)**

Salvesen.) RAJA RESHEE CASE LAW *v.* SATIS CHANDRA PAL. (1929) 33 C.W.N. 705 =

A. I. R. 1929 P. C. 134 = 57 M. L. J. 43.

—S. 109-A (3)—*Second appeal—Question of fact—Interference with—Jurisdiction—Limits of—C.P.C. of 1882, S. 584—Applicability.*

By the operation of S. 109-A, sub-S. (3) of the Bengal Tenancy Act, 1885, it is plain that the right of appeal is limited by the provisions regulating the right of appeal to the High Court from a Subordinate Court, and these were to be found in S. 584 of C. P. C. of 1882, the power as to the regulation of rents being dependent and consequent upon the alteration of the judgment upon the specified grounds (186).

Where, in an appeal under S. 109-A, sub-S. (3) of the Tenancy Act, the question for determination was as to the character of certain lands, and as to what was the measurement properly applicable, and the High Court reversed the judgment of the District Judge on the ground that upon the documents and evidence placed before the District Judge the High Court would have come to a different conclusion, *held*, that the High Court exceeded their jurisdiction, because it was precisely this revision of evidence which was excluded by the limited character of the appeal (189). (*Lord Buckmaster*). NAFAR CHANDRA PAL *v.* SHUKUR.

(1918) 45 I. A. 183 = 46 C. 189 (1945) = 23 C. W. N. 345 = 9 L. W. 552 = 51 I. C. 760.

—S. 116—*Private land—Land not being—Acquisition of occupancy right in.*

As regards the larger area, their Lordships deem it sufficient to say that the learned judges of the High Court have correctly apprehended the law applicable to the matter, and they see no ground for doubting the soundness of the conclusion of fact arrived at by the learned judges, to the effect that the larger area was not the plaintiff's private land, with the consequence that there was nothing in S. 116 of the Bengal Tenancy Act to preclude the acquisition by the defendant of occupancy rights, and that such rights had accordingly been acquired (73). (*Sir Arthur Wilson*.) DAMODAR NARAYAN CHOWDHRI *v.* DALGLEISH.

(1911) 38 I. A. 65 = 38 C. 432 (445) = 15 C. W. N. 345 = 9 M. L. T. 364 = 8 A. L. J. 441 = 13 C. L. J. 512 = 13 Bom. L. R. 396 = 9 I. C. 913 = (1911) 2 M. W. N. 182.

—S. 120—*Private lands—Terms in use for, in Bihar—Khudkasht—Meaning of.*

Besides the words *Sir* and *Zerai* the term *Khudkasht* is in common use in this part of Bihar as a synonym of *Sir*. *Khudkasht* literally means "one's own cultivation" (180). (*Mr. Ameer Ali*.) RAJA DHAKESHWAR PRASAD NARAIN SINGH *v.* GULAB KUR. (1926) 53 I. A. 176 =

5 Pat. 735 = 7 P. L. T. 483 = 97 I. C. 217 = A. I. R. 1926 P. C. 60.

—*Words—Bakasht—Meaning—Bihar.*

In Bihar the revenue officers invented a new designation for lands in regard to which it was difficult to ascertain whether they were *Sir* or *Zerai*, or whether they were *rai*yati lands temporarily in the possession of the *Zemin*-dar. They called such land "*bakasht*." The word "*bakasht*" literally means "in the cultivation of," and it conveys to all intents and purposes the same meaning as *khudkasht*, which is admittedly the same as *Sir* or *Zerai*. It might, however, imply *rai*yati lands that had temporarily come into the possession of the landlord and were temporarily under his cultivation (180, 185). (*Mr. Ameer Ali*.) RAJA DHAKESHWAR PRASAD NARAIN SINGH *v.* GULAB KUR. (1926) 53 I. A. 176 = 5 Pat. 735 =

7 P. L. T. 483 = 97 I. C. 217 = A. I. R. 1926 P. C. 60.

BENGAL ACTS—(Contd.)**Tenancy Act VIII of 1885, S. 120—(Contd.)**

—*Zerai land—Proof of—Quantum.*

All the lands in suit were in the bed of the river Ganges until shortly before 1843, whether owing to erosion or not was not known. The lands to which the suit related consisted of 228 bighas and odd, which emerged from the Ganges shortly before 1843, and in 1843 became suitable for cultivation, and of 25 bighas and odd, which in or shortly before 1902 emerged from the Ganges, and in 1904 were suitable for cultivation. In 1843 the Government, which was carrying on a stud-farm, got possession of all the lands which had then emerged from the Ganges, and thenceforward for about 30 years cultivated them for the purposes of supplying food and fodder for the horses at the stud-farm. Whether the Government held the lands under a written lease or under an oral agreement was not known. In 1873 the Government surrendered the lands to the then Maharaja of Dumraon, and quitted possession of them. Thereafter the Government did not make any claim to any interest in the lands.

After the Government quitted possession the Maharaja of Dumraon let the said lands to *F* first for a term of years, and then in 1883 for a further term of years. *F* in his *kabuliyat* admitted that he could under no circumstances acquire occupancy right in the lands, and that at the expiration of the term the proprietor had full right to keep or settle them as his *Zerai*. After sometime *F* was granted occupancy rights in the lands by the Maharajah. *F* subsequently became in arrear in the payment of rent, a decree was obtained against him, and in execution thereof his right and title to the lands were, in March 1896, sold by auction, and were purchased by the Maharajah of Dumraon. Thereafter the Maharajah let the lands to *A* (not a predecessor in interest of the defendants) for a term of 5 years. In November, 1902, the then representative of the Maharajah of Dumraon let all the lands in suit to the father of the defendants for a term of 7 years. A *patta* and a *kabuliyat* were exchanged between the parties, in each of which the lands let were described as *Zerai* lands, and it was expressly agreed that no right of occupancy in favour of the tenant should accrue, that the tenant was not entitled to transfer his interest in the lands to any other person, and that on the expiration of the tenancy the proprietors should be entitled to keep the land in his direct possession as *Zerai*, or to let it to any person. The land let was described as *Jaiwala Zerai* land. After the death of their father, the defendants, under the guardianship of their mother, continued in possession of the lands as cultivating tenants for the remainder of the term, except for a temporary dispossession of them by trespassers who had no title. In 1908, the defendants' mother, acting on their behalf, took the lands in suit in temporary *shikmi* cultivation for a term of nine years from the manager under the Court of Wards of the estate of the Maharajah. The *kabuliyat* then executed by the defendants' mother was nearly to the same effect as that given by their father in 1902. In 1910 the defendants and their mother brought suits in ejectment against the trespassers, and in their plaints in those suits they described the lands as the Maharaja's *Zerai* lands.

In a suit in ejectment brought in 1917 by the then Maharajah of Dumraon against the defendants, *held*, that there was ample admissible evidence that the suit lands were *Zerai* of the Dumraon raj, and that the defendants had no right of occupancy in them, even if a strict view was taken in favour of the defendants of S. 120 of the Bengal Tenancy Act, 1885 (175). (*Sir John Edge*.) BINDESHWARI PRASAD SINGH *v.* MAHARAJAH KESHO PRASAD SINGH. (1926) 53 I. A. 164 = 5 Pat. 634 = 7 Pat. L. T. 553 = 31 C. W. N. 74 = 44 C. L. J. 86 = A. I. R. 1926 P. C. 79 = 95 I. C. 1025 = 51 M. L. J. 587.

BENGAL ACTS—(Contd.)**Tenancy Act VIII of 1885, S. 120 (2)—(Contd.)**

—S. 120, Sub-S. (2) — *Kabuliyat subsequent to 2—3—1883, admitting Zerai nature of lands let—Admissibility in evidence of—Value of.*

It was held in 13 C. W. N. 135, on a construction of S. 120 of the Bengal Tenancy Act, before it was amended in 1907 by Bengal Act No. 1 of 1907, that an admission made by the tenant in a *kabuliyat* executed after 2—3—1883 that the land let was *Zerai* land was relevant and admissible evidence on a question as to the character of the land, and that the question of its probative force was a question of fact for the lower appellate Court. Their Lordships agreed with that construction (173-4).

Sub-S. (2) of S. 120, as their Lordships construe it, does not exclude as inadmissible evidence that subsequent to 2—3—1883, the tenant admitted that the lands let to him were *Zerai* lands of the landlord; such an admission is relevant and admissible evidence, but it is probative evidence only, which, like any other relevant fact, has to be considered, and such weight given to it as under the circumstances of the case it is entitled to have (174). (*Sir John Edge.*) BINDESHWARI PRASAD SINGH v. MAHARAJAH KESHO PRASAD SINGH.

(1926) 53 I.A. 164 = 5 Pat. 634 = 7 Pat L. T. 553 = 31 C.W.N. 74 = 44 C.L.J. 86 = A.I.R. 1926 P.C. 79 = 95 I.C. 1025 = 51 M.L.J. 587.

—S. 120, Sub-S. (2) (a)—*Agreement or compromise in—Meaning of—Kabuliyat containing statement as to nature of land let if an.*

What does 2 (a) of S. 120 of the Act mean? It is clear that land cannot be recorded as a proprietor's private land by reason of its having been decided to be such private land by a decree which was proved to the satisfaction of the Revenue Officer to have been obtained from the Court by collusion or fraud. And it is also clear that nothing in such a decree can affect the character of the land if it is proved to the satisfaction of the Court in a suit of ejectment that the decree was obtained by collusion or fraud. But what is the meaning of "any agreement or compromise" in S. 2 (a)? In their Lordships' opinion "any agreement or compromise" in S. 2 (a) must refer only to an agreement or compromise of a question in discussion as to the character of the land at the time when the agreement or compromise was made. If when land is let in Bengal or Bihar there is no doubt, and consequently no discussion or compromise as to the character of the land, it is difficult to understand why the agreement for letting of the land, lease, patta, or *kabuliyat*, which contains a statement of the character of the land, should not be admissible in evidence against a party to it. Sub-S. 2 (a) does not displace the view that the admission by the tenant in a *kabuliyat* executed after 2—3—1883 that the land let is *Zerai* land is relevant and admissible evidence on a question as to the character of the land (174-5). (*Sir John Edge.*) BINDESHWARI PRASAD SINGH v. MAHARAJAH KESHO PRASAD SINGH.

(1926) 53 I.A. 164 = 5 Pat. 634 = 7 Pat. L. T. 553 = 31 C.W.N. 74 = 44 C.L.J. 86 = A.I.R. 1926 P.C. 79 = 95 I. C. 1025 = 51 M.L.J. 587

—Ss. 159 to 177—*Sub-tenure holders—Protection afforded to—Lumping together of several tenures in one order for sale—Legality of.*

The provisions of Ss. 159-177 of the Act are devised for the purpose of protecting the persons interested in each separate tenure put up for sale. A sub-tenure holder may have to pay the arrears due upon the whole tenure under which he holds, but no more; and it would defeat the object of the Act if several tenures could be lumped together in one order for sale so that a sub-tenure holder to get pro-

BENGAL ACTS—(Contd.)**Tenancy Act VIII of 1885, Ss. 159 to 177—(Contd.)**

tection would have to pay the arrears not only on the specific tenure under which he held, but on other tenures with which he had no connection.

To defeat the claim of a sub-tenure holder, the Zemindar auction-purchaser must show that his proceedings were taken in respect of separate tenures and gave the sub-tenure holders the protection to which they are entitled under the Act as stated above. (*Lord Atkin*) PRAFULLA NATH TAGORE v. SATYA BHUSAN DAS.

A. I. R. 1929 P.C. 171.

—S. 161—*Incumbrance—Interest allowed to grow up by sufferance and negligence of taluqdar if an.*

Quere, whether an interest not directly created by the talukdar, but allowed to grow up by his sufferance and negligence, is an incumbrance within the definition given to that word in S. 161 of the Bengal Tenancy Act (507). (*Lord Phillimore.*) BIPRADAS PAL CHOWDHURY v. KAMINI KUMAR LAHIRI.

(1921) 48 I.A. 499 = 49 C. 27 (36) = 30 M.L.T. 138 = 26 C.W.N. 465 = 4 U.P.L.R. (P.C.) 53 = (1922) P.C. 48 = 15 L.W. 180 = 66 I. C. 674 = 41 M.L.J. 638.

—Ss. 161 & 167—*Putni taluq—Rent sale—Incumbrances—Purchaser's suit to avoid—Onus on plaintiff—Lakhiraj land—Tenant's claim on ground of.*

A purchaser at a rent sale of a putni taluq attempted to take possession of a portion of the lands included in it but was resisted by tenants who claimed to hold them as revenue free or as *lakhiraj*. He then served notices under S. 167 of the Bengal Tenancy Act of 1885 treating the interests which they claimed as incumbrances which he had power under the Act to avoid. They persisted in their claims and the purchaser thereupon instituted a civil suit. The only evidence adduced by him was a series of registers and *thakbust* maps and *thak* statements in none of which the suit lands were shown to be *lakhiraj*, although there were instances in which other lands were mentioned as being *lakhiraj*. He did not show that any rent had ever been received in respect of the suit lands. There was, on the other hand, a mass of evidence to show that the defendants and their predecessors had occupied the suit lands revenue-free for periods greatly exceeding 12 years.

Held, that, in the absence of any indication that the suit holdings as revenue-free tenures had an origin either by creation or by the sufferance of a putnidar since 1807, the High Court was right in saying that the proper presumption was that they ran back to a period antecedent to the creation of the taluk, or, to put it in another way, that it lay upon the plaintiff to show an origin subsequent to the creation of the putni taluq if he were seeking to avail himself of S. 167 of the Act, and to annul those interests as incumbrances (505-6). (*Lord Phillimore.*) BIPRADAS PAL CHOWDHURY v. KAMINI KUMAR LAHIRI.

(1921) 48 I. A. 499 = 49 C. 27 (34) = 30 M. L. T. 138 = 26 C. W. N. 465 = 4 U. P. L. R. (P.C.) 53 = (1922) P. C. 48 = 15 L. W. 180 = 66 I. C. 674 = 41 M. L. J. 638.

—Ss. 161 & 170—*Separate holdings of one holder—Single suit by Zemindar in respect of—Maintainability—Separate sales of holdings in—Decree in suit if may provide for—Proceedings for separate sales not taken by Zemindar—Effect.*

Under the C. P. C., the Zemindar may join in one suit claims against a holder in respect of all his separate holdings. Such a suit can result in a decree or decrees to sell the tenures separately so as to give the purchaser power to annul the incumbrances on each separate tenure. There is nothing in the C. P. C. or in the Bengal Tenancy Act to prevent the decrees and orders in such a suit from being so moulded as to enable their provisions to apply distributively

BENGAL ACTS—(Contd.)**Tenancy Act VIII of 1885, Ss. 161 and 170—(Contd.)**

to the separate holdings in respect of which the suit is brought. But obviously if the original suit is brought in respect of separate tenures the plaintiff must see that the subsequent process takes such a form that the tenures are in fact sold separately, so that each may be redeemed separately by the incumbrancers of such separate part pursuant to S. 170 of the Act.

Held, that, in the case before their Lordships, though the Zemindar had joined in one suit a claim in respect of several tenures, the proceedings taken by him were ineffective to annul the 11 incumbrances of which the plaintiff was then the holder. (*Lord Atkin.*) **PRAFULLA NATH TAGORE v. SATYA BHUSAN DAS.** **A I. R. 1929 P. C. 171.**

—S. 167.

In a suit to obtain khas possession of mouzahs which were comprised in a putni taluq which had been purchased by the plaintiffs at an auction sale under a decree for rent, the Subordinate Judge found that services of the notices under S. 167 of the Bengal Tenancy Act, 1885, had not been proved, and dismissed the suit. It was contended before him that the notices had been served in the manner prescribed for the service of a summons on a defendant under the Code of Civil Procedure, 1882, and also by proclamation and beat of drum and by posting them on some conspicuous place in the village in question, and that under the circumstances of the case either manner of service was sufficient. On appeal, the High Court not being satisfied that there was in the village in question an office where the rent was usually paid, and finding that the notices had been served by proclamation and beat of drum and by posting them on trees in the villages, held that the notices required by S. 167 of the Bengal Tenancy Act, 1885, had been duly served in one of the manners prescribed for service of such notices by the Government rules then in force. Their Lordships finding on the evidence that the notices were served in the manner prescribed for the service of a summons on a defendant under the Code of Civil Procedure, 1882, which was in force at the time when the notices were served, held it unnecessary to express an opinion as to whether there had or had not been effective service by proclamation and beat of drum, and by posting the notices as required by the Government Rules relating to the service of such notices. (*Sir John Edge.*) **ANANDA GOPAL v. NAFAR CHANDRA PAL.** (1913) 18 C. W. N. 259 = 21 I. C. 928 = 26 M. L. J. 86.

—Notice under—Invalidity of, because of lapse of more than a year after date of notice of sale—Plea of—Appeal—Maintainability for first time in.

In this case a question arose as to whether the notices under S. 167 of the Bengal Tenancy Act were invalid because they had not been served within one year from the date of the sale or the date on which the purchaser first had notice of the incumbrance whichever was the later. The purchaser did not act within one year from the date of the sale, but alleged that he did act within one year of his having notice. No point to the contrary was made in the Courts below the High Court, and no issue was taken. Nevertheless the High Court held, acting upon probabilities, that the purchaser must have had notice more than a year before he acted.

Held, that the High Court was wrong in deciding the point against the purchaser in the way it had done, and that if the point were of importance, their Lordships would have remitted the case in order that an issue as to that point might have been stated and found (507-8). (*Lord Phillimore.*) **BIPRADAS PAL CHOWDHURY v. KAMINI KUMAR**

BENGAL ACTS—(Contd.)**Tenancy Act VIII of 1885, S. 167.—(Contd.)**

LAHIRI. (1921) 48 I. A. 499 = 49 C. 27 (36-7) = 30 M. L. T. 138 = 26 C. W. N. 465 = 4 U. P. L. R. (P. C.) 53 = (1922) P. C. 48 = 15 L. W. 180 = 66 I. C. 674 = 41 M. L. J. 638.

—S. 174—Applicability—Orissa—Rent sale under Beng. Act VIII of 1865 pursuant to Collector's decree—Setting aside of.

Since the extension of Ch. XIV of the Bengal Tenancy Act (VIII of 1885) to Orissa, a sale in that division under Bengal Act VIII of 1865 for arrears of rent due under a decree obtained in the Collector's Court is liable to be set aside under S. 174 of the Act of 1885, upon the judgment-debtor depositing in Court within thirty days of the sale the amount recoverable under the decree. (*Lord Dunedin.*) **LAKSHMIDAR MAHANTI v. RATNAKAR MAHAPATRA.**

(1921) 48 I. A. 123 = 48 C. 811 = 25 C. W. N. 1009 = (1921) M. W. N. 399 = 2 P. L. T. 453 = 14 L. W. 358 = 61 I. C. 1 = 30 M. L. T. 32 = 40 M. L. J. 546.

—S. 179—Permanently-settled area—Lands in Sunderbans granted by Government if.

Appellants were grantees from the Government of land in the Sunderbans under a grant, dated December, 1880. By the terms of the grant the payment of the rent to the Government was not to commence for twenty years from 1861, and was to go on at increasing rates until the expiration of 99 years, when the following clause came into force. Then after the 99th year the grant shall be liable to survey and re-settlement, and to such moderate assessment as may seem proper to the Government of the day, the proprietary right in the grant and the right of engagement with Government remaining to the grantees, their heirs, executors or assigns, under the conditions generally applicable to the owners of estates not permanently settled; and that revenue equal to the amount annually paid from the 51st to the 99th year shall be paid annually by the grantees, their heirs, executors or assigns, until such survey and re-settlement or re-assessment as is described above be effected."

Held, that the terms of the grant were not such as to render the lands to which it referred "a permanently-settled area," within the meaning of S. 179 of the Bengal Tenancy Act of 1885.

The terms of the grant are in such strong contrast with what is known as "permanent settlement" in India that the appellants have failed to establish that the lands are situated in a permanently-settled area. (*Lord Moulton.*) **KHETRAMONI DAS v. JIBAN KRISHNA KUNDH.**

(1920) 48 I. A. 39 = 48 C. 473 = 25 C. W. N. 361 = 14 L. W. 248 = 33 C. L. J. 214 = 60 I. C. 1 = 30 M. L. T. 196 = 40 M. L. J. 232.

—Ss. 179, 2 (12)—Permanently-settled area—Lands in Sunderbans granted by Government in December 1880 if.

The appellants were grantees from the Government of land situated in the Sunderbans. The grant to the appellants was not made until December, 1880.

Held, that the grant to the appellants did not come within the description of "permanently-settled area" within the meaning of S. 179, read with S. 2, sub-S. 12, of the Bengal Tenancy Act, 1885, if the description was taken literally. (*Lord Moulton.*) **KHETRAMONI DAS v. JIBAN KRISHNA KUNDH.**

(1920) 48 I. A. 39 = 48 C. 473 (479) = 25 C. W. N. 361 = 14 L. W. 248 = 33 C. L. J. 214 = 30 M. L. T. 196 = 60 I. C. 1 = 40 M. L. J. 232.

—Ss. 179 and 52—Permanently-settled area—Lands not within—Lease of—Diminution of area of holding—Abatement of rent—Tenant's right to. See UNDER THIS ACT, Ss. 52 AND 179. (1920) 48 I. A. 39 = 48 C. 473,

BENGAL ACTS—(Contd.)**Tenancy Act VIII of 1885,—(Contd.)**

—S. 180—*Raiyat—Chur land—Occupancy right in—Acquisition of—Conditions.*

A raiyat cannot acquire under S. 180 of the Bengal Tenancy Act, 1885, a right of occupancy in chur land until he has held the land for twelve continuous years. (*Sir John Edge.*) MIDNAPUR ZEMINDARY CO., LTD. v. NARESH NARAIN ROY. (1924) 51 I.A. 293 (298) =

51 C. 631 = 26 Bom. L. R. 651 =
A. I. R. 1924 P. C. 144 = 35 M.L.T. 169 =
20 L. W. 770 = (1924) M. W. N. 723 = 80 I. C. 827 =
29 C.W.N. 34 = 23 A. L. J. 76 = 47 M. L. J. 23.

—S. 188—*Co-sharer landlords—Right of each of, to sue separately for his share of rent—Agreement establishing—Effect.*

Their Lordships have no inclination to question the course of rulings in Bengal by which it has been held that agreement, either expressly proved or implied by the conduct of the parties, may establish the right to sue separately for the shares of rent receivable by the separate shareholders. (*Sir Arthur Wilson.*) PRAMADA NATH ROY v. RAMANI KANTA ROY, (1907) 35 I. A. 73 (77) = 35 C. 331 (344) =

3 M.L.T. 151 = 7 C. L. J. 139 = 12 C.W.N. 249 =
10 Bom. L. R. 66 = 18 M. L. J. 43.

—*Co-sharer landlords—Suit for arrears of rent by one or some of making others defendants—Maintainability—Rent in arrear is debt.*

The right to recover a debt arises under the general law. A suit for recovery of rent does not require the authority of the Bengal Tenancy Act, nor does the Act purport to authorise such a suit. One or some joint landlords may therefore institute a suit for the recovery of arrears of rent, making the others defendants (6). (*Lord Macnaghten.*) JATINDRA NATH CHOWDHRI v. PRASANNA KUMAR BANERJEE. (1910) 38 I. A. 1 = 38 C. 270 (277) =

13 C. L. J. 51 = 15 C.W.N. 74 = 9 M.L.T. 1 =
(1911) 2 M.W.N. 119 = 13 Bom. L. R. 1 = 8 A.L.J. 1 =
8 I.C. 842 = 21 M. L. J. 92.

—*Co-sharer landlords—Suit for entire arrears of rent by one or some of, making others defendants*

S. 188 of the Act does not preclude a suit by a sharer for the rent of the entire tenure, making his co-sharers who have refused to join him as plaintiffs-defendants. The filing of a suit is not a thing which the landlord is, under the Act required or authorised to do. It is an application to the Court for relief against an alleged grievance, which the plaintiff is entitled to submit, not by reason of any provision of the Tenancy Act, but under the general law (78). (*Sir Arthur Wilson.*) PRAMADA NATH ROY v. RAMANI KANTA ROY. (1907) 35 I. A. 73 = 35 C. 331 (345) = 3 M.L.T. 151 =

7 C. L. J. 139 = 12 C.W.N. 249 = 10 Bom. L. R. 66 =
18 M. L. J. 43.

—*Co-sharer landlords—Suit for entire arrears of rent by one of, making others defendants—Agreement establishing right of each sharer to sue separately for his share of rent—Effect.*

By the express terms of the Act in the event of rent being unpaid, the owners of the Zemindari interest are entitled, by suit under that Act, to bring a putni to sale, with the consequences prescribed by the Act. Under the general law, a sharer, whose co sharers refuse to join him as plaintiffs, can bring them into the suit as defendants, and sue for the whole rent of the tenure. This is also the law applicable to a suit for rent brought by a co-sharer landlord under the Bengal Tenancy Act, unless there be something to exclude the case from the operation of the general rule. An agreement, expressly proved or implied by the conduct of the parties, establishing the right to sue separately for the shares

BENGAL ACTS—(Contd.)**Tenancy Act VIII of 1885, S. 188—(Contd.)**

of rent receivable by the separate shareholders, merely affects the right to sue separately for rent, and in no other respect modifies the terms of the holding. The right to bring the tenure to sale for arrears of rent therefore remains intact, and also the right of one sharer to sue, making his co-sharers defendants when they will not join as plaintiffs (77-8). (*Sir Arthur Wilson.*) PRAMADA NATH ROY v. RAMANI KANTA ROY. (1907) 35 I. A. 73 =

35 C. 331 (344-5) = 3 M.L.T. 151 = 7 C.L.J. 139 =
12 C.W.N. 249 = 10 Bom. L. R. 66 = 18 M.L.J. 43.

—*Co-sharer landlords—Enhancement of rent—Suit for, by one or some of them, making others defendants.*

S. 188 of the Act prohibits one or some of two or more joint landlords from suing to enhance the rent unless both or all of "the fractional landlords," as they are sometimes called, join in the suit as co-plaintiffs. The section requires that the joint landlords must act together. In order to comply with that provision the persons referred to must take common action. It is not enough if one of the joint landlords sues as plaintiff making those who do not concur with him defendants (5). (*Lord Macnaghten.*) JATINDRA NATH CHOWDHRI v. PRASANNA KUMAR BANERJEE. (1910) 38 I. A. 1 = 38 C. 270 (276-7) = 13 C.L.J. 51 =

15 C.W.N. 74 = 9 M.L.T. 1 = (1911) 2 M.W.N. 119 =
13 Bom. L. R. 1 = 8 A.L.J. 1 = 8 I.C. 842 = 21 M.L.J. 92.

—*Words—"Thing required or authorised by Act"—Suit for arrears of rent if a.*

The bringing of a suit for arrears of rent is not a thing which the landlord is under the Act required or authorised to do within the meaning of S. 188 of the Bengal Tenancy Act (6). (*Lord Macnaghten.*) JATINDRA NATH CHOWDHRI v. PRASANNA KUMAR BANERJEE. (1910) 38 I. A. 1 = 38 C. 270 (277) = 13 C.L.J. 51 =

15 C.W.N. 74 = 9 M.L.T. 1 = (1911) 2 M.W.N. 119 =
13 Bom. L. R. 1 = 8 A.L.J. 1 = 8 I.C. 842 = 21 M.L.J. 92.

—*Words—"Thing authorised by the Act"—Suit for enhancement of rent if a—Tenure-holders—Occupancy ryots—Cases of.*

The institution of a suit for enhancement of rent is a thing authorised by the Act within the meaning of S. 188 of the Bengal Tenancy Act in the case of tenure-holders as well as in the case of occupancy ryots (5). (*Lord Macnaghten.*) JATINDRA NATH CHOWDHRI v. PRASANNA KUMAR BANERJEE. (1910) 38 I. A. 1 = 38 C. 270 (276-7) =

13 C.L.J. 51 = 15 C.W.N. 74 = 9 M.L.T. 1 =
(1911) 2 M.W.N. 119 = 13 Bom. L. R. 1 = 8 A.L.J. 1 =
8 I.C. 842 = 21 M.L.J. 92

SCH. III, ART. 1 (a).

—*Applicability—Non-occupancy raiyats—Persons not in law.*

Art. 1 (a) of Sch. III of the Bengal Tenancy Act, 1885, does not apply to suits to eject persons who were not in law non-occupancy raiyats of the land (91). (*Sir John Edge.*) JAGARNATH DASS v. JANKI SINGH. (1922) 49 I.A. 81 =

1 Pat. 340 (350) = 26 C.W.N. 833 = 3 Pat. L.T. 197 =
66 I.C. 337 = 35 C.L.J. 506 = (1922) M.W.N. 410 =
(1922) P. C. 142 = 31 M.L.T. (P. C.) 231 = 43 M.L.J. 55.

—*Effect—Non-occupancy raiyat—Status or rights of, not created or conferred by Article.*

S. 45 of the Bengal Tenancy Act, 1885, was repealed, and the period of limitation which had been prescribed by it was by the Bengal Tenancy (Amendment) Act, 1907, inserted in Sch. III, as Art. 1 (a). It is quite clear that Art. 1 (a) did not create or confer upon any one the status or rights of a

BENGAL ACTS—(Contd.)**Tenancy Act VIII of 1885—(Contd.)****SCH. III, ART. 1 (a)—(Contd.)**

non-occupancy raiyat (89). (*Sir John Edge.*) JAGARNATH DASS v. JANKI SINGH. (1922) 49 I.A. 81 =

1 Pat. 340 (348) = 26 C.W.N. 833 =

3 Pat. L.T. 197 = 35 C.L.J. 506 = (1922) M.W.N. 410 =

(1922) P.C. 142 = 31 M.L.T. (P.C.) 231 = 66 I.C. 337 = 43 M.L.J. 55.

—Non-occupancy raiyat within meaning of — Who is a.

The non-occupancy raiyat of Art. 1 (a) of Sch. III of Bengal Tenancy Act of 1885, must be a person who before his term had expired had acquired the status and rights of a non-occupancy raiyat (89). (*Sir John Edge.*) JAGARNATH DASS v. JANKI SINGH. (1922) 49 I.A. 81 =

1 Pat. 340 (348) = 26 C.W.N. 833 = 3 Pat. L.T. 197 =

35 C.L.J. 506 = (1922) M.W.N. 410 = (1922) P.C. 142 =

31 M.L.T. (P.C.) 231 = 66 I.C. 337 = 43 M.L.J. 55.

—Non-occupancy raiyats within meaning of repealed S. 45—Persons who were not—Suit to eject—Limitation.

Art 1 (a) of Sch. III of the Bengal Tenancy Act, 1885, did not extend the limitation of six months to suits to eject persons who had not been non-occupancy raiyats within the meaning of the repealed S. 45 (89). (*Sir John Edge.*) JAGARNATH DASS v. JANKI SINGH. (1922) 49 I.A. 81 =

1 Pat. 340 (348) = 26 C.W.N. 833 = 3 Pat. L.T. 197 =

35 C.L.J. 506 = (1922) M.W.N. 410 = (1922) P.C. 142 =

31 M.L.T. (P.C.) 231 = 66 I.C. 337 = 43 M.L.J. 55.

—Private lands—Lessee of —Suit to eject, after expiration of lease—Limitation—Limitation Act, Art. 139—Applicability.

The plaintiff was the proprietor of the suit land, which was, within the meaning of S. 116 of the Bengal Tenancy Act, 1885, proprietor's private land. J held the land as a tenant under a lease which had been granted by the predecessor in title of the plaintiff for a term of nine years, which expired on May 31, 1912. On the expiration of the term the plaintiff demanded possession of the land, but J refused to quit and give up possession. Thereupon the plaintiff instituted on 5—12—1912 the suit out of which the appeal arose to eject J.

Held, that the period of limitation applicable to the case was that prescribed by Art. 139 of the Limitation Act of 1908, and not that prescribed by Art. 1 (a) of Sch. III of the Bengal Tenancy Act, 1885.

The crucial question in this case is—when, if at all, and how had J acquired before May 31, 1912, the status and rights of a non-occupancy raiyat? He had not acquired that status or those rights under Ch. VI, as that Chapter does not apply to the private lands of a proprietor, and it was only under that Chapter that the status and rights of a non-occupancy raiyat could be acquired. The definition of "Tenant" in S. 3 (3) of the Act applied to the position of J during the continuance of the term for which he held the land, and did not apply to J's position after his term had expired, as then, in the circumstances of this case, J became a trespasser liable to be ejected (89). (*Sir John Edge.*) JAGARNATH DASS v. JANKI SINGH. (1922) 49 I.A. 81 =

1 Pat. 340 (348) = 26 C.W.N. 833 =

3 Pat. L.T. 197 = 35 C.L.J. 506 =

(1922) M.W.N. 410 = (1922) P.C. 142 =

31 M.L.T. (P.C.) 231 = 66 I.C. 337 = 43 M.L.J. 55.

Village Chaukidari Act VI of 1870.

—S. 1—Assigned—Meaning.

The word "assigned" in S. 1 of Bengal Act VI of 1870 means lands "assigned" by Government or appropriated

BENGAL ACTS—(Concl'd.)**Village Chaukidari Act VI of 1870—(Contd.)**

under its authority or with its permission. Not only does the form of the "transferring order" in Sch. C of the Act clearly show that the expression "assigned" is applied to lands "assigned" by Government as explained above, for the maintenance of the Chaukidars and in respect of which they reserved the right to resume and transfer to the Zemindar subject to an additional assessment; but the resolution by which the Act was extended to Orissa leaves no possibility for doubt what the Government understood the Act to mean (42). (*Mr. Ameer Ali.*) SECRETARY OF STATE FOR INDIA v. KIRTIBAS BHUPATI HARICHANDAR MAHAPATRA. (1914) 42 I.A. 30 = 42 C. 710 (728-9) =

17 M.L.T. 1 = 2 L.W. 2 = 17 Bom. L.R. 32 =

19 C.W.N. 95 = 26 C.L.J. 31 = 26 I.C. 676 =

28 M.L.J. 457.

—S. 51—Chaukidari Chakeran lands—For cases relating to, see CHOWKIDARI CHAKERAN LANDS.

—Contract—Meaning of.

The word "contract" itself primarily means a transaction which creates personal obligations, but it may, though less exactly, refer to transactions which create real rights. It is in this latter sense that the word is used in S. 51 of Bengal Act VI of 1870, and the rights thereby reserved to the patnidars, comprehensively included in the word "contracts" are real rights (167). (*Lord Buckmaster.*) RANJIT SINGH v. MAHARAJ BAHADUR SINGH. (1918) 45 I.A. 162 =

46 C. 173 (181-2) = 25 M.L.T. 8 =

23 C.W.N. 198 = 16 A.L.J. 964 =

21 Bom. L.R. 506 = 10 L.W. 83 = 29 C.L.J. 193 =

45 I.C. 265 = 35 M.L.J. 728.

BENGAL LAND TENURES.

See LAND TENURES—BENGAL.

BENGAL REGULATIONS.

ACQUISITION OF LAND FOR PUBLIC PURPOSES REG. I OF 1824.

ALLUVION AND DILUVION REG. XI OF 1825.

CIVIL PROCEDURE REG. IV OF 1793.

COURT OF WARDS REG. X OF 1793.

COURT OF WARDS CEDED PROVINCES REG. LII OF 1803.

DECENNIAL SETTLEMENT REG. VIII OF 1793.

EXECUTION OF DECREES REG. VII OF 1825.

EXECUTION SALES OF MALGUZARY LANDS REG. XX OF 1795.

EXECUTION SALES OF MALGUZARY AND LAKHIRAJ LANDS REG. XLV OF 1793.

GOVERNMENT INDEMNITY REG. XI OF 1822.

GRANT OF LEASES REG. XLIV OF 1793.

INHERITANCE REG. XI OF 1793.

INHERITANCE REG. X OF 1800.

INTEREST REG. XV OF 1793.

INTEREST, CEDED PROVINCES REG. XXXIV OF 1803.

LAND CONDITIONAL SALES REG. I OF 1798.

LAND MORTGAGE REDEMPTION AND FORECLOSURE REG. XVII OF 1806.

LAND-REVENUE ASSESSMENT REG. I OF 1801.

LAND-REVENUE ASSESSMENT (RESUMED LANDS) REG. II OF 1819.

LAND-REVENUE ASSESSMENT (RESUMED LANDS) REG. III OF 1828.

LAND-REVENUE SALES REG. V OF 1812.

LAND-REVENUE SETTLEMENT REG. VII OF 1822.

LIMITATION REG. II OF 1805.

BENGAL REGULATIONS—(Contd.)

MINORITY OF LANDHOLDERS REG. XXVI OF 1793.
 PARTITION OF REVENUE-PAYING ESTATES REG. XIX OF 1814.
 PERMANENT SETTLEMENT REG. I OF 1793.
 PUTNI TALUQS REG. VIII OF 1819.
 RECOVERY OF ARREARS OF RENT AND REVENUE REG. VII OF 1799.
 REGISTRY OF DEEDS REG. XX OF 1812.
 RESISTING PROCESS REG. XI OF 1796.
 REVENUE-FREE LANDS (BADSHAHI GRANTS) REG. XXXVII OF 1793.
 REVENUE-FREE LANDS (NON-BADSHAHI GRANTS) REG. XIX OF 1793.
 REVENUE-FREE LANDS REG. VIII OF 1800.
 SECURITY FROM FOREIGN LITIGANTS REG. XIV OF 1829.
 SONTAL PARGANAS PERMANENT SETTLEMENT REG. III OF 1872.
 ZILLAH COURTS REG. III OF 1793.
 REGULATIONS OF 1781 AND 1787.
 REGULATION XIV OF 1793.
 REGULATION I OF 1845.

**Acquisition of Land for Public Purposes
 Reg. I of 1824.**

—S. 9, Cl. (3)—*Khalari payments—Nature of—Payment called or treated as "rent"—Effect.*

It is quite immaterial whether the *khalari* payments are called payments, or rents, or remissions. They seem, properly speaking, remissions within the meaning of S. 9, cl. (3) of Regulation I of 1824, but their being called or treated as "rents" would not affect the force of the Regulation (188). (*Sir Robert P. Collier.*) SECRETARY OF STATE FOR INDIA *v.* RANI ANUNDMOYI DEBI. (1881) 8 I. A. 172 = 8 C. 95 (108) = 4 Sar. 281.

—Cl. (11)—Words "Although originally . . . settlement had been formed" in parenthesis—Meaning and effect of.

The words in parenthesis "although originally belonging to an estate for which a permanent settlement had been formed", in S. 9, cl. (11) of Regulation I of 1824, do not narrow the meaning of the previous words, limiting it to such an estate only. The words have no restrictive effect, but are intended to prevent restrictions, and mean that whether the salt-lands worked did or did not belong to a permanently-settled estate, the same consequences would follow (187). (*Sir Robert P. Collier.*) SECRETARY OF STATE FOR INDIA *v.* RANI ANUNDMOYI DEBI. (1881) 8 I. A. 172 = 8 C. 95 (107) = 4 Sar. 281.

—Cls. (11), (12) and (4)—Salt lands, originally belonging to permanently-settled estate, worked by Salt Department and subsequently relinquished by it—Assessment of—Government's right of—*Khalari* payments—Lands held subject to.

Held, on the right construction of S. 9, cl. (11) of Regulation I of 1824, salt lands worked by the Salt Department from the time of the assumption by the Government of the monopoly of salt-manufacture to the present day, as provided in the said clause, are, though held by the Government subject to *khalari* payment, in contemplation of law, lands held by the Salt Department rent-free, whether they did or did not originally belong to a permanently-settled estate; and when such lands are relinquished by that Department they are liable to assessment just as they would have been if held under a lease which had expired (188-9).

BENGAL REGULATIONS—(Contd.)

Acquisition of Land for Public Purposes Reg. I of 1824, S. 9, Cls. (11), (12) and (4)—(Contd.)

If the relinquished salt lands are settled with others than the Zemindar within the ambit of whose Zemindary they are situated, the remissions made from his jumma during the holding by the Salt Department on account of *khalari* and other compensations will, under clause (4) of the section, be allowed to him in perpetuity (189).

Even if there had been no "Khalari rent" or compensation in the case of such lands, the Government would, under clause (12) of the section, acquire a title in 12 years (189). (*Sir Robert P. Collier.*) SECRETARY OF STATE FOR INDIA *v.* RANI ANUNDMOYI DEBI. (1881) 8 I. A. 172 = 8 C. 95 (108-9) = 4 Sar. 281.

Alluvion and Diluvion Reg. XI of 1825.

—See also ALLUVION AND DILUVION.

—Law under—Review of. NOGUNDER CHUNDER GHOSE *v.* MAHOMED ESOF. (1872) 10 B. L. R. 406 = 18 W. R. 113 = 3 Sar. 151 = 2 Suth. 640.

—S. 2—Custom under—Hearsay evidence of—Admissibility.

As to the date from which the custom (under S. 2 of Reg. XI of 1825) is said to have prevailed, after the existence of the custom for some years had been proved by direct evidence, it can only, as a rule, be shown to be immemorial by hearsay evidence, and it is for this reason that such evidence is allowable as an exception to the general rule (285). (*Lord Carson.*) RAJENDRA NARAIN DHANJ DEO *v.* GANGA-NANDA SINGH. (1925) 52 I. A. 279 = 4 Pat. 788 =

22 L. W. 645 = (1925) M. W. N. 549 = 89 I. C. 737 = A. I. R. 1925 P. C. 213 = 30 C. W. N. 169 = 1926 M. W. N. 69 = 7 Pat. L. T. 19 = 3 Pat. L. R. 309 = 50 M. L. J. 194 (199).

—Custom under—Local custom on bank of one river—Decision as to—Admissibility of, on question as to custom on bank of another river.

In a case in which the question was whether it had been established, within the meaning of S. 2 of Regulation XI of 1825, that there was an immemorial custom by virtue of which the River Ganges at the point in question was taken to be the boundary between the estates on either bank, so that alluvial land belonged to one or other of those estates according to the actual course of the river, *held*, that a proceeding which amounted to a decision that such a custom as the one in question obtained on the banks of another river (the Gogra) afforded no evidence that a similar custom existed on the banks of the Ganges (13).

The language of the Regulation implies that the custom to be proved is a local custom (13). (*Sir James W. Colville.*) RAE MANICK CHAND *v.* MADHORAM.

(1869) 13 M. I. A. 1 = 11 W. R. P. C. 42 = 3 B. L. R. 5 = 2 Suth. 217 = 2 Sar. 473.

—Custom under—Proof of—Evidence.

The question was whether the respondents, on whom the onus of proof lay, had established, within the meaning of S. 2 of Bengal Reg. XI of 1825, that there was an immemorial custom by virtue of which the River Ganges at the point in question was taken to be the boundary between the estates on either bank, so that alluvial land belonged to one or other of those estates according to the actual course of the river.

Held, reversing the Court below, that the respondents had not established such a custom (14).

Considering that the case of the respondents might have failed from mere defect of proof, and that similar cases

BENGAL REGULATIONS—(Contd.)**Alluvion and Diluvion Reg. XI of 1825, S. 2—(Contd.)**

might arise between other parties in the neighbourhood of that locality, their Lordships observed that their judgment should not be quoted in any future case between other parties as a conclusive decision of theirs to the effect that no such custom as that alleged before them existed (14). (*Sir James W. Colville.*) **RAE MANECK CHAND v. MADHORAM.** (1869) 13 M. I. A. 1=11 W. R. P. C. 42=3 B. L. R. P. C. 5=2 Suth. 217=2 Sar. 473.

——Custom under—River—Land once alluvial lying between two branches of a, or between two rivers—Shifting of volume of water—Intermediate tract of land—Riparian owner on side of channel for time being fordable—Right of, to ownership and possession of tract—Custom of. *See* RIVER—LAND ONCE ALLUVIAL, ETC.

(1872) Sup. I. A. 34 (36).

——Riparian proprietors—Usage governing rights of. *See* ALLUVION AND DILUVION—ACCRETION—GRADUAL ACCRETION—RIPARIAN PROPRIETORS.

(1879) 6 I. A. 211.

——Rule under—Applicability—Diluviation brought about by overflow of another river into river forming boundary.

The river Gandak or Beri Gandak flowed between two villages, Mouzahs M and R, Mouzah M being situated on its northern side, and Mouzah R on its southern side. The river Ganges, which flowed at some distance to the south of the Gandak, began its encroachment northwards, and ultimately joined with the Gandak, and by the combined action of the two rivers certain of the lands which had formed part of the Mouzah M were "diluviated", that is, the surface soil (the cultivable soil) was wholly washed away. In course of time, however, the waters receded and about 589 bighas of land gradually re-appeared towards the south, and by degrees the land became hard and firm soil, capable of being cultivated in the usual manner. The owner of Mouzah R claimed a portion of the said lands, contending that by immemorial custom the middle line of the bed of the Gandak formed the boundary line between Mouzahs M and R, and that, owing to the change in the course of the Gandak, the land which had re-appeared was on the southern side of the bed of the said river and belonged to him as the owner of Mouzah R. The owner of Mouzah R based his claim upon S. 2 of Regulation XI of 1825.

The High Court found in favour of the custom alleged, but held that the custom could not be relied upon by the owner of Mouzah R, because the diluviation was not by the action of the Gandak and the lands had not been recovered from the Gandak. They refused to give effect to the rule, because the conditions which had arisen in the case were brought about by the overflow of the Ganges into the Gandak.

Held, reversing the High Court, that, even so, the rule was applicable.

Whatever may have been the cause of the river Gandak becoming so swollen as to bring about the results already referred to, whether by floods or by the overflow of the Ganges into the Gandak, their Lordships cannot see anything in the regulation in question which prevents the main stream of the Gandak continuing to be the boundary after the lands had been diluviated, nor do think that such diluviation can be dissociated from the action of the Gandak. (*Lord Carson.*) **RAJENDRA NARAIN DHANJ DEO v. GANGANANDA SINGH.** (1925) 52 I. A. 279=

4 Pat. 788=22 L. W. 645=1925 M. W. N. 549=

89 I. C. 737=A. I. R. 1925 P. C. 213=

30 C. W. N. 169=1926 M. W. N. 69=

7 Pat. L. T. 19=3 Pat. L. R. 309=50 M. L. J. 194.

BENGAL REGULATIONS—(Contd.)**Alluvion and Diluvion Reg. XI of 1825—(Contd.)**

——Ss. 2 and 4, Cl. (2)—Permanent tenure—Lands gradually accreted to—Temporary assessment of—Effect. *See* ALLUVION AND DILUVION—ACCRETION—GRADUAL ACCRETION—RIPARIAN PROPRIETORS.

(1879) 6 I. A. 211.

——S. 4—Lands "gained" under—Re-formation of lands washed away on old site clearly recognizable—Ownership of—Riparian owners—Question between—Re-formation on other side of river.

Lands washed away and afterwards re-formed upon the old site, which can be clearly recognised, are not lands "gained" within the meaning of S. 4 of Reg. XI of 1825; they do not become the property of the adjoining owner, but remain the property of the original owner. This principle applies equally to a case in which the question arises between two riparian owners and when the land was washed away from one side of the river and re-formed on the other side but was re-formed on the old ascertained site. (*Sir Lancelot Sanderson.*) **MAHARAJA OF DUMRAON v. SECRETARY OF STATE FOR INDIA IN COUNCIL.** (1927) 54 I. A. 156=

6 Pat. 481=31 C. W. N. 717=101 I. C. 1=

45 C. L. J. 520=8 Pat. L. T. 497=

26 L. W. 754=25 A. L. J. 905=

A. I. R. 1927 P. C. 89=52 M. L. J. 576.

——Law as to accretions in—Applicability outside Bengal.

Bengal Regulation XI of 1825 did not apply to the Presidency of Madras. *Quare*, whether the law as to accretions enacted therein coincides with the law as to accretions in the Presidency of Madras or elsewhere in India (72). (*Lord Carson.*) **SECRETARY OF STATE FOR INDIA v. RAJAH OF VIZIANAGARAM.** (1921) 49 I. A. 67=

45 M. 207 (213)=30 M. L. T. 112=

26 C. W. N. 348=15 L. W. 389=20 A. L. J. 438=

35 C. L. J. 463=(1922) M. W. N. 381=

A. I. R. 1922 P. C. 105=67 I. C. 1=42 M. L. J. 589.

——Patni taluk within zemindary—Diluvion caused by tidal river—Diluviated land part of taluk reformed in situ—Right to—Zemindar—Patnidar—Claim by.

Appellants were owners of a zemindary within which was a patni taluq created in 1837. That taluq was owned by the respondents as patnidars. The dowl kabuliyat executed by the patnidar in respect of the tenure stated the area approximately and contained a provision for the variation of the rent in case of an increase or a diminution of the area. The reason for the approximate statement of the area and the provision regarding the variation of the rent was that a strong tidal river flowed close to the boundaries of the taluk in question. Subsequent to the lease the Zemindars obtained a decree for increased rent on the ground that additional land was found upon measurement to be in the patnidar's possession. Later, the patnidars obtained, under the provisions of S. 19 of Bengal Act VIII of 1869, a proportionate remission of rent on the ground of a portion of the lands having been washed away by the action of the river. On the diluviated lands subsequently re-appearing and re-forming *in situ*, the zemindars claimed that the said lands were part of their zemindari, whilst the patnidars contended that they were accretions to the taluq.

Held, that the lands did not come within the provisions of S. 4 of Reg. XI of 1825 and could not be claimed by either party as accretions to their respective property. (*Mr. Ameer Ali.*) **ARUN CHANDRA SINGH v. KAMINI KUMAR BAIDHAN.** (1913) 41 I. A. 32=41 C. 683=

22 I. C. 317=(1914) M. W. N. 175=

18 C. W. N. 369=15 M. L. T. 182=12 A. L. J. 243=

19 C. L. J. 272=16 Bom. L. R. 323=26 M. L. J. 251.

BENGAL REGULATIONS—(Contd.)**Alluvion and Diluvion Reg. XI of 1825—(Contd.)**

—S. 4, Cl. (1)—*Applicability—Alluvion—Accretion by—Land diluviated and afterwards reformed on old site—Ownership of—Distinction.*

Cl. (1) of S. 4 of Reg. XI of 1825 refers simply to cases of gain, of acquisition by means of gradual accretion. There are no words which imply the confiscation or destruction of any private person's property whatever. When the words are looked at, not merely of that clause, but of the whole Regulation, it is quite obvious that what the then Legislative authority was dealing with, was the gain which an individual proprietor might take by increment from that which was part of the public territory, the public dominion not usable in the ordinary sense, that is to say, the sea belonging to the State, a public river belonging to the State; this was a gift to an individual whose estate lay upon the river or lay upon the sea, a gift to him of that which, by accretion, became valuable and usable out of that which was in a state of nature neither valuable nor usable (475-6).

And on the very words of the section itself, if the ownership of the submerged site remained as it was (and there seems nothing to take it away), it is difficult to see why a deposit of alluvion directly upon it is not at least as much an accretion and annexation vertically to the site as it would be an accretion and annexation longitudinally to the river frontage of the adjoining property (476).

Held, therefore, that cl. (1) of S. 4 of Regulation XI of 1825 was inapplicable to the case of a land which was diluviated and was afterwards re-formed on the ascertained site (476). (*Lord Justice James.*) **LOPEZ v. MUDDUN MOHUN THAKOOR.** (1870) 13 M.I.A. 467 = 14 W.R. P.C. 11 = 5 B.L.R. 521 = 2 Suth. 336 = 2 Sar. 594.

—S. 4, Cls (1) and (5)—*River channel—Change in—Riparian owners—Rights of—Effect on—Alluvion—Accretion by—Case of—Distinction*

The appellant, the proprietor of village M, claimed a certain piece of land, measuring 2,058 bighas and admitted to have been originally part of village R belonging to the respondent, on the ground that the land had become his (appellant's) by alluvion.

Both in 1866, which was the commencement of both parties' rights, and at the date of suit, the river G flowed in a course which intersected village R, and the portion of village R which was on the eastern bank lay between the river and village M. In about the year 1885, however, the river began to work its way eastward, with the result that it came to have on the western bank of its new course not only all of village R that had formerly been on its eastern bank, but also some part of village M; and while this situation of things lasted the disjointed part of village M was taken possession of by the respondent. In 1891, however, the river changed its course, and once more had to its east, not only the whole of village of M, but (intervening between it and village R), the 2,058 bighas in dispute. For a time, during the wanderings of the river, this land was submerged, and the appellants' case was that it emerged "in an altered form, not capable of being identified".

Held, that the land in question did not cease to belong to the respondent, and that the appellant could not make title to it either under sub-s. 1, or sub-s. 5 of S. 4 of Regulation XI of 1825 or on any general principles of equity and justice.

The case does not fall within the well-known chapter of law which treats of the formation of new land through the gradual and imperceptible washing up of particles by a river or the sea. The case was not also one in which a piece of land is first disintegrated by water action and thereafter reintegrated or reformed by water action. The only note of similarity to alluvion to which the appellant could point was that the process of change was so far gradual; but this

BENGAL REGULATIONS—(Contd.)**Alluvion and Diluvion Reg. XI of 1825, S. 4, Cls. (1) and (5)—(Contd.)**

means merely that the river took several years to change its course. Now, the mere fact that a change in a river's course has placed land belonging to A in contiguity to the lands of B, could never deprive A of the lands and transfer them to B. The contention of the appellant is that if after temporary aberrations a river at last leaves the land of A in *statu quo ante* it must be held to be an accession to B, his next neighbour. Neither the statute law of India nor the general principles of jurisprudence lend the slightest support to such unreasonable conclusions. (*Lord Robertson.*) **SARDAR JAGJOT SINGH v. RANI BRIJNATH KUNWAR.**

(1900) 27 I.A. 81 = 27 C. 768 = 4 C.W.N. 555 = 7 Sar. 699.

—S. 4, Cl. (2)—*Rule in—English law same as—Tidal and non-tidal rivers—Rule applicable alike to.*

The provision in S. 4, cl. (2) of Beng. Regal XI of 1825 is in accordance with the English Law as laid down in the case of *Mayor of Calisle v. Graham*, (1869) L.R. 4 Ex. 361 368. Although the specific reference in that case is to a tidal river, their Lordships consider the principle equally applicable to a non-tidal river (171). (*Sir Andrew Scoble.*) **THAKURAIN RITRAJ KOER v. THAKURAIN SARFARAZ KOER.** (1905) 32 I.A. 165 = 27 A. 655 (669) =

2 C.L.J. 185 = 9 C.W.N. 889 = 7 Bom. L. R. 872 = 2 A.L.J. 623 = 8 O.C. 293 = 3 Sar. 873 = 15 M.L.J. 349.

—*Rule under—Accretion—Law of—Applicability—River—Shifting boundary of—Lands identified as those of defendant—Ownership of—Gradual accretion not proved.*

Plaintiff was the owner of a taluqa on the south bank of the river Gogra; and the defendant, the owner of a taluqa, on the north bank of the river. The suit was brought to recover possession of certain alluvial lands which the plaintiff claimed as an accretion to her estate, by reason of a change in the channel of the river. The property in dispute was originally the property of the defendants' predecessor in title. There was no question of a gradual and slow process of acquisition. The land in question was claimed, not on the ground that the action of the river had been slowly and gradually to push forward the northern boundary of the plaintiffs' land, but that the northern channel of the river, however it might shift, must be taken to be that boundary. It was not also the case of the plaintiff that the land laid bare by the alteration of the river's course adjoined the land of the defendant; on the contrary, the evidence was that there was still a channel of the river between the two properties, although the main stream had shifted to the north.

Held, affirming the court below, that the case was not one in which the land in question had gradually become accreted to the plaintiffs' property by an alteration in the course of the river, but was one provided for by clause 2 of S. 4 of the Bengal Reg. XI of 1825, and that the land in question remained the property of its original owner, the defendant (170-1). (*Sir Andrew Scoble.*) **THAKURAIN RITRAJ KOER v. THAKURAIN SARFARAZ KOER.**

(1905) 32 I.A. 165 = 27 A. 655 = 2 C.L.J. 185 = 9 C.W.N. 889 = 7 Bom. L. R. 872 = 2 A.L.J. 623 = 8 O.C. 293 = 3 Sar. 873 = 15 M.L.J. 349.

—S. 4, Cl. (3)—*Land originally formed as an island and at its formation surrounded by water not fordable—Government's title to.*

The suit which was instituted on 11-3-1872 was to recover certain plots of land, which plaintiffs alleged to be reformations of lands which belonged to them. The lands had formed in the bed of a river in 1859, and the plaintiffs took possession of them as reformed lands. They held possession of the same till 1868, when they were ousted by the

BENGAL REGULATIONS—(Contd.)

Alluvion and Diluvion Reg. XI of 1825, S. 4, Cl. (3)—(Contd.)

Collector, who assessed the same under Reg. XI of 1825, and settled them with A.

Held, that, even if the Government was not entitled to assess the lands in consequence of Act IX of 1847, they were entitled to take possession of them as lands which originally formed as an island, and were at their first formation surrounded by water which was not fordable, and they were entitled to oust the plaintiffs, who were trespassers, and to put A into possession (80). (*Sir Barnes Peacock*.) **WISE v. AMEERUNNISSA KHATOON.** (1879) 7 I.A. 73 = 6 C.L.R. 249 = 4 Sar. 127 = 3 Suth. 730 = Bald. 350.

Civil Procedure Reg. IV of 1793.

—**S. 5—Rejoinder of defendant—Scope of.**

By S. 5 of Regulation IV of 1793, the defendant in his rejoinder is simply to deny the truth of the reply of the plaintiff, or the parts of it which he means to dispute (291). (*Mr. Pemberton Leigh*.) **DOUGLAS v. COLLECTOR OF BENARES.** (1852) 5 M.I.A. 271 = 1 Suth. 231 = 1 Sar. 434.

—**Supplemental answer—Scope of—Case inconsistent with that made in first answer—Permissibility.**

The leave to file a supplemental answer is stated to have been given under S. 5, Regulation IV of 1793, which is certainly very general in its terms. But it is much to be regretted, if the practice of the Court be such as to warrant what has here taken place, if a defendant after having put in answer, stating facts which are within his own knowledge, or which he has the full means of ascertaining, may afterwards, on finding that he has no defence, as the case stands, do what the defendant has here been permitted to do, if he is at liberty, without any affidavit of the circumstances, without any explanation of the nature of the error which has been committed, or in what it has originated, or what is the correction to be made, or what the omission to be supplied, to make a totally new case, and state facts at direct variance with the statement in the first answer, and, of course, completely change the issue in the cause (289-20). (*Mr. Pemberton Leigh*.) **DOUGLAS v. COLLECTOR OF BENARES.** (1852) 5 M.I.A. 271 = 1 Suth. 231 = 1 Sar. 434.

—**S. 10—Four pleadings—Filing—Procedure after.**

After the four pleadings had been filed, it behoved the Principal Sudder Ameen, in accordance with the provisions of S. 10, Regulation XXVI of 1814, to have recorded a proceeding specifying the point or points to be established, and calling for evidence for and against the claim, with reference to the purport of the plaint and answer from the parties respectively, in order that such of the parties might file his evidence for or against the claim, from which full investigation might be had, and the merits of the case fully developed (292-3). (*Mr. Pemberton Leigh*.) **DOUGLAS v. COLLECTOR OF BENARES.** (1852) 5 M.I.A. 271 = 1 Suth. 231 = 1 Sar. 434.

Court of Wards Reg. X of 1793.

—**Disqualified proprietor—Authority to adopt given by—Validity—Sanction for—Necessity.**

Reg. X of 1793 prohibits a disqualified proprietor from making an adoption, except with the sanction of the Court of Wards; and it has been determined that the prohibition applies equally to an authority to adopt and to an actual adoption (83). (*Sir James W. Colville*.) **JUMOONA DASSYA CHOWDHRANI v. BAMASOONDERAI DASSYA CHOWDHRANI.** (1876) 3 I.A. 72 = 1 C. 289 (295) = 25 W.R. 235 = 3 Sar. 602 = 3 Suth. 222.

—**S. 33—Majority—Age of—General rule as to—Effect on.** See **BENGAL REGULATIONS—MINORITY OF NATIVE LAND-HOLDERS REG. XXVI OF 1793, S. 2.**

(1876) 3 I.A. 72 (74) = 1 C. 289 (291).

BENGAL REGULATIONS—(Contd.)

Court of Wards Reg. X of 1793, S. 33—(Contd.)

—**Person not under guardianship of Court of Wards—Adoption by—Sanction for—Necessity.**

Although under Reg. X of 1793 a disqualified proprietor is prohibited from giving authority to adopt and from actual adoption, except with the sanction of the Court of Wards, yet by S. 33 of the Regulation its operation would seem to be confined to persons who are under the guardianship of the Court of Wards (83). (*Sir James W. Colville*.) **JUMOONA DASSYA CHOWDHRANI v. BAMASOONDERAI DASSYA CHOWDHRANI.** (1876) 3 I.A. 72 = 1 C. 289 (295) = 25 W.R. 235 = 3 Sar. 602 = 3 Suth. 222.

Court of Wards Ceded Provinces Reg. LII of 1803.

—**Assumption of management under—Validity—Procedure.**

On 8-10-1868, the Collector of Ghazipur wrote a letter to the Commissioner of Benares, with a view to its being transmitted to the Board of Revenue, recommending, with a view to the preservation of the property, that the suit estate should be taken into the custody of the Court of Wards, and requesting the Commissioner to obtain the sanction of the Board of Revenue to his placing it under the Court of Wards. On the 24th of February, 1869, M, the proprietress of the estate and her daughter prayed that the estate might be put under the Court of Wards. The next document was a letter of the 18th of May, 1869, from the Secretary to the Government of the North-Western Provinces, to the Secretary of the Board of Revenue, in which he said that, as it appeared that the family of M were in possession of a small assessed property, the Board were authorised to assume the estate under their control, as the Court of Wards. A letter of the 22nd of July, 1875, from the Secretary to the Government of the North-Western Provinces, to the Secretary of the Board of Revenue of the North-Western Provinces stated that the Government authorised the Board to assume charge of the estate as the Court of Wards on account of the incompetency of the proprietors to manage it; and that the orders authorising the assumption of management were made subject to the condition that some portion of the estate was assessed to revenue. The same condition was subsequently referred to in another Government order dated the 20th of May, 1869. The Board, in their docket, No. 894, dated the 18th of August, 1869, reported that the condition required to make the orders of 20th of May, 1869, absolute was satisfied. Then it went on to say: "The proprietors are still deemed by the Government incompetent to manage their estate. The Board may therefore carry out their proposal to sell a portion of the talooka to discharge the debts contracted." The whole of M's property, including a house in Benares, was taken under the management of the Court of Wards.

Held, that the estate was properly put under the jurisdiction of the Court of Wards, so as to destroy the power which M would have had of charging it (191-2).

The evidence shows that the Government made some inquiries, and in the result were satisfied that M had some rent-paying land, and if so, the condition under which they directed her estate to be put under the management of the Court of Wards was complied with. It further appeared that the estate was put under the management of the Court of Wards because she was incompetent, and that she was so considered up to 1875 (191-2). (*Sir Robert P. Collier*) **RAI BALKRISHNA v. MUSSUMAT MASUMA BIBI.** (1882) 9 I.A. 182 = 5 A. 142 (151-2) = 13 C.L.R. 232 = 4 Sar. 398.

—**Disqualification under—Conditions—Reports of Collector and of Board of Revenue—Absence of—Estate in fact under management—Effect.**

BENGAL REGULATIONS—(Contd.)**Court of Wards Ceded Provinces Reg. LII of 1803—(Contd.)**

The provisions of Regulation LII of 1803 should be strictly pursued, in order to effect the disqualification of any particular person, and no one should lose her natural liberty of contracting debts unless the relation of Ward and Guardian between her and the Court of Wards be regularly and completely constituted (477).

Under the Regulation the Collector is to report a female proprietor as disqualified to the Board of Revenue, and the Board of Revenue, in their capacity of a Court of Wards, are to report that they have taken the estate under their charge, to the Governor-General in Council, so as to enable him to exercise his discretion of exempting her from the operation of the Regulation. Nor are these mere forms; they are necessary preliminaries to the disqualification of a female, so as to invalidate an alienation even of the property under charge of the Court of Wards by her (482).

The Court below seems to have assumed that, if the estate and property of a female were in fact under the charge of the Court of Wards, she was a disqualified person. But their Lordships are of opinion, that this does not necessarily follow; the Court of Wards may have obtained the custody originally under circumstances not affecting her personally, and may have continued in charge after the estate devolved upon her under circumstances which do not necessarily make her a disqualified female under Reg. LII of 1803 (477-8). (*Sir James W. Colville.*) **MOHUMMUD ZAHOR ALI KHAN v. MUSSUMAT THAKOORANEE RUTTA KOER.**

(1867) 11 M.I.A. 468 = 9 W.R. P.C. 9 = 2 Suth. 107 = 2 Sar. 320.

———*Person not validly disqualified, though his estate in fact under management—Contract by—Validity.*

Appellant sued for the recovery of the amount due under a simple money bond executed by R in appellant's favour in 1856. R's defence to the suit was that her estate and property were in fact under the charge of the Court of Wards when the said bond was alleged to have been executed, and that she was a disqualified female under Regulation LII of 1803, and incapacitated to contract debts in any way.

Held, that, though there was evidence to show that R's estate and property had been in the custody of the Court of Wards, from a time anterior to the date of the Bond to a time subsequent to the institution of the suit, R was not when the suit bond was alleged to have been executed, incapable of binding herself by contract by reason of that possession of the Court of Wards, which had begun in the time of R's predecessor in interest (482).

The evidence in the case not only fails to show that the necessary reports of the Collector and of the Board of Revenue were made; it also, though not uniformly consistent, goes far to negative any intention on the part of the Revenue authorities to treat R as a disqualified proprietor, or a person incompetent to manage her affairs. It shows, that when her title was attacked in 1855, they declined to act as a Court of Wards in its defence, but left her to sue or be sued, as a person *sui juris*, on her own responsibility, and at her own cost. It further shows that in 1856, and in the very month in which she is alleged to have executed the suit bond, they had taken all the necessary steps towards putting her into the full possession and enjoyment of the estate, as a proprietor competent to its management, on her entering into proper engagements for payment of the Government revenue; and that the completion of that arrangement was only prevented by the accident of the Mutiny. The fact, if that be, that for some time in and after the year 1858, the property was regularly managed by the Court of Wards, can have no bearing on the question

BENGAL REGULATIONS—(Contd.)**Court of Wards Ceded Provinces Reg. LII of 1803—(Contd.)**

of her capacity to bind herself by contract in 1856 (483). (*Sir James W. Colville.*) **MOHUMMUD ZAHOR ALI KHAN v. MUSSUMAT THAKOORANEE RUTTA KOER.**

(1867) 11 M.I.A. 468 = 9 W.R. P.C. 9 = 2 Suth. 107 = 2 Sar. 320.

———*Scope of—Bengal Regulation X of 1793—Scope of—Distinction.*

Regulation LII of 1803 is little, if anything, more than an extension of Bengal Regulation X of 1793 to the North-Western Provinces (482). (*Sir James W. Colville.*) **MOHUMMUD ZAHOR ALI KHAN v. MUSSUMAT THAKOORANEE RUTTA KOER.**

(1867) 11 M.I.A. 468 = 9 W.R. P.C. 9 = 2 Suth. 107 = 2 Sar. 320.

———**S. 7—Lakheraj property—Power to include—Portion of property paying Government revenue—Effect.**

In this case the Government put the construction upon S. 7 of Bengal Regulation LII of 1803 that if any part of the property pays Government revenue, then there is a power to include all the lakheraj property (190). (*Sir Robert P. Collier.*) **RAI BALKRISHNA v. MUSSUMAT MASUMA BIBI.** (1882) 9 I.A. 182 = 5 A. 142 (152) = 13 C.L.R. 232 = 4 Sar. 398.

Decennial Settlement Reg. VIII of 1793.

———*Applicability—Numuk sayar mehals—Settlement of, with persons not proprietors of soil.*

Regulation VIII of 1793 relates to the land revenue, and to settlements concluded with the actual proprietors of the soil, and has no relation to the *Numuk sayar mehals*, or any settlement made in respect of it with persons who were not proprietors of the soil (498). (*Lord Justice Turner.*) **BENGAL GOVERNMENT v. NAWAB JAFUR HOSSEIN KHAN.** (1854) 5 M.I.A. 467 = 1 Sar. 472.

———**S. 5—Independent talook—What is—Separation of—Right to—Time within which application for separation should be made—Laches—Effect—Regulation I of 1801, Ss. 8 and 14.**

The suit was by the appellants for a declaration that the order of the Board of Revenue of 20th March, 1909, directing the Collector to enter the respondent's talook as a separate estate on his towzi was *ultra vires*, illegal, and wholly injurious to the appellants, the owners of the zamindari within which the said talook was situate, and that the said talook had "become a dependent talook by operation of law."

Held, on the facts, affirming the Courts below, that the respondent had not lost the status of an independent talookdar by any laches in the affirmation of his right to obtain the separation of his talook, or by any declaration of the Collector, or of any other Court; that his application for separation was made in accordance with the provisions of Reg. I of 1801, within the year from the passing of the Act; and that there had been no want of diligence on his part in seeking the relief to which he was clearly entitled. (*Mr. Ameer Ali.*) **RANI HEMANTA KUMARI DEBI v. MAHARAJAH JAGADINDRA NATH ROY BAHADUR.**

(1918) 23 C.W.N. 149 = 51 I.C. 148.

———**Ss. 5 and 7—Talookdars independent and dependent—Distinction between.**

Bengal Regulation VIII of 1793 draws a wide distinction between "independent talukdars" and "dependent talukdars." The former come within the category of "actual proprietors of land," whereas the latter do not; "they are considered as lease-holders only" (S. 7). (*Mr. Ameer Ali.*) **SRINATH RAI v. PRATAP UDAI NATH SAHI DEO.**

(1923) 28 C.W.N. 145 = 33 M.L.T. 408 = (1923) M.W.N. 702 = A.I.R. 1923 P.C. 217.

BENGAL REGULATIONS—(Contd.)**Decennial Settlement Reg. VIII of 1793—(Contd.)**

—**S. 41—Chakeran lands—Zemindary—Lands within, granted before Permanent Settlement as hereditary Jaghir by Government for services rendered and to be rendered in connection with prevention of incursion of wild elephants and held rent-free for over a century if.**

The lands, the subject of the suit, being certain mahals comprised in a zemindary, were, in 1775, granted by the Government by a sunnud to *A*, who had done and was doing service in repressing the incursion of wild elephants. That sunnud contained no words of inheritance. In 1786, *A* being then dead, the Government granted a second sunnud to *B* and *C*, who represented themselves as the brother and nephew of *A*, and, as such, his heirs. That sunnud did contain words of inheritance. In 1804, a suit was brought against *B* and *C* by the true heirs of *A* for possession of the lands. The Court declared the plaintiffs in that suit to be the true heirs of *A*, and directed *B* and *C* to relinquish the possession and enjoyment of the lands to the plaintiffs therein, treating, apparently, the former as trustees for the true heirs. But considering, apparently, that it could not, without the sanction of Government, transfer the benefit of the second sunnud from the persons named in it to the true owners, the Court directed that the possession of the former should not be disturbed until an order should be issued by the Government. In consequence of that, a third sunnud was granted in 1807, which recited the two former sunnuds, and continued the Jaghir to the true heirs of *A*. Under the three sunnuds, the lands comprised in the Jaghir were held rent-free for nearly a century.

Held, that the lands held on such a tenure, even if treated as in the nature of chakeran lands in the Settlement between the Zemindar and the Government in 1802, differed widely from the ordinary chakeran lands contemplated by S. 41 of Bengal Regulation VIII of 1793 (460-1).

They seem hardly to fall within the description of "lands held by a public officer or a private servant, in lieu of wages." Neither *A* nor his descendants were by the sunnuds appointed to an office known as "Elephant Hunter for the Pergunnah," or by any like description. Still less ground is there for saying that they were the private servants of the Zemindar. Their right, whatever it be, was derived not from any Zemindar, but from the supreme authority in the State (461). (*Sir James W. Colville.*) **FORBES v. MEER MAHOMED.** (1870) 13 M.I.A. 438 = 14 W.B. P.C. 28 = 5 B.L.R. 529 = 2 Suth. 358 = 2 Sar. 588.

—**Ss. 49 and 51—Enhancement of rent—Suit by Zemindar for—Onus of proof in—Talooks—Ryoti and other under-tenures—Distinction. See LANDLORD AND TENANT—RENT—ENHANCEMENT OF—SUIT BY ZEMINDAR FOR—ONUS OF PROOF IN—BENGAL REG. VIII OF 1793.**

(1869) 13 M. I. A. 248 (261).

—**Enhancement of rent—Suit by zemindar for—Ryots—Defendants being—Suit on foot of—Defendants found to be dependent talookdars under S. 51—Effect on maintainability of suit.**

The respondent brought a suit against the appellants to enhance the rents of certain lands held by the appellants within the respondent's zemindary treating the appellants as ryots, having a right of occupancy in the lands at a variable rent. The appellants, on the other hand, contended that they were Shikmey Talookdars; that they and their ancestors had become so many years before the Decennial Settlement; and that they held the talook at a fixed rent.

Held, on the evidence, that the tenure of the appellants was a dependent talook, within the meaning of S. 51 of Reg. VIII of 1793 (268).

Quere, whether such a finding ought not of itself to be an answer to the suit as framed, for it might well be said that

BENGAL REGULATIONS—(Contd.)**Decennial Settlement Reg. VIII of 1793, Ss. 49 and 51—(Contd.)**

a plaintiff who brought a suit founded on her rights against a ryot in occupation of land, ought not to be allowed to convert that suit into one founded on different right, and governed by a different rule (268).

Held, that the effect of such a finding was certainly to cast upon the respondent the burden of showing that the rent was variable, and that if there was no evidence of that fact in the suit, her suit must fail (268). (*Sir James W. Colville.*) **BAMASOONDARY DASSYAH v. RADHIKA CHOWDHRAIN.** (1869) 13 M. I. A. 248 =

13 W. R. P. C. 11 = 4 B. L. R. P. C. 8 = 2 Suth. 293 = 2 Sar. 524.

—**S. 51—Kudeemee ryots—Inapplicability of section to.**

A claim to exemption from enhancement of rent based on the ground that the tenure was ryotty Kudeemee tenure does not fall within S. 51 of Regulation VIII of 1793, which relates to dependent talookdars properly so called. S. 51 does not extend to Kudeemee ryots (353). **RAM CHUNDER DUTT v. JUGHESH CHUNDER DUTT.**

(1873) 19 W. R. 353 = 12 B. L. R. 229 = 2 Suth. 836 = 3 Sar. 249.

—**Talook within meaning of—Registration under S. 48—Necessity—Tenure capable of being recognised at date of Decennial Settlement if enough.**

It is said, however, that the tenure, if a talook, is not a talook within the meaning of S. 51 of Reg. VIII of 1793, unless it is shown to have been registered under S. 48 of that Regulation (266). The view formerly held in the Courts in India was, no doubt, that in order to bring a talook within the scope of S. 51, it must be shown to have been "registered," "recorded," or "recognised" at the time of the Decennial Settlement. But that construction is no longer recognised as law by the High Court. The present view held by that Court is that it is, at all events, sufficient to show that the tenure existed, and was capable of being recognised at the date of the Decennial Settlement. Their Lordships are, therefore, not compelled by a long course of uniform decisions to put upon the clause in question a construction narrower than that which, in their judgment, its words warrant (267-8). (*Sir James W. Colville.*) **BAMASOONDARY DASSYAH v. RADHIKA CHOWDHRAIN.**

(1869) 13 M. I. A. 248 = 13 W. R. P. C. 11 = 4 B. L. R. P. C. 8 = 2 Suth. 293 = 2 Sar. 524.

Execution of Decrees Reg. VII of 1825.

—**S. 5—Summary suit to set aside sale under—Irregularity in publication of sale—Objection to sale on ground of—Failure to take—Effect—Suit to set aside sale—Maintainability of objection in. See BENGAL REGULATIONS—EXECUTION SALES OF MALGUZARI AND LAKHIRAJ LANDS REG. XLV OF 1793, S. 12.** (1861) 8 M.I.A. 427.

Execution Sales of Malguzary Lands Reg. XX of 1795.

—**Object principal of.**

The principal object of Bengal Regulation XX of 1795 was the security of the public revenue, as appears, not merely from its own preamble, but by the modifications which were made in it by Regulation VII of 1825 (338). (*Sir John Coleridge.*) **RAJAH MUHESH NARAIN SINGH v. KISHANUND MISR.** (1862) 9 M. I. A. 324 =

5 W. R. 7 = Marsh. 592 = 2 I. J. 51 = 1 Suth. 488 = 1 Sar. 862.

—**S. 3—Order for sale—Transmission of, to Collector and not to Revenue Board—Objection to sale on ground of—Maintainability—Prior order for sale in same proceedings and for sale of same property for same debt communi-**

BENGAL REGULATIONS—(Contd.)**Execution Sales of Malguzary Lands Reg. XX of 1795, S. 3—(Contd.)**

cated to same Commissioner and sale sanctioned by him—Effect.

In a suit brought to recover possession of property sold in execution of a decree of a Civil Court, objection was taken to the sale on the ground that the Court, in ordering the sale, dealt directly with the Collector of the Zillah instead of with the Revenue Board and thereby contravened the provisions of S. 3 of Bengal Regulation XX of 1795.

It appeared that, when a former order for sale had been made by the same Court, that Regulation had been fully complied with; that the Commissioner had authorized the sale of the whole talooka; and that a number of sales held thereunder had become ineffectual and nominal only because on each occasion men of straw had been put forward as bidders for the very purpose of rendering the decree abortive. Neither the property to be sold nor the sums to be recovered in pursuance of the subsequent order for sale complained of were different. And the subsequent order complained of was made in furtherance of the prior proceedings.

Held, that the objection had been rightly over-ruled by the Courts below (337).

The object of the Regulation had been fully answered by the communication to the Commissioner made by the prior order for sale, and the proceedings which were taken by him upon it. The objection would have been untenable even if it had been raised between the original parties to the suit, and promptly after the sale had taken place. It was *a fortiori* untenable because it was raised against a purchaser for valuable consideration without notice, and in a suit commenced years after the disputed sale (338). (*Sir John Coleridge.*) **RAJAH MUHESH NARAIN SINGH v. KISHANUND MISR.**

(1862) 9 M. I. A. 324 =
5 W. R. 7 (P. C.) = Marsh. 592 = 2 I. J. 51 =
1 Suth. 488 = 1 Sar. 862.

—S. 12—Sale under—Notification of time and place of—Absence of due—Plea of, in suit against transferee from execution-purchaser in possession for a long time—Onus of proof of.

In a suit brought to recover possession of property from a person who had been in possession thereof for 9 years under conveyances from purchasers at an auction sale of the property made under a decree of the Civil Court, the sale was sought to be set aside on the ground of want of due notification of the time and place of sale as required by S. 12 of the said Regulation.

Held, that the onus of proof of the absence of due notification alleged lay on the plaintiff, and that he had not discharged himself of it (339).

Considering how the defendant claims, at what distance of time the objection is made, and the extreme difficulty, if not impossibility, of satisfactorily proving a fact of this nature under such circumstances as are before their Lordships, they are of opinion that the onus ought not to be cast on the defendant. It would be monstrous to make the title to land in a purchaser depend, years after it has accrued, and possession has been enjoyed under it, on his proving the same affirmatively. In the nature of the thing all traces of the evidence may be expected, as to some of the particulars, to perish in a short time; in others, where the document ought in strictness to be filed, it is but too common for the officer, whose duty it would be to file it, to be neglectful (339). (*Sir John Coleridge.*) **RAJAH MUHESH NARAIN SINGH v. KISHANUND MISR.**

(1862) 9 M. I. A. 324 = 5 W. R. 7 = 2 I. J. 51 =
Marsh. 592 = 1 Suth. 488 = 1 Sar. 862.

BENGAL REGULATIONS—(Contd.)**Execution Sales of Malguzari and Lakhiraj Lands Reg. XLV of 1793.**

—S. 12—Publication of sale—Irregularity in—Dwelling-house of judgment-debtor—Affixture of notice of sale at—Town or village within pergunnah—Absence of proof of—Effect.

A suit was brought to set aside an execution sale on the ground of irregularity in not complying with the provisions of S. 12 of Bengal Reg. XLV of 1793, for the due publication of the sale. The notice of sale was affixed at the dwelling-house of the judgment-debtor, the place where his rents were paid, but which was not part of the estate sold. It was not made out that there was any town or village within the pergunnah at which notice could have been given as required by the said section.

Held, that the notification posted at the house of the judgment-debtor did not constitute a material irregularity within the provisions of Reg. XLV of 1793. (*Lord Kingsdown.*) **LAMB v. BIJOY KISHEN DASS.**

(1861) 8 M. I. A. 427 = 1 Sar. 803.

—Publication of sale—Irregularity in—Objection to sale on ground of—Maintainability—Bengal Execution of Decrees Reg. VII of 1825, S. 5—Suit to set aside sale under—Omission to take objection in—Effect.

The suit was to set aside an execution sale on the ground of irregularity in not complying with the provisions of S. 12 of Bengal Reg. XLV of 1793 for the due publication of the sale. A summary suit, under Bengal Reg. VII of 1825, S. 5, had been brought shortly after the sale by the judgment-debtor, to set it aside on the ground of inadequacy of the purchase-money. No plea was raised in that suit, which was eventually dismissed, that there was any irregularity in the publication of the sale, on the ground that there was a town or village within the pergunnah at which notice could have been given, and that the notification posted at the dwelling-house of the judgment-debtor therefore constituted a material irregularity within the provisions of Reg. XLV of 1793.

Held, that, even if there was an irregularity as alleged, it ought to have been brought before the Court in the summary suit and taken advantage of then. (*Lord Kingsdown.*) **LAMB v. BIJOY KISHEN DASS.**

(1861) 8 M. I. A. 427 = 1 Sar. 803.

Government Indemnity Reg. XI of 1822.**REVENUE SALE UNDER.**

—Confirmation of—Purchaser's rights on.

At a sale held under Regulation XI of 1822 for the purpose of satisfying the Government revenue, the Government became the purchasers of the lands in respect of which there was default, and the sale to the Government was fully confirmed according to the Regulations in that behalf provided.

Held, that, on the confirmation of the sale, the Government acquired a title to the lands purchased by them under the Regulations, subject only to be impeached, according to the provisions which were made in the Regulations, by a suit by parties having a right to impeach the same (461). (*Lord Justice Turner.*) **WATSON v. SREEMUNT LAL KHAN.**

(1854) 5 M. I. A. 447 = 1 Sar. 468.

—Government purchasing at—Annulment of talukdari tenure created subsequent to perpetual settlement—Failure to exercise option of, before 1842—Purchaser from Government—Right of, to annul tenure—Effect on.

The Government purchased in 1835 the zemindary rights in a pergunnah under Reg. XI of 1822 at a sale for arrears of Government revenue and re-settled one of the taluks in the pergunnah which taluk had been created subsequent to the decennial settlement with the plaintiff as talukdar. Subsequently, and after the expiration of the terms for

BENGAL REGULATIONS—(Contd.)**Government Indemnity Reg. XI of 1822—(Contd.)****REVENUE SALE UNDER—(Contd.)**

which they had re-settled with the plaintiff, the Government sold their zemindary rights to the defendant, who ejected the plaintiff. Plaintiff thereupon sued the defendant in the Collector's Court under S. 23, Act X of 1859.

Held, that assuming that an auction-purchaser under Regulation XI of 1822, had the option of cancelling and avoiding such a talookdari tenure as that of the plaintiff, the power was one which he might or might not exercise; that it was incumbent on the Government in the case before their Lordships to take some clear step for the purpose of declaring the avoidance or cancellation of the tenure (326); but that it did not, in fact, cancel or destroy the tenure, but left the talookdars in the position in which they would have been, as of right, under the old law; reducing their tenure from a talook at a fixed to one at a variable rent (332).

It follows from this that the appellant (defendant), though he has the right to bring a suit properly framed for the further enhancement of the rent, is not entitled to disturb the possession of the talookdars, or to let the lands over their heads to the highest bidder (332). (*Sir James W. Colville.*) **KHAJAH ASSANOOLLAH v. OBHOY CHUNDER ROY.** (1870) 13 M. I. A. 318 = 13 W. R. P. C. 24 = 2 Suth. 306 = 2 Sar. 535.

—Government purchasing at—Annulment of under-tenures—Enhancement of rent—Procedure for—Private purchaser—Procedure to be adopted by—Distinction.

Under Reg. XI of 1822, the position of Government, in one respect, differed from that of an ordinary purchaser at a sale for arrears of Government revenue; inasmuch as S. 36 of that Regulation expressly declares, that an estate purchased by Government shall be subject to the rules applicable to the management of ordinary Malguzary Mahals held khas. By virtue of this enactment the Revenue Officers had over the estate purchased by Government in 1833 all the powers conferred upon them by Regulation IX of 1825, and by the provisions of Regulation VII of 1822, which by S. 2 of the former Regulation are extended to and made applicable to estates held khas, and the other lands there mentioned. It follows that Government, though its rights either in respect of cancelling the under-tenures or of enhancing the rent, were not higher than those of an ordinary auction-purchaser, may have been at liberty to assert those rights by a procedure not open to a private individual (328). (*Sir James W. Colville.*) **KHAJAH ASSANOOLLAH v. OBHOY CHUNDER ROY.** (1870) 13 M. I. A. 318 = 13 W. R. P. C. 24 = 2 Suth. 306 = 2 Sar. 535.

—Government purchasing at—Lessee from, of lands purchased—Title of.

At a sale for arrears of Government revenue held under Regulation XI of 1822, the Government purchased the lands in respect of which there was default, and the sale to them was duly confirmed. Thereafter the Government granted a lease of those lands to the appellant for a period of twenty years.

Held that, as the title of the Government, under the sale, was valid, subject only to its being impeached by a suit, the title of the lessee under the Government became equally valid, subject only to the same liability to be impeached by parties having an interest in the lands antecedent to the sale which was made (461). (*Lord Justice Turner.*) **WATSON v. SREEMUNT LAL KHAN.**

(1854) 5 M. I. A. 447 = 1 Sar. 468.

—Purchaser at—Annulment of talukdari tenure created subsequent to perpetual settlement—Right of—Exercise of—Step clear for—Necessity.

Granting that an auction-purchaser under Regulation XI of 1822 had the option of cancelling and avoiding a talook-

BENGAL REGULATIONS—(Contd.)**Government Indemnity Reg. XI of 1822—(Contd.)****REVENUE SALE UNDER—(Contd.)**

dari tenure, created subsequent to the perpetual settlement and held at a fixed rent, the power was one which he might or might not exercise; and it was incumbent on the purchaser to take some clear step for the purpose of declaring the avoidance or cancellation of the tenure (326). (*Sir James W. Colville.*) **KHAJAH ASSANOOLLAH v. OBHOY CHUNDER ROY.** (1870) 13 M. I. A. 318 = 13 W. R. P. C. 24 = 2 Suth. 306 = 2 Sar. 535.

—Purchaser at—Enhancement of rent—Power of—Land held under pottah granted before Decennial Settlement at fixed and invariable rent.

A purchaser of a permanently settled talook at a revenue sale held under Bengal Reg. XI of 1822 has no power as such purchaser to enhance the rent of a holder of lands in the talook, who is in possession under a title founded on a pottah, or lease, dated in 1876 (before the Decennial Settlement) at a fixed and invariable rent paid at and since the date of such pottah (273). (*Sir James W. Colville.*) **RAJAH SUTTOSURRUN GHOSAL v. MOHESH CHUNDER MITTER.** (1868) 12 M. I. A. 263 = 11 W. R. P. C. 10 = 2 B. L. R. P. C. 23 = 2 Suth. 180 = 2 Sar. 420.

—Right to impeach—Original proprietors—Derivative estates created by them before sale—Persons having—Rights of.

The right to impeach the sale given by Reg. XI of 1822 was not merely to the original proprietors, but to parties having estates derived from those proprietors antecedently to the sale being made (461). (*Lord Justice Turner.*) **WATSON v. SREEMUNT LAL KHAN.**

(1854) 5 M. I. A. 447 = 1 Sar. 468.

—Under-tenures—Effect on—Annulment and avoidance of, on proper steps taken for the purpose.

The effect of Reg. XI of 1822 is that on the Government revenue falling into arrear, and a sale made by the Government for the purpose of satisfying that arrear, not only is the estate of the original proprietors, which has been sold, displaced, but all under-tenures founded on that estate is also liable to be avoided and annulled. If proper steps were taken for the purpose of avoiding and annulling the under-tenures, those under-tenures could not stand as against a bona fide sale made by the Government for the purpose of satisfying the arrears (463-4). (*Lord Justice Turner.*) **WATSON v. SREEMUNT LAL KHAN.**

(1854) 5 M. I. A. 447 = 1 Sar. 468.

—S. 6 (3)—Revenue sale—Irregularity—Waiver by proprietor of—Appropriation of surplus purchase-money by him—Effect—Sale void for want of authority of Board of Revenue.

The appeal arose out of a suit brought by Ranee Jaswant Singh to annul the sale of a talook for arrears of revenue. The ground on which the sale was sought to be annulled was that the sale by the Collector in one lot of the whole talook, without any specific authority previously conferred by the Board of Revenue was contrary to the general rules and principles of the Regulations governing the subject. It was contended by the Government and the purchaser that even if more than was necessary had been erroneously sold by the Collector, and if the form and publication of the advertisements had been defective, neither the Ranee nor her heirs could claim to have the sale annulled on such grounds, since the Ranee had, by appropriating the purchase-money after it had been paid into the treasury by the purchaser, adopted and ratified the sale, and waived all irregularities in the conduct of it; and still less could any irregularities in the form or service of the advertisements supply any ground for annulling the sale after such appropriation of the price.

BENGAL REGULATIONS—(Contd.)

Government Indemnity Reg. XI of 1822, S. 6
(3)—(Contd.)

Held, that, although all mere irregularities in the improper and unnecessary sale of the whole talook in one lot, in the form of the advertisements, and the manner of their service, could be held to have been sufficiently waived by the Ranee when she appropriated the surplus purchase-money to her own purposes, so as to deprive her of all claim to annul the sale on the ground of such irregularities, yet the Ranee's acquiescence in a sale made, as she had every reason to believe, by the authority of the Board of Revenue, could not be held to give legal efficacy to a sale altogether void for the want of such authority (97-8). (*Mr. Justice Erskine.*) **MAHARAJAH MITTERJEET SINGH BAHADOOR v. THE HEIRS OF RANEE JASWANT SINGH.**

(1842) 3 M. I. A. 42 = 6 W. R. 15 (P. C.) =
1 Suth. 114 = 1 Sar. 235.

—S. 25—*Not retrospective.*

S. 25 of Bengal Regulation XI of 1822 is not retrospective (97). (*Mr. Justice Erskine.*) **MAHARAJAH MITTERJEET SINGH BAHADOOR v. HEIRS OF RANEE JASWANT SINGH.**

(1842) 3 M. I. A. 42 = 6 W. R. 15 (P. C.) =
1 Suth. 114 = 1 Sar. 235.

—S. 27—*Rule under—Applicability—Money received before promulgation of that rule—Applicability to case of.*

Regulation XI of 1822 does not in terms refer to cases of money received before the promulgation of that rule, and in justice ought not to be so extended; and though as a positive Regulation it may be considered as an useful amendment of the law, there is no known general principle of law upon which such a rule could be held to exist independently of express enactment (98). (*Mr. Justice Erskine.*) **MAHARAJAH MITTERJEET SINGH BAHADOOR v. HEIRS OF RANEE JASWANT SINGH.**

(1842) 3 M. I. A. 42 =
6 W. R. 15 (P. C.) = 1 Suth. 114 = 1 Sar. 235.

—S. 30—*Revenue-sale—Government purchasing at—Lessee from, of lands purchased—Abandonment of lease by—What amounts to—Under-tenure existing at date of sale—Effect on.*

Lands, subject to a perpetual lease granted by the original proprietor in 1818, were in 1837 sold for arrears of Government revenue under Regulation XI of 1822, and purchased by the Government themselves. The Government then granted a lease of the said lands to the appellant for a term of 20 years. No suit was instituted to reverse the sale, but the Government, some time afterwards, in consequence of doubts as to the legality of the sale, offered to give up their rights under the sale, and to restore the lands to the original proprietors, subject to the recognition of the claims of the appellant. That offer resulted in an arrangement between the Government, the original proprietors, and the appellant, whereby the appellant's right under his lease was to be maintained, as regards a portion of the property covered by the lease, called the Jungle Mehals, but that his right in the other property comprised in the same was to be restored or given up to the original proprietors, and all the rights of the Government were also to be given up to them. In pursuance of that arrangement the appellant took a new lease of the said Jungle Mehals from the original proprietors, at a reduced rent. The respondent, whose right was founded on the antecedent perpetual lease granted by the original proprietors was not a party to that arrangement. He, therefore, instituted the suit out of which the appeal arose for the purpose of displacing the lease held by the appellant under the arrangement made with the Government and the original proprietors, and for possession under his perpetual lease, with mesne profits.

Held, that by S. 30 of Regulation XI of 1822 the perpetual lease of the respondent was determined by the sale for

BENGAL REGULATIONS—(Contd.)

Government Indemnity Reg. XI of 1822, S. 30—
(Contd.)

Government arrears, and that the arrangement by which the lands were restored to the proprietors, subject to the rights of the Government lessees, was in the nature of a compromise, and not such an unconditional restoration as amounted to a reversal of the sale, and the consequent revival of the perpetual lease of the respondent.

It is perfectly clear upon the evidence in this case, that if there was any abandonment at all, it was an abandonment upon terms, and that the respondent, if he adopted the abandonment, must also adopt the terms on which that abandonment was made (466).

Quere, as to what the result would have been if the respondent had sued for the purpose of setting aside the sale, and consequently the lease which was granted to the appellant (464). (*Lord Justice Turner.*) **WATSON v. SREEMUNT LAL KHAN.**

(1854) 5 M. I. A. 447 =
1 Sar. 468.

—Revenue sale under—Tenure of estate subject to—Character of—Effect of sale on.

In 10 M.I.A. 123 it was carefully considered, whether a sale for arrears of revenue of itself merely, and without any act, proceeding, or demonstration of will on the part of the purchaser, altered the character of the tenure. And it was decided, that the sale law had not "that hard and rigid character." It is true that the judgment dealt only with the effect of a sale under Bengal Reg. XIIV of 1793. But what is laid down concerning such a sale may, even *a fortiori*, be predicated of a sale under any of the subsequent sale laws, and, in particular, of one under Reg. XI of 1822. The words of S. 30 of Reg. XI of 1822, far more strongly than those of the earlier Regulation (*i.e.*, that of 1793), import that the estate is not, upon a sale for arrears of revenue, necessarily and *ipso facto*, changed in its nature and incidents. And, if this be so, the repeal of the Regulation which destroys the power to change the estate, must leave its freedom from change, independent of mutual will, unimpaired (270-1). (*Sir James Colville.*) **RAJAH SUTTOSURRUN GHOSAL v. MOHESH CHUNDER MITTER.** (1868) 12 M.I.A. 263 = 11 W.R.P.C. 10 = 2 B.L.R. P.C. 23 = 2 Suth. 180 = 2 Sar. 420.

—Ss. 30 to 33—*Dependent tenures—Annulment of—Heir or assignee of revenue sale purchaser—Right of.*

Quere.—Whether the stringent powers given by Ss. 30 to 33 of Bengal Reg. XI of 1822 to purchasers, *eo nomine* could in any case be exercised by the heirs or assignees of such purchasers. Justice and sound policy alike require that inasmuch as the Law has given them for the particular purpose only of enabling the purchaser again to make the income of the estate an adequate security for the public revenue assessed upon it, and the exercise of them cannot but occasion great hardship to under-tenants, and insecurity to property they should be exercised within a reasonable time. (*Sir James Colville.*) **RAJAH SUTTOSURRUN GHOSAL v. MAHESH CHUNDER MITTER.**

(1868) 12 M. I. A. 263 (271-2) = 11 W. R. P. C. 10 =
2 B. L. R. P. C. 23 = 2 Suth. 180 = 2 Sar. 420.

—Ss. 30, 32 and 33—*Revenue sale purchaser of zemindary—Shikmee talook created before Decennial Settlement and held of Zemindar at fixed rent—Resumption of—Right of.*

In a suit by the purchaser of a zemindary at a sale for arrears of revenue held under Bengal Reg. XI of 1822 for recovery of possession of mouzahs alleged to have formed part of the zemindary, and to have been held *khas* by the defaulting Zemindar at the time of the sale, the defendants alleged that the mouzahs formed a Shikmee talook created before the Decennial Settlement and held of the Zemindar

BENGAL REGULATIONS—(Contd.)**Government Indemnity Reg. XI of 1822, Ss. 30, 32 and 33—(Contd.)**

by mocrerry tenure, *i.e.*, at a fixed rent, not liable to alteration.

Held, on the evidence, reversing the decree appealed from and restoring that of the court below, that the mouzahs formed a *Shikmee Talook* created before the Decennial Settlement and held of the Zemindar by mocrerry tenure at a fixed rent, and were not liable to resumption by a purchaser under Reg. XI of 1822, Ss. 30, 32 and 33. (*Lord Justice Turner.*) **WISE v. BHOOBUN MOYEE DEBIA CHOWDRAINEE.** (1863-5) 10 M. I. A. 165 = 3 W. R. 5 = 2 Sar. 91 = 1 Suth. 563.

—**S. 32—Mofussil talookdars—Who are—Dependent talookdars whose tenures were created subsequent to the settlement if included.**

There is considerable weight in the reasoning in support of the view that mofussil talookdars spoken of in S. 32 of Regulation XI of 1822 must be taken to be such talookdars as are described by S. 5 of Regulation VIII of 1793, who, at the time of the Decennial Settlement, might have engaged directly with Government for the payment of the public revenue assessed on their lands; and even after the settlement, and until that right was taken away by Regulation I of 1801, might have claimed to have separated from the estate of the Zemindar; and that the term does not include dependent talookdars whose tenures have been created since the settlement, they being talookdars, who, under S. 7 of Reg. VIII of 1793, are declared not to have the property in the soil, but to be mere lease-holders (326). (*Sir James Colvile.*) **KHAJAH ASSANOULLAH v. OBHOY CHUNDER ROY.** (1870) 13 M. I. A. 318 = 13 W. R. P. C. 24 = 2 Suth. 306 = 2 Sar. 535.

Grant of Leases Reg. XLIV of 1793.

—**S. 5—Annulment of under-tenures—Enhancement of rent—Right of—Personal to purchaser or extends to his heirs also.**

Quære.—Whether S. 5 of Bengal Reg. XLIV of 1793 is to be construed as giving a power only to the purchaser, or to him and his heirs, or a power attached to the zemindary which passed to subsequent purchasers (148).

The power is given to collect what the former proprietor would have been entitled to demand, if the cancelled engagement had never been made; words which seem to point to something to be done on the change of ownership, not to something to be done after any indefinite lapse of time; and in terms the power is given only to the purchaser himself, as to whom reasons might apply which would not extend to subsequent purchasers from him (148). (*Lord Justice Turner.*) **RANEE SURNOMOYEE v. MAHARAJAH SUTTESCHUNDER ROY BAHADOOR.**

(1864) 10 M. I. A. 123 = 2 W. R. 13 = 2 Sar. 60 = 1 Suth. 548.

—**Construction—Words—“Stands cancelled from the day of sale”—Meaning and effect—Confirmation of sub-tenure by purchaser or his successor—Effect of.**

The respondent contends that by the operation of the words “stands cancelled from the day of sale” in S. 5 of the Regulation, the existing interests of the talookdar, *ipso facto*, ceased to exist, without any act done by the purchaser; that it was incapable of confirmation or being set up by him or his successors; and that where, from the acquiescence of the purchaser or those claiming under him, the possession had remained in the talookdar and those claiming under him undisturbed, and the original rent had been received, no matter for how long a period, or through whatever number of mesne conveyances, it still remained a bare possession at the will of the Zemindar for the time being,

BENGAL REGULATIONS—(Contd.)**Grant of Leases Reg. XLIV of 1793, S. 5—(Contd.)**

and the rent always liable to enhancement. In this hard and literal construction of the words cited above their Lordships do not concur. They think that their meaning is properly to be collected from the policy and intent of the Regulation, from the language used in other parts of the same section, and from the seventh section, which creates an exception out of the provisions of that section (144-5). (*Lord Justice Turner.*) **RANEE SURNOMOYEE v. MAHARAJAH SUTTESCHUNDER ROY BAHADOOR.**

(1864) 10 M. I. A. 123 = 2 W. R. P. C. 13 = 1 Suth. 548 = 2 Sar. 60.

—*If and to what extent in force.*

Quære.—Whether, S. 5 of Bengal Reg. XLIV of 1793, can be held in force for any purpose but that of declaring the general principles upon which all the subsequent legislation has proceeded, namely, that of putting a purchaser at a sale for arrears of revenue, in the position of the party with whom the perpetual settlement of the estate was made.

Their Lordships do not think that a party who has lost the particular rights which were given to him, or to the purchaser whom he represents, by any of the subsequent statutes, can fall back upon the old law which has been so repeatedly modified (272-3). (*Sir James Colvile.*) **RAJAH SUTTOSURRUN GHOSAL v. MOHESH CHUNDER MITTER.**

(1868) 12 M. I. A. 263 = 11 W. R. P. C. 10 = 2 B. L. R. P. C. 23 = 2 Suth. 180 = 2 Sar. 420.

—**Purchaser at sale—Destruction of tenure—Enhancement of rent to Pergunnah rates—Right of.**

The conclusion at which their Lordships have arrived as to the construction of S. 5 of Bengal Regulation XLIV of 1793 is this—that a power was given by it to the purchaser at a Government sale for arrears to avoid the subsisting engagements as to rent, and to increase the rent to that amount at which, according to the established usages and rates of the pergunnah, or district, it would have stood had the cancelled engagement so avoided never existed. This gives it a just and reasonable operation, and virtually it would have none, when the existing rent was already according to the usages and rate of the pergunnah (147).

The object of the Government was that the jumma should be duly paid, and that the means of paying it should not be withdrawn by the improvident grants of the Zemindars who had made default; but cases of default might often arise where no improvident grant had been made, where the talookdars and the ryots held at proper rents, and the default was owing to extravagance, mismanagement, or other causes,—in such cases the Government cannot be supposed to have intended a wanton and unjust disturbance of vested interests. It is true that the section makes no distinction in terms between the two classes of cases, and it would be unsafe in construction to make any such; but the consideration furnishes reason for such limitation, both as to time and extent of operation, as the words will admit, indeed seem to require, in order to give effect to the whole sentence. Now, looking at what follows in the same clause, it is obvious that no such absolute cancellation was intended, for the power expressly and affirmatively given to the purchaser supposes the talookdars and the ryots to remain in all respects as before, except that they become liable to a certain limited increase of rent, “according to the established usages and rates of the pergunnah or district”; words in themselves showing that the section was directed to cases in which grants had been made with reservations of rent below those usages and rates. It is to be observed also that in terms this power is given only to the purchaser himself, which would ordinarily suffice to remedy the mischief in contemplation. The language of the exception, too, in S. 7 shows, that what was aimed at

BENGAL REGULATIONS—(Contd.)**Grant of Leases Reg. XLIV of 1793, S. 5—(Contd.)**

by S. 5, was not the destruction of the tenure, but the increase of rent, under certain specified and equitable limitations (145-7). (*Lord Justice Turner.*) **RANEE SURNOMOYEE v. MAHARAJAH SUTTEESCHUNDER ROY BAHADOOR.** (1864) 10 M.I.A. 123 = 2 W.R. 13 = 2 Sar. 60 = 1 Suth. 548.

—*Purchaser at sale—Enhancement of rent of mesne tenant holding hereditary tenure at fixed rent—Right of—Waiver of—Proof of—Effect of.*

The suit was originally brought by the respondent's father, and the relations of the parties to each other were those of Zemindar and Talookdar, the appellant holding as mesne tenant a portion of the Zemindary. The object of the suit was to enhance the rent at which the appellant held that portion. The appellant did not dispute the respondent's general title, or the relation in which the appellant stood towards him. She insisted that the suit must fail because her tenure was hereditary and at a fixed rent, which the Zemindar had no power to enhance.

The interest which the appellant represented was first created by grant in favour of S at some date prior to the commencement of the 19th century. On parts of the land comprised within his grant, S laid out gardens and erected factories and other buildings, but there was no direct evidence that the grant was made for those purposes. S appeared to have been a Civil Servant of the E. I. C.; and after some years, when leaving India for England, he sold the whole property to the grandfather of the appellant's husband; on his death it descended to the father, and thence in due course to her husband, from whom she inherited it as his widow. A portion of the land during this course of years had been granted to the Government, and a public College erected thereon. And during the whole time of the occupation of these five tenants, the same rent had always been paid.

While the father of the appellant's husband was in possession, the Government revenue payable by the Zemindary fell into arrear, and the property was, therefore, put up to auction; one M became the purchaser, and he acquired the rights which the then subsisting Regulations gave to a purchaser at such a sale. After some time, M sold the Zemindary by private contract to H from whom, on his death, it passed to his widow; from her it was purchased by the respondent's father, who brought the suit.

Held, that, assuming S. 5 of Bengal Regulation XLIV of 1793 to be applicable to the case, it did not support the suit (149).

The sale to M, according to the respondent's own case, took place some time before 1823, and he found those under whom the appellant claims holding the land at an old rent; he did not attempt to disturb the occupation or increase this rent; but received it during all the time he remained owner. He sold by private contract to H, from whom it passed to his widow, and from her again by private contract to the respondent's father. During all this time (and for a considerable period before, so far as appears indeed from the very creation of the tenure—more than 60 years ago), the same rent has always been paid; and there is no evidence that when first imposed—nay, even when the purchase was made, it was not a perfectly adequate rent for the property. If the section in question did not authorise the purchaser to disturb the possession, and left him an option to confirm the existing rate of rent, there seems to be the strongest evidence that he exercised the option in favour of the Talookdar; and even if the same rights passed from him unimpaired to H and in succession to those who claim under him, the evidence is equally strong—nay, as

BENGAL REGULATIONS—(Contd.)**Grant of Leases Reg. XLIV of 1793, S. 5—(Contd.)**

regards H's widow personally, it is stronger (147-8). (*Lord Justice Turner.*) **RANEE SURNOMOYEE v. MAHARAJAH SUTTEESCHUNDER ROY.**

(1864) 10 M.I.A. 123 = 2 W.R. 13 = 2 Sar. 60 = 1 Suth. 548.

—*Repeal of, by subsequent Regulations.*

The respondent relied upon S. 5 of Regulation XLIV of 1793, and contends that, although subsequent Regulations upon the subject have been passed in different language and repealed, this S. 5 of Reg. XLIV of 1793, has never been repealed. *Quære*, whether upon the true construction of all the Regulations taken together this particular section ought to be taken to have been repealed or not (143). (*Lord Justice Turner.*) **RANEE SURNOMOYEE v. MAHARAJAH SUTTEESCHUNDER ROY BAHADOOR.**

(1864) 10 M. I. A. 123 = 2 W. R. 13 = 2 Sar. 60 = 1 Suth. 548.

Inheritance Reg. XI of 1793.

—*Applicability—Family usage continuing—Claim resting upon, and not on peculiar character of zemindari itself or on district or local custom—Reg. X of 1800—Effect.*

Quære, whether, notwithstanding the qualification placed upon Reg. XI of 1793 by Reg. X of 1800, the former Regulation governs a case where the claim rests only on a continuing family usage, and not on the peculiar character of the zemindari itself or on a local or district custom (747). **RAJAH RAJ KISHEN SINGH v. RAMJOY SURMA MOZOOMDAR.** (1872) 2 Suth. 744 = 19 W.R. 8 = 8 M.J. 151.

—*Applicability—Raj—Cases where deed or will executed—Effect in such cases.*

Regulation XI of 1793 is confined to cases in which there is no deed and no will executed. Where there is a deed, or where there is a will, it does not give a validity to that deed or that will, which the deed or will would not otherwise possess, but it leaves it precisely where it stood before. *Quære*, whether the Regulation applies to the case of a Raj. (*Mr. Pemberton Leigh.*) **BABOO GANESH DUTT SINGH v. MAHARAJAH MOHESHUR SINGH.**

(1855) 6 M.I.A. 164 (187-8) = 2 Suth. 20 = 1 Sar. 521.

—*Applicability—Succession opening after July 1794.*

Regulation XI of 1793 provides, that after the 1st of July, 1794, if any Zemindar shall die without a will, etc., and leave two or more heirs, who, by the Mahomedan or Hindu law (according as the parties may be of the former or latter persuasion), may be respectively entitled to succeed to a portion, such heirs shall succeed.

The suit out of which the appeal arose was instituted in January, 1815, for the recovery of the moiety of a Zemindary, to which the appellant claimed to be entitled on the death of his brother A, who died on 28-9-1813, leaving the respondent his widow and three children. That zemindari had formerly belonged to the appellant's father, F, who died in the possession of it in December, 1793. After his death the appellant and his brother A, then minors, were in joint possession of the zemindari, and so continued after their majority in 1799 or 1800 until the demise of A.

Held, that the suit claim being a claim to succeed to A, who died long after July, 1794, not to F, who died before, the succession must be governed by Regulation XI of 1793 (475). (*Mr. Baron Parke.*) **RAJAH DEEDAR HOSSEIN v. RANEE ZUHOOR-UN-NISSA.** (1841) 2 M.I.A. 441 = 2 Suth. 993 = 1 Sar. 217.

—*Applicability—Zemindari—Impartibility—Custom of—Succession in case of.*

BENGAL REGULATIONS—(Contd.)**Inheritance Reg. XI of 1793—(Contd.)**

The existence for a very long time of a family usage of non-division in a zemindari cannot exempt it from the operations of the Regulation XI of 1793, which provides, that after the 1st of July, 1794, if any Zemindar shall die without a will, etc., and leave two or more heirs, who, by the Mahomedan or Hindu law (according as the parties may be of the former or latter persuasion), may be respectively entitled to succeed to a portion, such heirs shall succeed (475). (*Mr. Baron Parke.*) **RAJAH DEEDAR HOSSEIN v. RANEE ZUHOOR-ON-NISSA.**

(1841) 2 M. I. A. 441 = 2 Suth. 993 = 1 Sar. 217.

———Grant by Government in 1790—Incidents of estate subject of—Intention of Government as regards—Evidence—Regulation XI of 1793 if. See **HINDU LAW—IMPARTIBLE ESTATE—CONFISCATION AND RE-GRANT—GOVERNMENT.** (1867) 12 M. I. A. 1 (36-7).

———*Inheritance—Mahomedans of Shiah sect—Law applicable to.*

A, a Mahomedan of the Shiah sect, died leaving a brother, a widow and three children. The brother sued for the recovery from the widow of the properties left by the deceased, and the question was whether the law of succession applicable to the case was that which prevailed amongst the Soonees or Shiahs. Both the litigant parties belonged to the latter sect.

Held that, on the natural and equitable construction of Regulation XI of 1793, the law applicable was that of the sect to which the litigant parties belonged, and that there were no judicial decisions or established practice limiting or controlling its meaning (477-8). (*Mr. Baron Parke.*) **RAJAH DEEDAR HOSSEIN v. RANEE ZUHOOR-ON-NISSA.** (1841) 2 M. I. A. 441 = 2 Suth. 993 = 1 Sar. 217.

———Repeal of, by Bengal Regulation X of 1800—Extent of. See **BENGAL REGULATIONS—INHERITANCE REGULATION X OF 1800—EFFECT ON BENGAL REGULATION XI OF 1793.** (1841) 2 M. I. A. 441 (476).

———**S. 5 Proviso—Object and effect of.**

The proviso to S. 5 of Regulation XI of 1793 was introduced to avoid any retrospective operation of the previous clause, and to prevent any claim by the co-heirs under it, to succeed to an estate which had then devolved entire or should devolve entire before 1st July 1874 (475-6). *Mr. Baron Parke.*) **RAJAH DEEDAR HOSSEIN v. RANEE ZUHOOR-ON-NISSA.** (1841) 2 M. I. A. 441 =

2 Suth. 993 = 1 Sar. 217.

———**S. 15—Inheritance—Mahomedans—Law applicable—Law of sect to which parties belong.**

According to the true construction of S. 15 of Regulation XI of 1793, in the absence of any judicial decisions or established practice limiting or controlling its meaning, the Mahomedan law of succession applicable to each sect ought to prevail as to litigants of that sect. It is not said that one uniform law should be adopted in all cases affecting Mahomedans, but that the Mahomedan law, whatever it is, shall be adopted. If each sect has its own rule according to the Mahomedan law, that rule should be followed with respect to litigants of that sect. Such is the natural construction of this Regulation, and it accords with the just and equitable principle upon which it was founded, and gives effect to the usages of each religion, which it was evidently its object to preserve unchanged (477-8). (*Mr. Baron Parke.*) **RAJAH DEEDAR HOSSEIN v. RANEE ZUHOOR-ON-NISSA.** (1841) 2 M. I. A. 441 = 2 Suth. 993 = 1 Sar. 217.

Inheritance Reg. X of 1800.

———*Applicability—Zemindaries undivided with custom of indivisibility.*

BENGAL REGULATIONS—(Contd.)**Inheritance Reg. X of 1800—(Contd.)**

Bengal Regulation X of 1800 does not apply to undivided zemindaries, in which a custom might prevail that the inheritance should be indivisible, but only to the Jungle Mahals, and other entire districts, where local custom prevails. The construction contended for, viz., that every individual zemindary in which the custom had been that it should descend entire was exempted, would repeal the Regulation XI of 1793 altogether; whereas it is clear that it was intended to be partially repealed only (476). (*Mr. Baron Parke.*) **RAJAH DEEDAR HOSSEIN v. RANEE ZUHOOR-ON-NISSA.** (1841) 2 M. I. A. 441 =

2 Suth. 993 = 1 Sar. 217.

———*Effect on Bengal Regulation XI of 1793—Latter not wholly repealed by former.*

Bengal Regulation X of 1800 was not intended to repeal Regulation XI of 1793 altogether; it is clear that the latter regulation was intended to be partially repealed only (476). (*Mr. Baron Parke.*) **RAJAH DEEDAR HOSSEIN v. RANEE ZUHOOR-ON-NISSA.** (1841) 2 M. I. A. 441 =

2 Suth. 993 = 1 Sar. 217.

Interest Reg. XV of 1793.

———*Applicability—Arrears paid in part—Case of.*

Regulation XV of 1793, which hinders persons from recovering arrears of interest of more than one hundred per cent. applies only to arrears which have not been any part of them paid (308). (*Sir William H. Maule.*) **BAMUNDOSS MOOKERJEA v. OMEISH CHUNDER RAE.** (1856) 6 M. I. A. 289 = 1 Sar. 542

———*Interest—Suit for—Dismissal of, on ground of usury—Principal—Suit subsequent for—Maintainability—Res judicata.*

In a case in which the Court below had dismissed an action which was, in substance, for the recovery of interest due under an agreement held to be a shift for usury within the meaning of Bengal Regulation XV of 1793, the plaintiff-appellant contended that, as the action included both principal and interest, if their Lordships were disposed to affirm the decree below, their Lordships should make a declaration that the principal might be recovered, although the interest could not be, on the ground of usury, or they should in their judgment declare that such affirmance was without prejudice to the plaintiff's right to bring a fresh action in respect of the principal. The plaintiff was evidently apprehensive that the decree dismissing the suit might be pleaded as a bar to a fresh suit for the principal.

Their Lordships declined to make the declaration prayed for, observing on the question of *res judicata* as follows:—"It may be strongly argued that the question of usury has been decided in this case; but if the question has not arisen, whether the principal may be recovered, without interest, then the plea of *res judicata* cannot be applied to a subsequent proceeding which has for its object to recover the principal, without interest; because if that question does not arise here, it cannot be adjudged here, and the plea *res judicata*, can be no bar to a subsequent proceeding (219). (*Lord Campbell.*) **WISE v. KISHENKOOMAR BONS.** (1847) 4 M. I. A. 201.

———*Mortgage—Redemption—Accounts—Lease part of same transaction as mortgage and part of security—Rent fixed in—Actual rents and profits—Mortgagee's liability for.*

The mother of a minor executed a mortgage of the minor's estate. As part of the same transaction she granted a lease of the mortgaged property to the mortgagee, the lease being intended to create, not a distinct estate, but only a security for the mortgage money.

In a suit brought by the minor, after attaining majority to set aside the mortgage, and to recover possession of the

BENGAL REGULATIONS—(Contd.)**Interest Reg. XV of 1793—(Contd.)**

mortgaged property with mesne profits, the question was whether, in taking the accounts between the parties, the mortgagee was to be charged, as mortgagee in possession, with the actual rents and profits, or only with the rent fixed by the lease.

Held, that the decree below, which directed an account of the actual rents and profits, proceeded on the right principle, and was in accordance with the nature of the security and the spirit of the Regulations (Reg. XV of 1793).

It is certainly possible that, by reason of the provision that the rent shall be a fixed one, notwithstanding losses and casualties, the mortgagee might be a loser, in his character of lessee, on an account calculated on this basis; but, notwithstanding that contingency, as it was not meant that the principal should be risked, it was virtually a provision to exclude an account of the rents and profits (421-2). (*Lord Justice Knight Bruce.*) **HUNOONAN PERSAUD PANDAY v. MUSST. BABOOEE MUNRAJ KOONWEREE.**

(1856) 6 M. I. A. 393 = 18 W. R. 81 = 2 Suth. 29 = 1 Sar. 552 = Sevestre 253 N.

—Mortgage with possession—Redemption—Forfeiture—Declaration of—Suits for—Natures of—Limitation applicable to—Reliefs obtainable in—Distinction. *See* MORTGAGE—USUFRUCTUARY MORTGAGE—REDEMPTION—FORFEITURE. (1868) 12 M.I.A. 157 (189).

—S. 5—Applicability—S. 9—Cases comprised under—Stipulated in S. 5—Meaning.

Section 5 of Bengal Regulation XV of 1793 declares that if a lower rate of interest than any of the rates authorised to be awarded shall have been stipulated between the parties, no higher rate of interest than the rate so stipulated is to be decreed. This plainly relates to the real agreement between the parties, constituting an actual legal stipulation; for it constitutes a limitation of the 4th section, as well as of the others. It does not extend to the cases comprised within S. 9, where a device or means are used to disguise the real contract as to interest, for the provisions are inconsistent. The language of S. 5 would be violated by a construction of the word "stipulated," which would confine it to "expressed" (188). (*Lord Chelmsford.*) **SHAH MUKHUN LALL v. BABOO SREE KISHEN SINGH.**

(1868) 12 M. I. A. 157 = 11 W. R. P. C. 19 = 2 B. L. R. P. C. 44 = 2 Suth. 190 = 2 Sar. 403.

—Words—"Stipulated"—Meaning of. *See* UNDER THIS REGULATION, S. 5—APPLICABILITY.

(1868) 12 M. I. A. 157 (188).

—Ss. 6, 7 and 9—Applicability—Contract—Suit to enforce—Suit for relief against.

Ss. 6, 7 and 9 of Regulation XV of 1793 apply in terms to remedies in suits brought to enforce, not to suits brought for relief against, a contract (188). (*Lord Chelmsford.*) **SHAH MUKHUN LALL v. BABOO SREE KISHEN SINGH.**

(1868) 12 M. I. A. 157 = 11 W. R. P. C. 19 = 2 B. L. R. P. C. 44 = 2 Suth. 190 = 2 Sar. 403.

—Ss. 8 and 9—Usury—Device for—Transaction amounting to—Interest—Recovery of, in such a case—Right of.

In 1831, K applied to the appellant for a loan to be paid off in the course of 6 years. The appellant consented to advance K the amount required, upon having the repayment thereof properly secured to him. It was ultimately agreed that the loan should be made, and that the securities to be given for the repayment thereof, with interest, should be the personal bond of K, and a lease of K's zemindary, to be made to M, the appellant's gomasta or manager, accompanied by an order from K, whereby K should direct M to pay to the appellant, principal and interest at certain times which were agreed upon. In pursuance of the agree-

BENGAL REGULATIONS—(Contd.)**Interest Reg. XV of 1793, Ss. 8 and 9—(Contd.)**

ment, the appellant, on the 29th of May, 1831, lent to K, Rs. 20,000, and K gave his bond to the appellant, whereby he became bound to repay that sum, with interest, after the rate of 1 per cent. per month, by the month of March, 1837.

At the same time, in pursuance of the same agreement, K executed a lease of his lands and zemindary to M. This lease was accompanied by a deed of possession, and, as agreed upon, it was also accompanied by an order for transfer of payment, both of which instruments were given by K to M. M was let into possession and remained in such possession for about 8 months. On 15th January, 1832, a sub-lease of the premises was made by M to S, and a counter-part of such sub-lease was signed and given by S to M. Annexed to the sub-lease was the security-bond of K, whereby he became bound to M for the due performance of the conditions of the sub-lease.

S and K, his surety, paid only portions of what was due from them, according to this agreement, and M instituted the suit out of which the appeal arose against S and K for the recovery of the arrears payable to him.

The question for decision was whether there was an usurious agreement between the parties to the suit, whether the bond, the lease, and the sub-lease, were a mere shift for usury, it being admitted that, if they were, the action could not be maintained, at least, to recover the interest by reason of the provisions of Ss. 8 and 9 of Bengal Regulation XV of 1793.

Held, affirming the Courts below, that the bond, the lease, and the sub-lease, were a mere shift for usury (218).

This case seems to their Lordships to be a case free from all doubt, *res ipsa loquitur*. The written documents raise a case of very great suspicion, and they can hardly be opened without believing that they were intended to cover an usurious contract. That suspicion is proved to be the fact by a number of witnesses, who substantially prove, that there was an agreement between these parties that more than the legal interest should be reserved, and that these instruments were executed for the purpose of securing that illegal interest. We see no reason for disbelieving those witnesses; and if they are believed, it is conceded that the defence is established (218). (*Lord Campbell.*) **WISE v. KISHENKOOMAR BONS.**

(1847) 4 M. I. A. 201.

—Usury—Law of—Device to evade—Transactions amounting to.

In a case in which money had been advanced by A to B and others, the repayments, by instalments extending over a period of 11 years, of the principal and interest at 12 per cent. per annum, calculated up to a certain date, was secured by three instruments, consisting of (1) a usufructuary lease, (2) an under-lease agreement, and (3) a security bond. The suit was on foot of the securities for the recovery of the balance found due on the expiration of the stipulated time for payment. The plea in defence was that the lease and under-lease were a fraudulent contrivance to cover illegal interest, and, therefore, void under Ss. 8 and 9 of Bengal Reg. XV of 1793.

Held, reversing the Court below, in the circumstances, and from the accounts, that the transaction was not a device, or evasion of the law of usury, within the meaning of that Regulation. (*Lord Chelmsford.*) **ANUND MOHUN PAL CHOWDHURY v. KISHEN CHUNDER BANNERJEA.**

(1860) 8 M. I. A. 358 = 1 Sar. 765.

—S. 9—Effect—Usurious contract if void—S. 8—Effect of—Distinction.

Section 9 of Reg. XV of 1793 does not declare the contract itself void, nor direct any pledge to be returned, without redemption. The section is one in *in panam* against the concealment of usury; for the open violation of

BENGAL REGULATIONS—(Contd.)**Interest Reg. XV of 1793, S 9—(Contd.)**

the Regulation entails, under S. 8, only a forfeiture of interest. If the 9th section were so extended by construction as to invalidate the contract itself, and make it, and the conveyance also obtained under it, null and void, then, inasmuch as there are no saving words, an innocent purchaser without notice, from the mortgagee, by assignment of the pledge, would be unable to retain it, even for the just debt and legal interest (188-9). (*Lord Chelmsford.*) **SHAH MUKHUN LALL v. BABOO SREE KISHEN SINGH.**

(1868) 12 M. I. A. 157 = 11 W. R. P. C. 19 = 2 B. L. R. P. C. 44 = 2 Suth. 190 = 2 Sar. 403.

—*Usury—Interest sued for disallowed on ground of—Principal—Decree for, or declaration of right to, in such a case—Permissibility.*

We are asked, at all events, to pronounce a declaration whereby the principal is to be recovered, although the interest may not, on the ground of usury. But it seems to their Lordships quite clear, that it is utterly impossible for them to pronounce such a judgment in this action, because it is an action which is, in substance, brought to recover the interest due on a loan; and S. 9 of Bengal Reg. XV of 1793 expressly requires that, in such an action, no other judgment should be given but for the dismissal of the suit the costs to be paid by the plaintiff. If, therefore, in this case, we were to pronounce a judgment whereby the principal should be recovered, without interest, such a judgment would be in complete defiance of that Regulation, by which we are bound (218-9).

We are, then, called upon to pronounce a special declaration respecting the right to bring a fresh action. Their Lordships are of opinion, that they are not at all called upon to pronounce any special declaration, but to leave this judgment to have its legal effect. If the judgment is a bar to any future proceeding, there is no reason why it should not have that operation (219). (*Lord Campbell.*) **WISE v. KISHENKOOMAR BONS.**

(1847) 4 M. I. A. 201.

—*Usury—Transaction tainted with—Bond, lease and under-lease.*

A granted a bond to B to secure an advance of money, C acting as B's agent. A lease was afterwards granted by A to D, a servant of C, at a colorable rent, and, subsequently, an under-lease was made by D to E, a relative of A, the consideration for which was also colorable, and made with a view to elude the usury laws.

Held, that the bond, the lease, and the under-lease formed one entire transaction, which was tainted with usury (492-3). (*Lord Justice Giffard.*) **WISE v. JUGGOBUNDHOO BOSE.**

(1869) 12 M. I. A. 477 = 2 B. L. R. P. C. 69 = 2 Sar. 459.

—*Usury laws—Mortgage, lease and agreement entered into to evade—Mortgagee's rights in case of.*

The original plaintiffs, the mortgagors, sued the representatives of the original mortgagees, and also one K, the gomasta of the mortgagees' firm, to cancel on redemption three several instruments, *viz.*, the mortgage-deed, lease, and agreement named in the plaint. Those instruments the plaintiffs alleged to constitute one mortgage security of the mortgagees-defendants. All the defendants asserted, however, as to two of those instruments, *viz.*, the lease and the agreement, a different title and interest, conferring a separate interest, as distinct from the Bankers, on their gomasta, the last defendant.

Held, that the three instruments were entered into with a view to evade the usury laws by a device or means, within the meaning of S. 9 of Reg. XV of 1793; and that the plaintiffs were entitled to redeem at any time, though before the expiration of the twenty years' term created by the

BENGAL REGULATIONS—(Contd.)**Interest Reg. XV of 1793, S 9—(Contd.)**

lease, on payment or satisfaction of all that might be due on the mortgage securities for principal money interest and costs, such interest to be calculated at 12 per cent (200-1). (*Lord Chelmsford.*) **SHAH MUKHUN LALL v. BABOO SREEKISHEN SINGH.**

(1868) 12 M. I. A. 157 = 11 W. R. P. C. 19 = 2 B. L. R. P. C. 44 = 2 Suth. 190 = 2 Sar. 403.

—*Ss. 9 and 8—Applicability and effect—Usurious contract—Suit on—Principal—Decree for—Validity.*

S. 8 of Bengal Regulation XV of 1793 deals with the case in which the usurious interest is disclosed on the face of the instrument, and is different to S. 9. There might be a very good reason for that. There might well be, where there was no fraud, and where the whole thing was disclosed, a right to recover the principal, whereas, in a case where there was fraud, that right might be taken away. Under S. 9 the Court must dismiss the suit, so far as it has relation to a usurious contract, though of course it would be different, if there was one count on one transaction, and another count upon another and a totally different transaction. To pronounce a judgment whereby the principal should be recovered, without interest, would be in complete defiance of S. 9 (493-4). (*Lord Justice Giffard.*) **WISE v. JUGGOBUNDHOO BOSE.**

(1869) 12 M. I. A. 477 = 2 B. L. R. P. C. 69 = 2 Sar. 459.

—*S. 10—Applicability—Mortgage—Setting aside of, and restitution of pledge on terms of redemption—Mortgagor's suit for—Interest allowed to mortgagee—Rate of.*

In this case the original plaintiffs, the mortgagors (Sings), sued the representatives of the original mortgagees (Lalls) and their gomastah R to cancel, on redemption, three several instruments, *viz.*, a mortgage-deed, lease, and agreement. These instruments the plaintiffs alleged to constitute one mortgage security of the Lalls. All the defendants asserted, however, as to the lease and the agreement, a different title and interest, conferring a separate interest, as distinct from the Lalls, on the gomastah. The lease bore date the 16th May, 1837. It was for twenty years, and reserved a rent of Rs. 24,858 payable to the Sings by the gomastah.

The mortgage deed bore date the 15th June 1837, and pledged the same property also for twenty years to the Lalls, to secure a loan of Rs. 1,50,000 from them to the Sings. The interest reserved was 9 per cent. Ostensibly the mortgagees were entitled to the rent alone, the surplus of which, after deducting the Government revenue, left a balance of Rs. 13,500 exactly the sum calculable as interest on the loan at 9 per cent. The gomastah granted, as apparently a subsidiary arrangement, sub-leases to certain nominees of the mortgagors, at rents aggregating Rs. 35,067; and the mortgagors guaranteed to him those receipts of rents. Ostensibly, therefore, the several instruments evidenced a mortgage transaction providing only for interest alone from the usufruct, leaving the principal debt to be paid otherwise in full, and a beneficial lease in the gomastah yielding an annual profit of Rs. 13,200. All the defendants insisted that the ostensible was also the real character of the instruments. The third instrument, namely, the agreement, was executed by the Sings to the gomastah on the 29th August, 1837, as a security to recover certain losses incurred or anticipated from adverse claims, for the due payments of their rents by the sub-lessees, and for a further advance of Rs. 7,000 at 12 per cent. The plaintiffs sought also to recover possession alleging the mortgagees, the Lalls, whom they treated as mortgagees in possession, to be satisfied from the usufruct, and further claimed as mesne profits a small alleged surplus from the same source. The claim to redeem before the twenty years were past was denied in respect of

BENGAL REGULATIONS—(Contd.)**Interest Reg. XV of 1793, S. 10—(Contd.)**

all that the lease covered, which was the whole that the mortgage deed covered. The suit further raised these questions: at what rate of interest, whether 9 per cent. or a higher rate, the plaintiffs were entitled at any time to redeem; whether the loan was at usurious interest; and whether the several instruments were a device or means within S. 9 of Regulation XV of 1793 to evade the usury laws.

Held, that S. 10 of the Regulation XV of 1793 was the only section at all applicable to the suit, which was brought to set aside plaintiffs' contract, and to have restitution of the pledge on terms of redemption; and that interest should be calculated at the higher rate of 12 per cent. (190-2).

(*Lord Chelmsford.*) **SHAH MUKHUN LALL v. BABOO SREE KISHEN SINGH.** (1868) 12 M. I. A. 157 =

11 W. R. P. C. 19 = 2 B. L. R. P. C. 44 =

2 Suth. 190 = 2 Sar. 403.

—**S. 11—Mortgagee—Accounts of receipts from mortgaged property—Liability to keep and furnish—Nature and extent of.**

Under S. 11 of Bengal Regulation XV of 1793 mortgagees are bound to keep an account of the gross receipts from the property mortgaged, and also the expenses of management and preservation. Some difficulties might attend a very rigid compliance with this Regulation. Their Lordships desire to enforce, by everything which may fall from them on the subject, the duty, as well as the policy and prudence, of keeping as full, complete, and plain an account of the transactions attending the management and receipts of an estate mortgaged as the nature of the case will admit. It is obvious, however, that the language of the section which applies to the common case, must receive a construction such as may suffice to accommodate its strict salutary provisions to the variable and different natures of estates and possession. The gross receipts must be such as the mortgagor himself, previous the mortgage, would have been entitled to, and if he could not, by reason of an intervening lease, call for the account of the collections, neither can his mortgagee; and also, if, at the time of the mortgage, a valid engagement, not designed to exclude accounting, is made by common consent qualifying the nature of the usufructuary possession the account of the receipts must be subject to that modification. The terms of the law are evidently not inflexible terms. (*Lord Chelmsford.*) **SHAH MUKHUN LALL v. BABOO SREE KISHEN SINGH.**

(1868) 12 M. I. A. 157 (194-5) = 11 W. R. P. C. 19 = 2 B. L. R. P. C. 44 = 2 Suth. 190 = 2 Sar. 403.

—**Mortgagee—Accounts of receipts from mortgaged property—Verification by Manager of—Sufficiency of—Maxim—Qui facit per alium facit per se—Application of.**

The provision in S. 11 of Bengal Regulation XV of 1793 as to the attestation of the truth of the accounts must necessarily be flexible; for the mortgagee is to verify only his gross receipts and his expenditure, not the rents, nor the extent of arrears, nor the causes of such arrears; he is not, in fact, directed, then, to make out and verify such an account as might be established against him in a hostile suit, but only his gross receipts and his expenditure. The common rule *qui facit per alium facit per se*, would apply to him. What is done by his Agent is done by himself, and the accounts of the property managed by the Agent, though prepared by the Agent, are the Principal's accounts. He, though by delegation, must deliver in the accounts, and he must in some mode swear or depose that they are true and authentic. Must it necessarily be by his own personal oath in all cases? How can he do that if he knows nothing at all about them? He may have no belief, and may even suspect them to be false;

BENGAL REGULATIONS—(Contd.)**Interest Reg. XV of 1793, S. 11—(Contd.)**

for he may suppose himself to have been deceived by his Agent. Can the Legislature seriously be supposed to have contemplated anything so immoral as that a man should swear positively to knowledge of that of which he has, and can have, no personal knowledge. If it be urged that he may swear to his knowledge and belief, still that rational permission is a modification and expansion of the terms of the law. The words are without any exception, and in terms apply to women, infants, lunatics, persons out of the country and others managing necessarily remote possessions, by Agents whom they must employ, and in whom they may confide. Can the Indian Legislature, which recognized gomasthas by legislation, be supposed ignorant of their large authority and responsibility? And can it have resolved to make this direction to take an oath imperatively obligatory on every mortgagee alike in every conceivable case? Their Lordships think otherwise. They think that the language which, like other provisions of the earlier Regulations, is curt and applied to the more common cases, must, to preserve even the spirit of the enactment itself, be construed reasonably, as admitting, in case of necessity, of some delegation also in the person deputed to perform the duty of attesting the accounts. If the General Manager who did all, and knows all, with whom the mortgagors, with that knowledge, contracted, whose name is used, whose accounts in one sense they are, and who, far more than mere representatives, knowing nothing of their own knowledge of the transactions, satisfies the spirit of the law by swearing to the truth of the accounts, it is such a reasonable compliance with the spirit of the law, at least, that its performance, in a case circumstanced like the present, by a substitute, furnishes no ground whatever for suspecting malpractice or designed evasion of the law, and with that alone their Lordships are concerned in this case, since the mere mode of the verification has no other importance in this case, than as it raises a case of suspicion against the accounts themselves. (*Lord Chelmsford.*) **SHAH MUKHUN LALL v. BABOO SREE KISHEN SINGH.** (1868) 12 M. I. A. 157 (195-7) =

11 W. R. P. C. 19 = 2 B. L. R. P. C. 44 = 2 Suth. 190 = 2 Sar. 403.

—*Repeal of, by Act XXVIII of 1855.*

Their Lordships incline to think that S. 11 of Bengal Regulation XV of 1793 with respect to the non-production of accounts of receipts by mortgagees in possession must, as regards this suit (brought by mortgagors under an usufructuary mortgage of the year 1837 to establish their right to redeem, for cancellation of the mortgage deed, possession of the lands, and payment of the surplus), be taken to be still in force and unrepealed by Act XXVIII of 1855. It is, however, unnecessary to decide the point (194). (*Lord Chelmsford.*) **SHAH MUKHUN LALL v. BABOO SREE KISHEN SINGH.** (1868) 12 M. I. A. 157 = 11 W. R. P. C. 19 = 2 B. L. R. P. C. 44 = 2 Suth. 190 = 2 Sar. 403.

Interest, Ceded Provinces Reg. XXXIV of 1803.

—**S. 5—Construction No. 359—Effect—Redemption suit—Mortgagee in possession resisting—Rights of.**

The effect of construction No. 359 is, that when the creditor sues for his principal and interest (the latter being equal or more than equal at the commencement of the suit to the amount of principal), he is not debarred from charging subsequent interest for the period during which he is kept out of his money by his debtor's resistance of the demand. Neither the rule nor the reason of it, however, applies to a case in which a mortgagee in possession is not a party suing for the money, but the party resisting by every means in his power a claim to redemption, and the final

BENGAL REGULATIONS—(Contd.)**Interest, Ceded Provinces Reg. XXXIV of 1803, S. 5—(Contd.)**

settlement of the account. (*Sir James W. Colville.*) **NAWAB AZIMUT ALI KHAN v. JOWAHIR SINGH.**

(1870) 13 M. I. A. 404 (413-4) = 14 W. R. P. C. 17 = 2 Suth. 346 = 2 Sar. 573.

— **Ss. 9 and 10—Mortgagee's liability to render accounts—Contract relieving him from—Validity of.**

While Reg. XXXIV of 1803 was in force, a mortgagee was made of what was called the malikana interest of certain Talookdars, the amount of that malikana being, during the pendency of the then settlement, a fixed and known sum. The mortgage deed provided that the mortgagee should take possession of the mortgaged villages, collect the jama fixed by the Government from the villages of the Ilaka, and himself pay the revenue to the Government, that he might bring to his own use the income of the malikana due to the mortgagor, crediting every harvest Rs. 1,656 per year as interest on the amount of consideration on the mortgage, at the rate of 1 per cent. per mensem, and take the remainder, Rs. 565, the surplus of the malikana, as his own collection fee and pay off the agent and peons employed for making collections in the villages; that is, he might credit the income of the malikana to the payment of two items—one, the interest on the mortgage amount, and the other the expenses incurred in making collections in the villages. The mortgage deed concluded thus: "We have agreed that the amount of interest of the mortgage consideration, and the expenses of making collections in the villages, should be equal to (or cover) the malikana profits, and we have no longer any right to claim a rendition of the account of mesne profits accruing during the time of the mortgagee's possession."

The Courts below found that the stipulation was not in the nature of a contract for interest; that there was no evasion thereby of the law, or any contract to give usurious interest; that the Rs. 565 constituted a percentage which was *bona fide* agreed to be allowed to the mortgagees for the expense and risk of collecting; and which, being only about 5½ per cent., was certainly neither exorbitant nor unusual. Accordingly they held that the mortgagee was relieved by that stipulation of his liability to render the account mentioned in Ss. 9 and 10 of the Regulation.

Their Lordships affirmed the judgments below (53-4).

If the amounts received by the mortgagees had been fluctuating they might have been bound to file the statutory accounts. Those accounts might have been necessary to enable the Court to decide on the validity of the contract set up. In the present case, however, it is clear that the only sum which the mortgagees could receive, *ultra* the interest, was a fixed and unvarying balance of Rs. 565, and this the Courts have found to be a sum which the parties might legitimately agree to fix as the allowance to be made for the costs of collection (54). (*Sir James Colville.*) **BADRI PARSHAD v. BABU MURLIDHUR.** (1879) 7 I. A. 51 = 2 A. 593 (597-8) = 6 C. L. R. 257 = 4 Sar. 100 = 3 Suth. 708.

— The contention that a mortgagee cannot by contract relieve himself from the statutory obligation of filing accounts under Ss. 9 and 10 of Reg. XXXIV of 1803 is not well-founded. There is nothing in the Regulation which says expressly that the accounts must be filed whether they are required for the determination of the rights of the parties in the suit or not. S. 15 of the Regulation, on the other hand, indicates the contrary (53-4). (*Sir James Colville.*) **BADRI PARSHAD v. BABU MURLIDHUR.** (1879) 7 I. A. 51 = 2 A. 593 (597) = 6 C. L. R. 257 = 4 Sar. 100 = 3 Suth. 708.

— **Law before and after Regulation.**

Both previous to Regulation XXXIV of 1803, and since the repeal of the usury laws, a contract between a mortgagor and a mortgagee by which the mortgagee should take the

BENGAL REGULATIONS—(Contd.)**Interest, Ceded Provinces Reg. XXXIV of 1803, Ss. 9 and 10—(Contd.)**

mesne profits in lieu of interest, and so be saved from having to account for them would be a good and legal contract. That Regulation, however, limited the rate of interest to 12 per cent. and contained provisions under which securities might be avoided if they contracted directly or indirectly for a higher rate of interest; and the taking of the accounts between mortgagor and mortgagee was regulated by Ss. 9 and 10 of the Regulation. A stipulation, therefore, in a mortgage made while the Regulation was in force, made in evasion of the usury law introduced by the Regulation, and as a contrivance for giving the mortgagees a higher rate of interest than that to which they were by law entitled, would be a bad contract, and could not prevent the accounts from being taken in the usual manner (53). (*Sir James Colville.*) **BADRI PARSHAD v. BABU MURLIDHUR.**

(1879) 7 I. A. 51 = 2 A. 593 (596-7) = 6 C. L. R. 257 = 4 Sar. 100 = 3 Suth. 708.

Land Conditional Sales Reg. I of 1798.

— **Bengal Land Redemption and Foreclosure Regulation XVII of 1806—Applicability and object of.**

Bengal Regulations I of 1798 and XVII of 1806 apply to cases where there is a stipulation that unless the money borrowed be repaid, with or without interest, within a fixed period the sale should become absolute, and were designed to relieve the mortgagor from the necessity of proving that he had tendered, or was ready and willing to pay, the money due within the time limited, especially in the case where the fact of the tender was denied by the lender, and also to afford the mortgagor the means of establishing before a Court of Judicature that he had in fact made the tender, or was willing to pay the amount due within the time limited, or to have it determined whether his having omitted to do so made the sale absolute (290). (*Lord Atkinson.*) **JHANDA SINGH v. WAHID-UD-DIN.** (1916) 43 I. A. 284 =

38 A. 570 (577) = 14 A. L. J. 1189 =

20 M. L. T. 529 = (1916) 2 M. W. N. 570 =

21 C. W. N. 66 = 25 C. L. J. 524 = 5 L. W. 189 =

19 Bom. L. R. 1 = 36 I. C. 38 = 31 M. L. J. 750.

— **S. 2—Deposit under—Object of.**

The object of S. 2 of Bengal Regulation of 1798 was to relieve mortgagors seeking to redeem, from the difficulties of proving a tender, by enabling them to pay the proper amount into Court (349). (*Sir James Colville.*) **FORBES v. AMEERONISSA BEGUM.**

(1865) 10 M. I. A. 340 = 5 W. R. 47 =

1 Suth. 621 = 2 Sar. 153.

Land Mortgage Redemption and Foreclosure Reg. XVII of 1806.

— **Applicability and effect—Bengal Land Conditional Sales Reg. I of 1798—Distinction.** See **BENGAL REGULATIONS—LAND CONDITIONAL SALES REG. I OF 1798—BENGAL LAND REDEMPTION AND FORECLOSURE REGULATION.** (1916) 43 I. A. 284 (290) = 38 A. 570 (577).

— **Foreclosure—Proceedings for—Limitation.** See **BENGAL REGULATIONS—ZILLAH COURTS REG. III OF 1793, S. 14.**

— **Mortgage in general use at time of—Form of—Alteration in, subsequent to Regulation.**

At the time when Reg. XVII of 1806 was enacted, the form of security in general use throughout the Presidency of Bengal was simply a conditional sale. The conveyance to the lender was in terms absolute but it was qualified by a proviso imposing the condition that the borrower should have the right to demand a reconveyance, if he repaid the principal of the loan with interest, upon a future day specified. Until that day arrived, the conveyance consti-

BENGAL REGULATIONS—(Contd.)**Land Mortgage Redemption and Foreclosure Reg. XVII of 1806—(Contd.)**

tuted a right in security and nothing more. If it passed without the borrower having made payment, or having taken any judicial proceedings with that view, the conveyance at once became absolute in favour of the lender, without the necessity of his taking any step towards foreclosure. The law of Bengal did not recognise the English rule of "once a mortgage always a mortgage until judicial foreclosure" (189-90).

Since the date of the Regulation conveyancers in the Presidency of Bengal have borrowed a variety of penal and other clauses from England, and have superinduced these upon the older and simpler form of conditional sale; and the application of S. 8 of the Regulation to the modern and more complex style of deeds has on more than one occasion been considered by the Indian Courts (190). (*Lord Watson.*) **KISHORI MOHUN ROY v. GUNGA BAHU DEBI.**

(1895) 22 I. A. 183 = 23 C. 228 (244-5) = 6 Sar. 649 = 5 M. L. J. 261.

———*Mortgagee who has foreclosed mortgage and made conditional sale absolute—Perfection of title of—Step to be taken for.*

It is settled law that a mortgagee after having done all that Regulation XVII of 1806 requires to be done in order to foreclose the mortgage and make the conditional sale absolute, must bring a regular suit to recover possession if he is out of possession, or to obtain a declaration of his absolute title if he is in possession (350-1). (*Sir James W. Colville.*) **FORBES v. AMEERONISSA BEGUM.**

(1865) 10 M. I. A. 340 = 5 W. R. P. C. 47 = 1 Suth. 621 = 2 Sar. 153.

———**S. 7—Notice of foreclosure—Service of, on occupant of mortgaged property claiming to have purchased same from mortgagor—Effect—Occupant's title to redeem—Mortgagee's right to dispute—Estoppel.**

The service of notice of foreclosure on the occupant of the mortgaged property (a party who claimed as purchaser from the mortgagor, but who had not established his title), does not estop the mortgagee from disputing the occupant's title to redeem the mortgaged premises.

The mortgagee cannot tell the exact nature of an occupant's title in all cases, nor how far he may be entitled, with the mortgagor's consent, to tender in his name. It is best to have a general rule, and service on the occupant is calculated to prevent all errors. (*Lord Kingsdown.*) **PRANNATH ROY CHOWDRY v. ROOKEA BEGUM.**

(1859) 7 M. I. A. 323 (359) = 4 W. R. 37 = 1 Suth. 367 = 1 Sar. 692.

———**Ss. 7 and 8—Deposit of mortgage-money under—Object of.**

The meaning of the direction in Ss. 7 and 8 of Bengal Regulation XVII of 1806 that the money may be paid into Court clearly is, that the mortgagor may have adequate and lasting evidence of that which is put in place of a tender, and the mortgagee the security and advantage of a deposit in acknowledgment of the title (358-9). (*Lord Kingsdown.*) **PRANNATH ROY CHOWDRY v. ROOKEA BEGUM.**

(1859) 7 M. I. A. 323 = 4 W. R. 37 = 1 Suth. 367 = 1 Sar. 692.

———*Person without title to redeem—Deposit of mortgage-money by—Right of.*

The mortgagee is not bound to accept a tender of the mortgage-money made by one who has no title to redeem the mortgage, and who does not offer it with due consent, in the name of the heir of the mortgagor (359). (*Lord Kingsdown.*) **PRANNATH ROY CHOWDRY v. ROOKEA BEGUM.**

(1859) 7 M. I. A. 323 = 4 W. R. 37 = 1 Suth. 367 = 1 Sar. 692.

BENGAL REGULATIONS—(Contd.)**Land Mortgage Redemption and Foreclosure Reg. XVII of 1806, Ss. 7 and 8—(Contd.)**

———*Validity of deposit under—Dispute of mortgagee's title—Deposit accompanied by.*

An occupant of the mortgaged property paid the mortgage-money into Court, and directed it to be paid out to the mortgagee; but, at the same time in his petition to the Court, he disputed the validity of the mortgagee's title to foreclose, and expressed an intention, amounting to a notice, to sue the mortgagee to recover back the very money which he was tendering.

Held, that the tender was not a good tender, or such a tender as was contemplated by Ss. 7 and 8 of Bengal Regulation XVII of 1806 (358-9). (*Lord Kingsdown.*) **PRANNATH ROY CHOWDRY v. ROOKEA BEGUM.**

(1859) 7 M. I. A. 323 = 4 W. R. 37 = 1 Suth. 367 = 1 Sar. 692.

———*Interest on mortgage money—Failure to deposit as required by S. 7—Effect—Mortgagee not obtaining possession—Case of.*

The suit was for redemption of a mortgage by conditional sale dated 14-3-1868.

On 23-4-1875, after the expiration of the term fixed by the mortgage, the mortgagee filed a petition under Bengal Reg. XVII of 1806, in which he claimed a certain sum as due for principal and interest. Within a year after service of the notification of the foreclosure petition the appellant (mortgagor) deposited the principal sum and interest for the last year, with a petition alleging that the interest for the previous years was, according to the condition, to be recovered by a separate suit; and he thereupon brought the suit out of which the appeal arose. Admittedly much more than one year's interest was due on the date of the deposit.

Held, that the mortgagor not having done what was necessary by the terms of the Regulation to entitle him to the redemption his suit must be dismissed.

The words of S. 7 of the Regulation are, that where the mortgagee has not been put in possession of the mortgaged property (which was the case in this mortgage), the payment or established tender of the principal sum lent, with any interest due thereupon, shall entitle the mortgagor to the redemption of his property before the mortgage is finally foreclosed in the manner provided by the 8th section. That section gives the mortgagor one year from the date of the notification to redeem the property, and says that if he does not do so in the manner provided by the 7th section, the mortgage will be finally foreclosed and the conditional sale will become conclusive. (*Sir Richard Couch.*) **SAYYID MANSUR ALI KHAN v. BABU SARJU PARSHAD.**

(1886) 13 I. A. 113 = 9 A. 20 (23) = 4 Sar. 749.

———**S. 8—Construction—Words—'Stipulated period'—Meaning—Petition for foreclosure prematurely filed—Effect on right to redeem—Clause accelerating payment—Construction.**

The period described in S. 8 of Regulation XVII of 1806 as "the stipulated period" must be ascertained by referring to the date fixed in the proviso for redemption, as the date at which the mortgagor may redeem the subject of the security by repaying the capital of the loan. The period so ascertained will not be altered or affected by the failure of the mortgagor to make due and regular payment of termly interest before that period arrives. A separate stipulation which, for other purposes, accelerates the time at which the principal is to become due and makes no provision for the mortgagor making payment in order to avoid forfeiture, cannot legitimately be taken into account in considering, what ought to be regarded as "the stipulated period." (*Lord Watson.*) **KISHORI MOHUN ROY v. GANGA BABU DEBI.**

(1895) 22 I. A. 183 = 23 C. 228 = 6 Sar. 649 = 5 M. L. J. 261.

BENGAL REGULATIONS—(Contd.)**Land Mortgage Redemption and Foreclosure Reg. XVII of 1806, S. 8—(Contd.)**

—Foreclosure—Possession as upon—Mortgagee's suit for—Notice of foreclosure—Service of—Sufficiency of—Admission in pleadings by mortgagor of—What amounts to. *See UNDER THIS REGULATION, S. 8—NOTICE OF FORECLOSURE—SERVICE OF—SUFFICIENCY OF—ADMISSION OF, ETC.* (1884) 11 I. A. 186 (191-2) = 11 C. 111 (118).

—Foreclosure—Possession as upon—Mortgagee's suit for—Notice of foreclosure—Service of—Sufficiency of—Objection to—Appeal—Permissibility for first time in—Discretion of High Court as to—P. C.'s interference with. *See UNDER THIS REGULATION, S. 8—NOTICE OF FORECLOSURE—SERVICE OF—SUFFICIENCY OF—OBJECTION TO.* (1884) 11 I. A. 186 (192-3) = 11 C. 111 (118).

—Foreclosure—Possession as upon—Mortgagee's suit for—Objection to original mortgage title or to foreclosure proceedings in—Maintainability.

In a suit brought by a mortgagee, who alleged that he had perfected his title by foreclosure under Reg. XVII of 1806, for recovery of possession of the property from the mortgagor and a purchaser of the property in execution of a decree obtained against the mortgagor, the purchaser being the substantial defendant in the suit, *held*, that the plaintiff had to make out his title to dispossess the purchaser, and that any objection which could be taken either to the original mortgage title or to the proceedings in foreclosure might be taken in such suit (158). (*Sir James W. Colville.*) RAM KRISHNA DAS SURROWJE *v.* SURFUNNISSA BEGUM. (1880) 7 I. A. 157 = 6 C. 129 (132) = 4 Sar. 151 = 3 Suth. 755.

—Foreclosure—Possession as upon—Mortgagee's suit for—Service of notice—Proof of—Onus of—Evidence—Finding of Judge in foreclosure proceedings—Value of.

In a suit for possession as upon a foreclosure under S. 8 of the Regulation, it is essential for the plaintiff to satisfy the Court that the condition of foreclosure required by S. 8 has been complied with, the condition being that the mortgagor should be furnished with a copy of the petition, and should have a notification from the Judge, in order that he may within a year from the time of such notice redeem the property (24).

A finding recorded by the Zillah Judge in the proceedings upon the foreclosure petition as to the sufficiency of the service is neither conclusive, nor even *prima facie*, evidence of the fact of such service (25).

Their Lordships, considering that the duties of the Zillah Judge in the matter of a foreclosure are of a ministerial nature, considering the vast importance to mortgagors of the notification, and the consequences which follow, if they do not redeem within the prescribed time, are of opinion that the service of it should be established by evidence in a suit like the present, which is brought, in fact, to enforce the foreclosure. The proceedings of the Judge are *ex parte*, and even if the Judge examined the nazir or person who served the notice, it would be unsatisfactory that the estate of the mortgagor should depend upon his opinion. It would be going far to say that it is of such authority as to be *prima facie* evidence, which should shift the onus of proof upon such an important point, and relieve the mortgagee from giving affirmative proof of the due performance of a condition necessary to be established before the foreclosure can attach upon the estate (24-5). (*Sir Montague Smith.*) NORENDER NARAIN SINGH *v.* DWARKA LAL MUNDUR.

(1877) 5 I. A. 18 = 3 C. 397 (405) = 1 C. L. R. 369 = 3 Suth. 480 = 3 Sar. 771.

—Function of Judge under, is purely ministerial.

(1) (*Sir James W. Colville.*) FORBES *v.* AMEEROONISSA

BENGAL REGULATIONS—(Contd.)**Land Mortgage Redemption and Foreclosure Reg. XVII of 1806, S. 8—(Contd.)**

BEGUM. (1865) 10 M. I. A. 340 (350) = 5 W. R. 47 = 1 Suth. 621 = 2 Sar. 153.

(2) (*Sir Montague E. Smith.*) NORENDER NARAIN SINGH *v.* DWARKA LAL MUNDUR.

(1877) 5 I. A. 18 (24) = 3 C. 397 (405) = 1 C. L. R. 369 = 3 Suth. 480 = 3 Sar. 771.

(3) (*Lord Watson.*) KISHORI MOHUN ROY *v.* GUNGA BABU DEBI. (1895) 22 I. A. 183 (189) =

23 C. 228 (243-4) = 6 Sar. 649 = 5 M. L. J. 261.

—Notice of foreclosure—Service of—Condition of foreclosure.

The condition of foreclosure required by S. 8 of the Regulation is that the mortgagor should be furnished with a copy of the petition, and should have a notification from the Judge, in order that he may within a year from the time of such notice redeem the property (24). (*Sir Montague E. Smith.*) NORENDER NARAIN SINGH *v.* DWARKA LAL MUNDUR. (1877) 5 I. A. 18 = 3 C. 397 (404-5) = 1 C. L. R. 369 = 3 Suth. 480 = 3 Sar. 771.

—Notice of foreclosure—Service of—Evidence—Finding of Judge in foreclosure proceedings as to—Value of.

The finding of the Zillah Judge, in the foreclosure proceedings, that notice had been duly given to the mortgagors, is not even *prima facie* evidence of the Regulation having been complied with (192). (*Sir Robert P. Collier.*) MADHO PERSHAD *v.* GAJADHAR. (1884) 11 I. A. 186 = 11 C. 111 (117) = 4 Sar. 574 = R. & J.'s No. 85.

—Notice of foreclosure—Service of—Evidence—Nazir's return.

In a suit brought to recover possession as upon a foreclosure under S. 8 of Regulation XVII of 1806, no proof whatever was given by the plaintiffs of the service of the notification required by S. 8 of the Regulation. They relied on the recorded return of the nazir in the proceedings upon the foreclosure petition. It appeared that the Judge in the proceedings upon the foreclosure petition, considered that return to be proof of the service of the notice.

Held, that the return of the nazir, which was a mere statement of that officer, without apparently any verification upon oath, or any examination of the nazir by the Judge was not proof, properly so called, of the service (25). (*Sir Montague Smith.*) NORENDER NARAIN SINGH *v.* DWARKA LAL MUNDUR.

(1877) 5 I. A. 18 = 3 C. 397 (406) = 1 C. L. R. 369 = 3 Suth. 480 = 3 Sar. 771.

—Notice of foreclosure—Service of—Person on whom to be made—Attaching decree-holder of equity of redemption before filing of notice of foreclosure.

In September 1850, when the mortgagees filed their notice of foreclosure under Bengal Regulation XVII of 1806, they not only had notice that the interest of the original mortgagor had been taken in execution, but were actively disputing in a summary suit the right of the decree-holder to put up that interest for sale. There had been a decision against their objection, and their appeal against that decision was pending. The appeal was decided against them on 8-1-1851, and the equity of redemption was sold to the appellants on 7-4-1851. It is quite clear upon the authorities that, if the sale had taken place before the notice of foreclosure was filed, that notice, to be effectual, must have been served on the purchaser, and, in the circumstances above-stated, their Lordships conceive that it ought to have been served upon the decree-holder. Service of the notice upon the widow and heiress of the original mortgagor is, in such a case, not sufficient (14). (*Lord Justice Knight Bruce.*)

BENGAL REGULATIONS—(Contd.)**Land Mortgage Redemption and Foreclosure Reg. XVII of 1806, S. 8—(Contd.)**

MOHUN LALL SOOKOOL *v.* GOLUCK CHUNDER DUTT.
(1863) 10 M. I. A. 1 = 1 W. R. 19 (P. C.) =
1 Suth. 533 = 2 Sar. 49.

———*Notice of foreclosure—Service of—Person on whom to be made—Property held in shares—Foreclosure of entire—Service on some mortgagors only—Sufficiency of—Validity of foreclosure as regards others.*

In a suit brought for possession as upon a foreclosure under S. 8 of Regulation XVII of 1806, it appeared that the mortgage alleged to have been foreclosed was for one entire sum, and that the property, although held in certain shares, was mortgaged as a whole to the extent of five annas and a fraction, and was redeemable only upon payment of the entire sum. The notice required to be served under S. 8 of the Regulation was served upon some of the mortgagors only, and they omitted to redeem. The mortgagee, nevertheless, foreclosed, not merely the individual shares of each mortgagor as against each mortgagor, but the whole estate, as upon one mortgage, one debt, and one entire right against all the mortgagors.

Held, that the proceedings upon the foreclosure petition were not such as would sustain a suit for possession as upon foreclosure as against any of the mortgagors (27-8).

Quare, whether there may not be cases of mortgages of separate shares, in which, by proceedings properly framed, foreclosure may take place in respect of some of such shares only (28). (*Sir Montague Smith.*) NORENDER NARAIN SINGH *v.* DWARKA LAL MUNDUR. (1877) 5 I. A. 18 = 3 C. 397 (408-9) = 1 C. L. R. 369 = 3 Suth. 480 = 3 Sar. 771.

———*Notice of foreclosure—Service of—Person on whom to be made—Purchasers of equity of redemption before foreclosure proceedings.*

The notice of foreclosure prescribed by S. 8 of Reg. XVII of 1806 must be served upon persons who had purchased the equity of redemption before the foreclosure proceedings took place, and such service is necessary whether or not the purchasers had taken possession. The mortgagee, when he seeks to foreclose, must discover and serve the persons who are the then owners of the estate (28). (*Sir Montague Smith.*) NORENDER NARAIN SINGH *v.* DWARKA LAL MUNDUR. (1877) 5 I. A. 18 = 3 Sar. 771 = 3 C. 397 (408) = 1 C. L. R. 369 = 3 Suth. 480.

———*Notice of foreclosure—Service of—Person on whom to be made—Widow of mortgagor—Service on—Sufficiency of—Adopted son of mortgagor alive, and a minor under widow's guardianship—Widow with life interest in property.*

S. 8 of Regulation XVII of 1806 provides that the Judge, on receiving the application for an order of foreclosure, should cause the mortgagor, or his legal representative, to be furnished with a copy of it.

The copy of the petition was in the case before their Lordships served upon the widow of the mortgagor, and the question was whether it was served upon the proper party within the meaning of S. 8.

It appeared that the mortgagor had executed a deed of permission to adopt by which an interest was given to the wife, for her life, with a power to appoint an heir, which heir, when appointed, would have a right to the inheritance, and that, in pursuance of the said permission to adopt, the widow had adopted a minor boy, who was under the guardianship of the widow.

Held, that, as the widow had a life interest, and was also guardian of the minor adopted son, service upon her was quite sufficient (402). (*Lord Langdale.*) RAM MUNI DIBIAH *v.* PRAN KISHEN DAS. (1848) 4 M. I. A. 392 = 7 W. R. 66 (P. C.) = 1 Suth. 207 = 1 Sar. 369.

BENGAL REGULATIONS—(Contd.)**Land Mortgage Redemption and Foreclosure Reg. XVII of 1806, S. 8—(Contd.)**

———*Notice of foreclosure—Service of—Sufficiency of—Admission by mortgagors of—What amounts to.*

A petition presented by the mortgagors a short time only before the end of the year of grace allowed by S. 8 of Reg. XVII of 1806 referred in the following way, and in that way only, to the service of the notice required by that section: "The applicants" (mortgagees) "caused a notice under Regulation XVII of 1806 to be issued on 27th February, 1866, clandestinely served without the knowledge and information of your petitioners. Now your petitioners having come to the knowledge of the case from some out-of-the-way sources, offer objections on the following grounds."

Held, that the petition contained no admission of the time, or sufficiency of the service, and that it did not amount to an admission that the notice had been properly served upon them at the time at which the mortgagee alleged it to have been, or that they had knowledge of it at a time which would have justified the foreclosure (25-6).

Another petition presented by the mortgagors contained this statement: "The petitioners have under a deed of conditional sale, dated the 9th Aughan, 1266, F. S., for Rs. 5,000, had notice under Regulation XVII of 1806 issued to us. Therefore we beg to submit our objections."

Held, that, though the petitioners did not in terms admit the time at which they had notice, a Judge would not be wrong in holding that there was an admission by them of due service (26). (*Sir Montague Smith.*) NORENDER NARAIN SINGH *v.* DWARKA LAL MUNDUR.

(1877) 5 I. A. 18 = 3 C. 397 (406-7) = 1 C. L. R. 369 = 3 Suth. 480 = 3 Sar. 771.

———*Notice of foreclosure—Service of—Sufficiency of—Admission of, by mortgagors in pleadings in suit for possession as upon foreclosure—What amounts to.*

In a suit to recover proprietary possession of a village on the completion of foreclosure proceedings with respect to a mortgage of it, the mortgagors admitted in their written statement that they received some notice of foreclosure.

Held, that to construe the written statement of the mortgagors as a binding admission that they had received due notice, according to the Regulation of 1806, in the foreclosure proceedings, would be to apply to pleadings in India a stricter construction than is usual (191-2). (*Sir Robert P. Collier.*) MADHO PERSHAD *v.* GAJADHAR.

(1884) 11 I. A. 186 = 11 C. 111 (118) = 4 Sar. 574 = R. & J.'s No. 85.

———*Notice of foreclosure—Service of—Sufficiency of—Objection to—Suit for possession as upon foreclosure—Appeal in—Permissibility for first time in—Discretion of Court below as to—P. C.'s interference with.*

In a suit to recover proprietary possession of a village on the completion of foreclosure proceedings with respect to a mortgage of it, the mortgagors in the trial Court rested their case solely on the absence of consideration for the mortgage, and did not raise any plea as to the validity of the foreclosure. And no issue was framed raising that point. The trial Judge found against the mortgagors on the question of consideration, and gave judgment against them.

On appeal, the mortgagors questioned for the first time the regularity of the foreclosure proceedings. The Judicial Commissioner went into the question, and reversed the decree below on the ground that the proper proceedings had not been taken to effect foreclosure.

Held, that the Judicial Commissioner had, at the least, a discretion to inquire into the subject if he thought fit, and that it could not be said, under the circumstances of the case, that he exercised that discretion so wrongly that his judgment ought to be reversed (193).

BENGAL REGULATIONS—(Contd.)**Land Mortgage Redemption and Foreclosure Reg. XVII of 1806, S. 8—(Contd.)**

The Judicial Commissioner had the subject brought before him by the grounds of appeal; he had power to take additional evidence, or to frame a new issue, which it is to be presumed that he would have done had it been necessary, and had the parties desired it (192-3). (*Sir Robert P. Collier.*) **MADHO PERSHAD v. GAJADHAR.**

(1884) 11 I. A. 186 = 11 C. 111 (118) = 4 Sar. 574 = R. & J.'s No. 85.

—*Notice of foreclosure—Service of—Validity of—Conditions—Proof strict of—Necessity.*

Where the notification served upon the mortgagor was not a perwannah under the seal and official signature of the Judge; it did not notify from what date the year during which redemption should be made began to run; and it neither was nor purported to be a copy of the petition for foreclosure, *held*, that the requirements of Regulation XVII of 1806 had not been complied with (196).

The service of the petition for foreclosure and the perwannah of the Judge in the form directed by the Regulation must be strictly proved (192). (*Sir Robert P. Collier.*) **MADHO PERSHAD v. GAJADHAR.**

(1884) 11 I. A. 186 = 11 C. 111 (120-1, 117-8) = 4 Sar. 574 = R. & J.'s No. 85.

—*Petition for foreclosure—Jurisdiction to entertain—Property situated in two districts.*

S. 8 of Regulation XVII of 1806 directs that a petition for an order of foreclosure is to be presented to the Judge of the zillah or city, in which the mortgaged lands or other property may be situated.

Held, that, where mortgaged property was situate in two districts, an order of foreclosure relating to the whole property might be made in the Court of either district. (*Lord Langdale.*) **RAS MUNI DIBIAH v. PRAN KISHEN DAS.** (1848) 4 M. I. A. 392 (402) = 7 W. R. 66 (P. C.) = 1 Suth. 207 = 1 Sar. 369.

—*Proceedings under—Regularity of—Insufficiency of demand—Effect.*

It was urged that the proceedings under S. 8 were irregular by reason of the insufficiency of the demand. Their Lordships are disposed to think that upon the true construction of the Regulations, and of the Circular Order, it is not necessary that the demand should be for the specific sum ultimately ascertained to be due (356-7). (*Sir James W. Colville.*) **FORBES v. AMEEROONISSA BEGUM.**

(1865) 10 M. I. A. 340 = 5 W. R. P. C. 47 = 1 Suth. 621 = 2 Sar. 153.

—*Proceedings under—Regularity of—Mortgagee in possession—Accounts—Non-production of—Effect.*

It was urged that the proceedings under S. 8 were irregular by reason of the non-production of the accounts in the course of those proceedings. Their Lordships are disposed to think that upon the true construction of the Regulations, and of the Circular Order, it is not necessary that the accounts of a mortgagee in possession should be produced in these preliminary proceedings, in which they cannot be investigated (356-7). (*Sir James W. Colville.*) **FORBES v. AMEEROONISSA BEGUM.**

(1865) 10 M. I. A. 340 = 5 W. R. P. C. 47 = 1 Suth. 621 = 2 Sar. 153.

—*Provisions of—Nature of—Directory or imperative—Strict compliance with—Necessity.*

The provisions of S. 8 of Regulation XVII of 1806 are not merely directory but imperative, prescribing conditions precedent to the right of the mortgagee to enforce forfeiture of the estate of the mortgagor. Accordingly it has been held that the prescribed procedure must be strictly observed (192). (*Sir Robert P. Collier.*) **MADHO PERSHAD v. GAJADHAR.** (1884) 11 I. A. 186 = 11 C. 111 (117) = 4 Sar. 574 = R. & J.'s No. 85.

BENGAL REGULATIONS—(Contd.)**Land Mortgage Redemption and Foreclosure Reg. XVII of 1806, S. 8—(Contd.)**

—*Provisions of—Object of.*

The provisions of S. 8 of Regulation XVII of 1806 have for their object to protect mortgagors, who are often poor and ignorant men, from fraud and oppression on the part of money-lenders (192). (*Sir Robert P. Collier.*) **MADHO PERSHAD v. GAJADHAR.** (1884) 11 I. A. 186 =

11 C. 111 (117) = 4 Sar. 574 = R. & J.'s No. 85.

—*Redemption—Right of—When barred.*

If the application of the mortgagee is made in due time, after the expiry of what is described as "the stipulated period," and the requisite statutory notice is given to the mortgagor, his equity of redemption is completely barred, unless, within a year from the service of the notice, as required by S. 7 of Reg. XVII of 1806, he brings into Court the amount of principal and interest due by him (189). (*Lord Watson.*) **KISHORI MOHUN ROY v. GUNGA BAHU DEBI.** (1895) 22 I. A. 183 = 23 C. 228 (243-4) = 6 Sar. 649 = 5 M. L. J. 261.

—*Redemption—Year allowed for—Commencement of—Date of perwannah—Date of issue thereof by Judge—Date of service thereof.*

The year during which the mortgagor may redeem his property, under S. 8 of Regulation XVII of 1806, runs, not from the date of the perwannah or the issuing of it by the Judge, but from the time of service (26).

It is obvious that, if the year is to run from the date of the perwannah, the negligence of the nazir, or other circumstances, may prevent its service for a considerable time after its date, and so the mortgagor would lose the benefit of the full time which it was intended by the Regulation to give him (27). (*Sir Montague Smith.*) **NORENDER NARAIN SINGH v. DWARKA LAL MUNDUR.**

(1877) 5 I. A. 18 = 3 C. 397 (407) = 1 C. L. R. 369 = 3 Suth. 480 = 3 Sar. 771.

Land-Revenue Assessment Reg. I of 1801.

—*S. 8—Actual produce—Produce of what date.*

The "actual produce" on which the assessment of revenue under S. 8 of Bengal Regulation I of 1801 is to be based is "the actual produce" at the time when proceedings were instituted for the separation of the talook. The Legislature could never have intended to lay down an ambulatory standard, which would vary according to the period or time when separation was being carried into effect. (*Mr. Ameer Ali.*) **RANI HEMANTA KUMARI DEBI v. MAHARAJAH JAGADINDRA NATH ROY BAHADUR.**

(1918) 23 C. W. N. 149 = 51 I. C. 148.

—*Ss. 8 and 14—Independent talook—Separation of—Right to—Application for—Time within which, should be made—Laches—Effect. See BENGAL REGULATIONS—DECENNIAL SETTLEMENT REG. VIII OF 1793, S. 5—INDEPENDENT TALOOK.* (1918) 23 C. W. N. 149.

Land-Revenue Assessment (Resumed Lands) Reg. II of 1819.

—*Malikanadari right—Creation of—Arrangement—Necessity.*

The *Malikanadari* right can only come into existence by arrangement. (*Mr. Ameer Ali.*) **JAGDEO NARAIN SINGH v. BALDEO SINGH.** (1922) 49 I. A. 399 (411) = 2 P. 38 (51) = 32 M. L. T. 1 = (1923) M. W. N. 361 = 27 C. W. N. 925 = 36 C. L. J. 499 = 3 Pat. L. T. 605 = A.I.R. 1922 P.C. 272 = 71 I.C. 984 = 45 M.L.J. 460.

—*Modification of, by Bengal Regulation III of 1828—Extent of.*

Regulation III of 1828 modified in some respects the provisions of Regulation II of 1819. It enacted that decisions of the Board of Revenue declaring the liability to assessment of lands should be carried into immediate execution, notwithstanding that the parties against whom the

BENGAL REGULATIONS—(Contd.)**Land-Revenue Assessment (Resumed Lands) Reg. II of 1819—(Contd.)**

decisions had passed had sued to contest the decision in one of the established courts of justice. It further provided that all suits which might be instituted in the established courts of justice under the provisions of Regulation II of 1819 to contest decisions of the Board of Revenue should be heard and determined in the same manner as regular appeals, and no further pleadings should be required or received than the objections of the appellant to the decision of the Board, and the reply to these objections on the part of the Revenue authorities, and that it should not be competent to the Courts to take further evidence, oral or documentary, unless it should appear that such evidence was tendered by the party adducing it to the Collector or the Board, and was then rejected on insufficient grounds, or that such evidence was essential to the ascertainment of some fact material to the issue not fully inquired into in the course of the previous investigation. It will be observed that these modifications of the law of 1819 only affect the procedure in cases of appeal to the ordinary civil tribunals of the country. They do not touch the right of appeal to such tribunals or alter any of the rights previously assured to the owners of permanently settled lands (49-50). (*Lord Herschell.*) SECRETARY OF STATE FOR INDIA *v.* SRIMATI FAHAMIDU-NISSA BEGUM. (1889) 17 I. A. 40 = 17 C. 590 (601) = 5 Sar. 391.

—S. 3—Decennial Settlement—Churs formed after—Assessment—Liability for—Bengal Act IX of 1847, S. 6—Bengal Regulation XI of 1825—Effect.

The effect of Regulation II of 1819 is to declare that churs formed after the decennial settlement are to be treated as unsettled; and this express provision cannot be excluded merely by showing that the river-bed from which the churs have been thrown up was at the date of the settlement the property of the Zemindar, and that the settlement was imposed upon the Zemindari as a whole. The ownership of the bed may determine the proprietary rights in the churs; but property is one thing and assessability is another. The Regulation declares in terms that new churs are to be included in the category of unsettled lands, and contains no exception for churs formed upon a river-bed belonging to a settled estate. Such churs must therefore be treated as unsettled and the Government held entitled to assess them to revenue as being "Land added to the estate" within the meaning of S. 6 of Act IX of 1847.

The above conclusion as to the effect of Regulation II of 1819 is strongly supported by the terms of Regulation XI of 1825. (*Viscount Cave.*) SECRETARY OF STATE FOR INDIA *v.* MAHARAJA OF BURDWAN.

(1921) 48 I. A. 565 (576) = 49 C. 103 (115-6) = 26 C. W. N. 619 = 4 U. P. L. R. (P. C.) 1 = 35 C. L. J. 92 = (1922) P. C. 6 = 67 I. C. 835 = 42 M. L. J. 61.

—S. 30—Applicability—Durputnidar—Lands held as Lakhiraj by—Declaration that they are mal lands of plaintiff—Suit for, and for assessment of lands.

The appellant, a durputnidar, instituted a suit to obtain a declaration that certain lands which the respondents claimed to hold as Lakhiraj land were so held by them under an invalid title; that they were the *mal* lands of the appellant, liable, as such, to pay rent to him, and to have them assessed accordingly.

Held, that the provisions of S. 30 of Regulation II of 1819 did not apply to such a suit as the appellant's (171-2). (*Sir James Colville.*) HURRYHUR MOOKHOPODHYA *v.* MADAB CHUNDER BABOO. (1871) 14 M. I. A. 152 = 20 W. R. P. C. 459 = 8 B. L. R. 566 = 2 Suth. 484 = 2 Sar. 713.

BENGAL REGULATIONS—(Contd.)**Land-Revenue Assessment (Resumed Lands) Reg. II of 1819, S. 30—(Contd.)**

—Applicability—Suit by Zemindar or putnidar to enforce claim under S. 10 of Regulation XIX of 1793.

S. 30 of Regulation II of 1819 is inapplicable to a suit brought by a Zemindar or a putnidar to enforce a claim under S. 10 of Regulation XIX of 1793 (488). NOBOKISTO MOOKERJEE *v.* KOYLASH CHUNDER BHUTTACHARJEE. (1871) 2 Suth. 484.

—Resumption suit improperly brought by Zemindar under, and tried as such—Remand in appeal of, to make it suit under S. 10 of Regulation XIX of 1793—Propriety.

Appellant, a darputnidar, sued to obtain a declaration that certain lands which the respondents claimed to hold as Lakhiraj land were so held by them under an invalid title; that they were the *mal* lands of the appellant, liable, as such, to pay rent to him, and to have them assessed accordingly. The plaint expressly stated that the suit was brought under cl. (1) of S. 30 of Regulation II of 1819.

The Courts below tried the suit as one properly brought under S. 30 of the said Regulation, threw the onus of proof on the Lakhirajdar, and decided in favour of the appellant. In special appeal the High Court held that the suit was improperly brought under S. 30 of the said Regulation and that the onus of proof had been wrongly cast upon the defendant, and remanded the suit. On remand the appellant amended his plaint pursuant to the order of remand by striking out all reference to the Regulation II of 1819, and making it a plaint for resumption of land fraudulently made Lakhiraj after 1st December 1790, and, therefore, falling within S. 10 of Regulation XIX of 1793. The Courts below threw the onus of proof on the appellant and decided against the appellant on the ground that he adduced no evidence to show that the suit lands were once his *mal* lands.

On appeal to the P. C. the appellant contended that the remand was improper.

Held, overruling the contention, that the remand for re-trial upon an amended plaint was not only correct, but an indulgence to the appellant, whose suit, if not so remanded, ought to have been dismissed (172).

The invocation of S. 30 of Regulation II of 1819 is not mere matter of form to be rejected as surplusage. The effect of it is to cause the case to be tried according to the procedure and presumptions prescribed by that enactment, and the enactments *in pari materia*, greatly to the advantage of the plaintiff, and consequently to the prejudice of the defendant. It follows that, if the procedure was not applicable to the case, there had been a mis-trial (172). (*Sir James W. Colville.*) HURRYHUR MOOKHOPODHYA *v.* MADAB CHUNDER BABOO. (1871) 14 M. I. A. 152 = 20 W. R. P. C. 459 = 8 B. L. R. 566 = 2 Suth. 486 = 2 Sar. 713.

—S. 30, Cl. (1)—Suit by Zemindar or transferee of Zemindar's rights under—Onus of proof in, on Zemindar and Lakhirajdar.

In suits brought under the 1st clause of S. 30 of Regulation II of 1819 by a Zemindar, or one to whom the Zemindar's rights have been transferred, the whole burthen of proving the nature and commencement of his title was understood to be thrown upon the defendant, the Lakhirajdar, whom the plaintiff, who disputed the validity of his tenure, might compel to produce the sunnuds and other ancient documents upon which such title rested. The sole proof of title which the defendant could require, in the first instance, from the plaintiff was that the lands in question were within the ambit of his *zemindary* or *patnee*, as the case might be (161). (*Sir James Colville.*) HURRYHUR

BENGAL REGULATIONS—(Contd.)**Land-Revenue Assessment (Resumed Lands) Reg. II of 1819, S. 30, Cl. (1)—(Contd.)**

MOOKHOPODHYA v. MADAB CHUNDER BABOO.

(1871) 14 M. I. A. 152 = 20 W. R. P. C. 459 = 8 B. L. R. 566 = 2 Suth. 486 = 2 Sar. 713.

—*Suit by Zemindar or person claiming in his right—Onus of proof in—Initial onus on plaintiff in—Onus on defendant in.*

In suits brought under S. 30, cl. (1) of Regulation II of 1819 by a Zemindar, or one to whom the Zemindar's rights have been transferred, the whole burden of proving the nature and commencement of his title was understood to be thrown upon the defendant, the Lakhirajdar, whom the plaintiff, who disputes the validity of the tenure, might compel to produce the sunnuds and other ancient documents upon which such title rested. The sole proof of title which the defendant could require in the first instance from the plaintiff was that the lands in question were within the ambit of his zemindary or patnee, as the case might be (485). NOBOKISTO MOOKERJEE v. KOYLASH CHUNDER BHUTTACHARJEE. (1871) 2 Suth. 484.

—**S. 31—Waste land—River-bed if can be treated as.**

A river-bed cannot be treated as "waste land" coming within the protection of S. 31 of Regulation II of 1819. Indeed the express provision in S. 31 that waste land shall not be the subject of an additional assessment when brought into cultivation, when contrasted with the provisions of S. 3 of the same Regulation as to newly formed churs and islands, affords further support to the view that the legislative authority intended to put such churs upon a different footing from the waste lands and to make them liable to assessment. (*Viscount Cave.*) SECRETARY OF STATE FOR INDIA v. MAHARAJA OF BURDWAN.

(1921) 48 I. A. 565 (577) = 49 C. 103 (117-8) = 26 C. W. N. 619 = 4 U. P. L. R. (P. C.) 1 = 35 C. L. J. 92 = (1922) P. C. 6 = 67 I. C. 835 = 42 M. L. J. 61.

**Land-Revenue Assessment (Resumed Lands)
Reg. III of 1828.**

—*Construction of—Rights of property—Safeguarding of—Provisions as to—Giving full force and effect to—Necessity.*

In interpreting and carrying into effect the Regulations respecting the resumption of lands, and the subjecting them to be assessed, it is the duty of the Court to give full force and effect to those provisions which were manifestly intended to protect the rights of property, and prevent a vexatious interference with those rights (305). (*Dr. Lushington.*) MAHARAJAH MOHESHUR SINGH v. BENGAL GOVERNMENT. (1859) 7 M. I. A. 283 = 3 W. R. 45 = 1 Suth. 325 = 1 Sar. 645.

—*Effect of—Substantive law—Tribunal—Change of.*

Regulation III of 1828 recited that, partly from the number of revenue cases, and partly from the practice of the courts in treating the appeals made to them as original suits, little or no progress had been made towards the settlement of the matter, and heavy arrears of such cases had accumulated. It accordingly provided for the appointment of special Commissioners, to whom were entrusted the powers of the Court, all appeals to the ordinary Courts being abrogated in those districts in which such Commissioners had been appointed. So far the Regulation only altered the tribunal; it made no substantive change in the law (49). (*Lord Herschell.*) SECRETARY OF STATE FOR INDIA v. SRIMATI FAHAMIDUNNISSA BEGUM. (1889) 17 I. A. 40 = 17 C. 590 (601) = 5 Sar. 391.

—*Lakhiraj lands—Resumption of alleged—Proceedings for—Parties—Adverse title to portion of lands—Person claiming, if proper party.*

BENGAL REGULATIONS—(Contd.)**Land-Revenue Assessment (Resumed Lands) Reg. III of 1828—(Contd.)**

Disputes arose between the Mahant of a religious society and the Government, as to the assessable quality of certain lands claimed as Lakhiraj and enjoyed by the society for a long time, free from assessment. The appellant was the antiquous proprietor, and claimed a portion of the lands, sought to be resumed and assessed, as forming part of his permanently assessed Zemindary. The Deputy Collector of the District commenced proceedings against the Mahant for the resumption and assessment of the said lands. At some of the meetings the Mooktar of the appellant had accidentally, or otherwise, been present, and had been questioned by the Deputy Collector. Under those circumstances, the appellant, apprehending that his interests might be affected by any decision of the Collector, declaring the Lakhiraj lands to be more extensive than they really were, intervened by petition. Throughout the whole of the proceedings no objection was ever raised to his intervention; he was allowed the privileges of a party by the examination of his witnesses, and otherwise; and he was subjected to all the inconveniences of a suitor by the condemnation in costs in virtue of the ultimate decree.

Held, that the appellant was both *de facto* and *de jure* a party to the proceedings, that he had an interest sufficient to justify his being made a party, and that he had, therefore, a right to appeal from the decree (300-1).

In every view of the case, the appellant had an interest which justified him in intervening in the proceedings; for even assuming it to be true that the Collector's report, as to the extent of the land subject to revenue, was not binding on the appellant, and that he had a remedy against such a proceeding in another Court, still he had clearly an interest in averting an erroneous report being made to his prejudice, the creation of *prima facie* evidence prejudicial to himself, and the necessity of resorting to a Civil Court to remedy an evil already inflicted (300). (*Dr. Lushington.*) MAHARAJAH MOHESHUR SINGH v. BENGAL GOVERNMENT.

(1859) 7 M. I. A. 283 = 3 W. R. 45 = 1 Suth. 325 = 1 Sar. 645.

—*Object double of.*

Regulation III of 1828 was passed, as the preamble declares, with the double object of appointing Special Commissioners, whose judgment should be final in resumption suits, and of amending the procedure furnished by Regulations II of 1819 and IX of 1825, in such suits; and of making provision for the immediate settlement of the limits of the Soonderbuns as ascertained by careful local inquiry conducted by the commissioner specially appointed to the duty, and the Surveyors under his authority. The latter object is dealt with by S. 13 of the Regulation (236). (*Sir James Colville.*) RAJAH BURODACANT ROY v. COMMISSIONER OF THE SOONDERBUNS. (1868) 12 M. I. A. 226 = 11 W. R. P. C. 14 = 2 B. L. R. P. C. 33 = 2 Suth. 184 = 2 Sar. 413.

—*Penal nature of.*

The Regulations respecting the resumption of lands, and the subjecting them to be assessed, are Regulations in themselves almost necessarily severe in their operation (304). (*Dr. Lushington.*) MAHARAJAH MOHESHUR SINGH v. BENGAL GOVERNMENT. (1859) 7 M. I. A. 283 = 3 W. R. 45 = 1 Suth. 325 = 1 Sar. 645.

—*Resumption by Government of—Validity of—Decision by Sudder Dewanny Adawlut as Special Commissioners against—Mesne profits pursuant to—Award of—Jurisdiction of that Court.*

The Sudder Dewanny Adawlut at Calcutta, acting as Special Commissioners under Bengal Regulation III of 1828, in resumption suits have jurisdiction in a summary way to

BENGAL REGULATIONS—(Contd.)**Land-Revenue Assessment (Resumed Lands) Reg. III of 1828—(Contd.)**

direct payment of Wasilat, or mesne profits, of lands taken possession of by Government for resumption, to the party entitled to the same, upon a decree declaring the lands not liable to resumption and re-assessment. The admitted power of that Court of deciding as to the correctness or incorrectness of the resumption includes the jurisdiction to direct payment of the whole money in dispute with interest, to the person or persons entitled (490). (*Lord Justice Knight Bruce.*) **RAJAH LELANUND SINGH v. GOVERNMENT OF BENGAL.** (1863) 9 M. I. A. 479 =

1 W. R. P. C. 20 = 1 Suth. 535 = 2 Sar. 46.

—S. 4 (5)—*Special Commissioners—Decrees of—Review of, by themselves—Jurisdiction—Petition for review presented after expiry of period allowed—Grant of—Grounds.*

All the Regulations, applicable to the granting of a review by the Sudder Court of its decrees, are applicable to the decrees of the Special Commissioners acting under Bengal Regulation III of 1828, in granting a review of their own decrees (307).

Where, therefore, the Special Commissioners grant a review of a decree of theirs on an application presented after the prescribed period, the validity of the order granting review depends on two conditions: (1) Whether just and reasonable cause was shown for the delay in presenting the petition for review, and (2) whether the circumstances of the case, in justice, required it should be granted (307). (*Dr. Lushington.*) **MAHARAJAH MOHESHUR SINGH v. BENGAL GOVERNMENT.** (1859) 7 M. I. A. 283 =

3 W. R. 45 = 1 Suth. 325 = 1 Sar. 645.

—The fact of two Commissioners coming to a conclusion not altogether reconcilable with the prior decree of the Special Commissioners held, in the circumstances of the case, not to be a sufficient ground, after the expiration of 5 years and more, for the granting of a review (308-9). (*Dr. Lushington.*) **MAHARAJAH MOHESHUR SINGH v. BENGAL GOVERNMENT.** (1859) 7 M. I. A. 283 = 3 W. R. 45 =

1 Suth. 325 = 1 Sar. 645.

—*Special Commissioners—Proceedings before—Applicability to, of cls. (2) and (3) of Bengal Civil Procedure Regulation XXVI of 1814.*

Cls. (2) and (3) of S. 4 of Regulation XXVI of 1814 must be read together, and such of the substantial enactments of both as are in their nature applicable to the Court of the Special Commissioner, regard being had to its independence of the Sudder Dewanny Adawlut, must be held to have been applied to it by the Regulation III of 1828, S. 4, cl. (5). A decree passed by Special Commissioners is not to be subject in all respects to the rules applicable to a decree by a Zillah, City, or Provincial Court, because the proceedings of the Special Commissioners are not subject to the cognizance of the Sudder Court; whereas, by the provisions of this Regulation, any orders of the Courts specified, granting a review, must receive confirmation from the Sudder Court (306). (*Dr. Lushington.*) **MAHARAJAH MOHESHUR SINGH v. BENGAL GOVERNMENT.** (1859) 7 M. I. A. 283 =

3 W. R. 45 = 1 Suth. 325 = 1 Sar. 645.

—S. 13—*Boundary line fixed under—Conclusive character of—Waste and jungle lands.*

The line of demarcation drawn under S. 13 of Reg. III of 1828 was to be final and conclusive, at least in respect of all waste lands and uncleared jungle (238). (*Sir James Colville.*) **RAJAH BURODACANT ROY v. COMMISSIONER OF THE SOONDERBUNS.** (1868) 12 M. I. A. 226 =

11 W. R. P. C. 14 = 2 B. L. R. P. C. 33 = 2 Suth. 184 =

2 Sar. 413.

—*Boundary line fixed under—Cultivated land within—Claim to—Suit to establish—Maintainability—No appeal*

BENGAL REGULATIONS—(Contd.)**Land-Revenue Assessment (Resumed Lands) Reg. III of 1828, S. 13—(Contd.)**

to Special Commissioner within three months—Effect.

As the boundary line fixed under S. 13 of Reg. III of 1828 defines the tract called the Soonderbuns, and the Soonderbuns are declared to be *extra* the Perpetual Settlement, it is difficult to see how, after the line had, on the expiration of three months fixed by that section, become final, any party could be heard to say that even cultivated lands within it were part of his settled zemindary (239).

Held, therefore, that, where boundaries had been determined by the Commissioner under Reg. III of 1828, and no appeal therefrom made to the Special Commissioner within three months, such determination was a bar to a suit seeking to re-open the question of boundaries (239). (*Sir James Colville.*) **RAJAH BURODACANT ROY v. COMMISSIONER OF THE SOONDERBUNS.**

(1868) 12 M. I. A. 226 = 11 W. R. P. C. 14 =

2 B. L. R. P. C. 33 = 2 Suth. 184 = 2 Sar. 413.

—*Boundary line fixed under—Cultivated land within—Person in occupation of—Courses open to, within three months of fixing boundary.*

In a case in which a boundary line has been fixed under S. 13 of Reg. III of 1828, a person in occupation of cultivated land might, within three months, do two distinct things: he might pray for a further investigation, which might result in a new demarcation of the boundary; and he might put forward his claim to hold the particular lands free from public assessment, which would lead to a judicial investigation of his title (238-9). (*Sir James Colville.*) **RAJAH BURODACANT ROY v. COMMISSIONER OF THE SOONDERBUNS.** (1868) 12 M. I. A. 226 =

11 W. R. P. C. 14 = 2 B. L. R. P. C. 33 = 2 Suth. 184 = 2 Sar. 413.

—*Boundary line fixed under—Lands included in—Lease taken by Zemindar of—Claim subsequent by Zemindar of—Lands being included in his permanently settled estate—Onus of proof on him.*

In a question of disputed boundaries as to the line of demarcation between the permanently assessed mouzahs of a neighbouring zemindar adjoining upon the Soonderbuns, the zemindar having taken a lease from Government of part of the lands as within the limits of the Soonderbuns, but afterwards claimed by him as part of his mouzahs, the onus is upon him to identify the lands so claimed as not forming part of the Soonderbuns (240). (*Sir James Colville.*) **RAJAH BURODACANT ROY v. COMMISSIONER OF THE SOONDERBUNS.** (1868) 12 M. I. A. 226 =

11 W. R. P. C. 14 = 2 B. L. R. P. C. 33 = 2 Suth. 184 = 2 Sar. 413.

—*Boundary line fixed under—Limitation for questioning—Extension of, on ground of infancy or otherwise. See UNDER THIS REGULATION, S. 13, CLS. (1) AND (2)—OBJECT OF.* (1868) 12 M. I. A. 226 (238).

—*Boundary line fixed under—Objection to—Onus in case of.*

Any person objecting to the line of demarcation fixed under S. 13 of Reg. III of 1828 could not be heard unless he declared and offered proof that, at the time of the survey, he was in the occupation of a definite quantity of land cleared and under cultivation within the line (238). (*Sir James Colville.*) **RAJAH BURODACANT ROY v. COMMISSIONER OF THE SOONDERBUNS.**

(1868) 12 M. I. A. 226 = 11 W. R. P. C. 14 =

2 B. L. R. P. C. 33 = 2 Suth. 184 = 2 Sar. 413.

—S. 13, CLS. (1) and (2)—*Object of—Boundary line fixed under—Limitation for questioning—Extension of, on ground of infancy or otherwise.*

As the object of passing cls. (1) and (2) of S. 13 of Reg. III of 1828 was to make provision for the immediate settlement

BENGAL REGULATIONS—(Contd.)**Land-Revenue Assessment (Resumed Lands) Reg. III of 1828, S. 13, Cls. (1) and (2)—(Contd.)**

of the limits of the Soonderbuns, that object could only be attained by fixing peremptorily a period at which the demarcation of those limits should be final. The object would be defeated if any person could come in after that period, pleading infancy or other ground for re-opening the question of boundary, since the geographical boundary line was necessarily to be one and the same for all the world (238). (*Sir James Colville.*) **RAJAH BURODACANT ROY v. COMMISSIONER OF THE SOONDERBUNS.**

(1868) 12 M. I. A. 226 = 11 W. R. P. C. 14 = 2 B. L. R. P. C. 33 = 2 Suth. 184 = 2 Sar. 413.

Land-Revenue Sales Reg. V of 1812.

—Revenue arrear—Sale of entire zemindary for—Validity—Power of Board of Revenue. *See* BENGAL REGULATIONS—REG. XIV OF 1793—REVENUE—ARREAR OF—SALE OF ENTIRE ZEMINDARY FOR.

(1837) 1 M. I. A. 383 (407-8).

Land-Revenue Settlement Reg. VII of 1822.

—Award of Thakbust or Survey authorities under—Suit to contest—Limitation—Bengal Limitation Act XIII of 1848—Applicability.

An award under Bengal Reg. VII of 1822 of the Thakbust or Survey Authorities in a disputed question of boundaries having been made in 1848, a suit was brought in 1861 respecting the same boundaries.

Semble that, as the award had not been contested during the three years limited by Act XIII of 1848, it operated as a bar to the suit (335-6). (*Sir James W. Colville.*) **RAJAH SAHIB PERHLAD SEIN v. MAHARAJAH RAJENDER KISHORE SING.**

(1869) 12 M. I. A. 292 = 12 W. R. P. C. 6 = 2 B. L. R. P. C. 111 = 2 Suth. 225 = 2 Sar. 430.

—Collectors—Provinces in which there are no—Substitute for Collectors in.

In applying Reg. VII of 1822 in its spirit, Courts must, in provinces in which there are no Collectors, substitute for Collectors and their subordinates the persons who were performing the duties which would have fallen upon Collectors in the parts of India to which the Regulation originally applied (69). (*Sir Montague E. Smith.*) **RANI LEKRAJ KUAR v. BABOO MAHPAL SINGH.**

(1879) 7 I. A. 63 = 5 C. 744 (753-4) = 6 C. L. R. 593 = 4 Sar. 94 = 3 Suth. 704 = R. & J.'s No. 61 (Oudh).

—Inheritance—Custom of clan as to—Record of—Jurisdiction of Collector or Settlement Officer to make.

Where *wajib-ul-arz*, or village administration papers made in pursuance of Reg. VII of 1822 stated a custom to the effect that daughters were excluded from succeeding to the inheritance of their father's estate in a particular clan, *held*, that the custom was clearly a usage which the Regulation required the Settlement Officer to ascertain and record, and that the papers were not inadmissible in evidence on a question as to the existence of the custom on the ground that they related to matters which the Settlement Officer had no jurisdiction to include in them (69-70). (*Sir Montague E. Smith.*) **RANI LEKRAJ KUAR v. BABOO MAHPAL SINGH.**

(1879) 7 I. A. 63 = 5 C. 744 (753-4) = 6 C. L. R. 593 = 4 Sar. 94 = 3 Suth. 704 = R. & J.'s No. 61 (Oudh).

Limitation Reg. II of 1805.

—Applicability—Bengal Reg. II of 1803—Suit instituted and decree therein made during operation of—Repeal of, after decree and pending appeal therefrom, by Regulation of 1805—Appellate Court if bound to take cognizance of Regulation of 1805. *See* BENGAL REGULATIONS—ZILLA COURTS, CEDED PROVINCES REG. II OF 1803, S. 18.

(1835) 5 W. R. 95 = 1 Suth. 20 (21-2).

BENGAL REGULATIONS—(Contd.)**Limitation Reg. II of 1805—(Contd.)**

—Applicability—Government. *See* UNDER THIS REGULATION—OBJECT OF—APPLICABILITY TO, ETC.

(1860) 8 M. I. A. 225 (236).

—Courts of Civil Justice within meaning of—Revenue Collector and Special Commissioner appointed under Regs. II of 1819 and III of 1828 *if*.

The Courts of the Revenue Collector and the Special Commissioner appointed under Regs. II of 1819 and III of 1828 are Courts of Civil Justice within the meaning of Reg. II of 1805 (508). (*Mr. Pemberton Leigh.*) **MAHARAJA DHEERAJ RAJA MAHATAB v. THE GOVERNMENT OF BENGAL.**

(1849-50) 4 M. I. A. 466 = 1 Sar. 385.

—Limitation under—Right to benefit of—Party obtaining possession wrongfully—Party coming in upon his death—Right of.

Held, that, under Bengal Reg. II of 1805, a party who obtained possession of property by committing a wrong was not entitled to the benefit of the limitation, and the party who came in upon his death not having been in possession under any supposable fair inheritance, he was not entitled to any favour. (*Mr. Justice Bosanquet.*) **LALL DOKUL SINGH v. LALL ROODER PURTAB SINGH.**

(1835) 5 W. R. 95 (P. C.) = 1 Suth. 20 (23) = 1 Sar. 879.

—Object of. *See* BENGAL REGULATIONS—ZILLAH COURTS REG. III OF 1793—OBJECT OF.

(1858) 7 M. I. A. 238 (253).

—Object of—Applicability to Government.

Undoubtedly, the great object of Reg. II of 1805 was to prevent vexatious suits, in consequence of the litigiousness that generally prevails among the natives of India, and, in all probability, it was not intended at that time to embarrass the East India Company or the Government of India (236). (*Lord Kingsdown.*) **GOVERNMENT OF BENGAL v. MUSSUMAT SHURRUFFUTOONNISSA.**

(1860) 8 M. I. A. 225 = 3 W. R. 31 = 1 Suth. 405 = 1 Sar. 749.

—Plaint or replication—Ground not raised in—Plaintiff if can succeed upon.

In a suit for possession, the plaintiff relying upon Regulation II of 1805, averred in his plaint that the possession of the defendant was obtained by violence. He attempted to prove that averment, but failed in the courts below. On appeal to the P. C., he suggested that there was collusion between the defendant and the tenant on the land in dispute and that the defendant obtained possession by means thereof.

Held, that the plaintiff could not rely upon the ground that possession was obtained by collusion, for he had not alleged that the possession was so obtained in his plaint or in his replication, and there was no evidence to support the suggestion (259). **MUSSUMAT JUSWANT KOONWAR v. MUSSUMAT PARABUTTY KOONWAR.**

—Violence—Plea of—Specification of violence—Necessity—General allegation of violence or force insufficient.

Reg. II of 1805, no doubt, enacts that in case the possession shall have been acquired by violence or fraud the limitation of twelve years shall not be applicable; but it also provides that the plaintiff who relies upon that answer to the limitation shall set it forth distinctly either in his petition of plaint or in his replication. When that qualification, made by the Regulation of 1805, is relied upon, the pleading ought to state with more distinctness and particularity what is the nature of the violence by which the possession was obtained. A general allegation that possession was obtained by violence, that is, that there was a forcible entry, is not enough (259). **MUSSUMAT JUSWANT KOONWAR v. MUSSUMAT PARABUTTY KOONWAR.**

(1872) 7 M. J. 258.

BENGAL REGULATIONS—(Contd.)**Limitation Reg. II of 1805—(Contd.)**

—*Violence—Possession of defendant obtained by—Plaintiff's plea of—Proof of—Quantum.*

In a case in which the plaintiff relied upon Reg. II of 1805, his plaint alleged generally that possession was obtained by violence, that is, that there was a forcible entry. Some of his witnesses said in general terms that the possession was obtained by violence; but the evidence disclosed no specific act of force or violence. The only statement which the witnesses made to support the general allegation, that there was violence in the mode of taking possession, was that two of them said that the amlahs of the plaintiff were removed by the amlahs of the defendant; but it appeared that there was a lessee on the land in dispute, and that the statement of the two witnesses could not be true.

Held, that, standing by itself and unsupported by the other witnesses, it was not trustworthy evidence upon which their Lordships could come to the conclusion that possession was obtained by violent means (259). **MUSSUMAT JUSWANT KOONWAR v. MUSSUMAT PARABUTTY KOONWAR.** (1872) 7 M. J. 258.

—**S. 2 (2)—Public claim—Costs awarded by decree if—E. I. Co. appointed agents for successful party—Effect.**

Under the provisions of the Statute 3rd and 4th Will. IV, c. 41, and the order in Council of the 4th September, 1883, an appeal from the Sudder Court in India was brought to a hearing by the East India Company, before the Judicial Committee of the Privy Council, and by an order in Council made on the appeal in 1836, the costs incurred in prosecuting the appeal were directed to be paid to the East India Company by the respective parties to the appeal, or their representatives, as provided by the order in Council of the 18th November 1883.

Held, that the recovery of the costs awarded did not constitute a "public claim" within the meaning of cl. (2) of S. 2 of Bengal Regulation II of 1805 (237).

The acts relied upon were all private acts between individuals, and they had not originally in their nature anything of a public character to be ascribed to them. The fact that the East India Company were the agents appointed to assert the right of the originally successful party to the costs incurred in the appeal could not convert the private character of the act into a public one. Anybody else might have been appointed to conduct those proceedings and to realise the costs, and in that case the parties so appointed could not have sued except as private individuals (238-9). (*Lord Kingsdown.*) **GOVERNMENT OF BENGAL v. MUSSUMAT SHURRUFFUTOONNISSA.**

(1860) 8 M. I. A. 225 = 3 W. R. 31 = 1 Suth. 405 = 1 Sar. 749.

—*Words "any other public right whatever"—Meaning—Ejusdem generis rule—Applicability.*

Perhaps it would be too strict a construction to say that the words "any other public right whatever" in cl. (2) of S. 2 of Bengal Reg. II of 1805 shall be construed precisely to be *ejusdem generis* with those matters which are mentioned before, namely, "the assessment of land held exempt from the public revenue without legal and sufficient title to such exemption, or for the recovery of arrears of the public revenue assessment;" but, although they may not be construed with that degree of strictness, yet they must be taken to depend upon the same principles, otherwise the word "public" would have no meaning (237). (*Lord Kingsdown.*) **GOVERNMENT OF BENGAL v. MUSSUMAT SHURRUFFUTOONNISSA.** (1860) 8 M. I. A. 225 = 3 W. R. 31 = 1 Suth. 405 = 1 Sar. 749.

BENGAL REGULATIONS—(Contd.)**Limitation Reg. II of 1805—(Contd.)**

—**S. 3—Applicability—Maintenance—Limitation.**

S. 3 of Regulation II of 1805 is inapplicable to a case where the occupant was not a mortgagor or depositary, but was only subject to the payment of a portion of the proceeds annually to another person during her life on account of her maintenance. (*The Vice-Chancellor.*) **GORDON v. KHAJAH ABOO MAHOMED KHAN.** (1834) 5 W. R. 68 = 1 Suth. 3 = 2 Knapp. 225 = 1 Sar. 41.

—*Fraudulent, unjust, or dishonest acquisition—Proof of—Onus on plaintiff.*

By the express words of S. 3 of Regulation II of 1805, the proof of the fraudulent, unjust, or dishonest acquisition is thrown upon the plaintiff (17). (*Mr. Justice Erskine.*) **SHEIKH IMDAD ALI v. MUSSUMAT KOOTBY BEGUM.** (1842) 3 M. I. A. 1 = 6 W. R. 24 (P. C.) = 1 Suth. 124 = 1 Sar. 227.

—*Object of.*

The main object of these laws of limitation is to protect an honest purchaser from the consequences of an owner's neglect to assert his rights, and thus giving to a usurper the semblance of a title which he did not really possess (17).

N.B.—The limitation law under consideration in this case was Regulation II of 1805, S. 3. (*Mr. Justice Erskine.*) **SHEIKH IMDAD ALI v. MUSSUMAT KOOTBY BEGUM.** (1842) 3 M. I. A. 1 = 6 W. R. 24 (P. C.) = 1 Suth. 124 = 1 Sar. 227.

—*Suit under—Bar to—Possession which operates as a—Nature of, necessary. See BENGAL REGULATIONS—ZILLAH COURTS REG. III OF 1793, S. 14, EXCEPTION—GOOD AND ETC.* (1858) 7 M. I. A. 238 (259-60).

—*Unjust or dishonest acquisition in—Meaning of.*

It is obvious from cl. (3) of S. 3 of Reg. II of 1805 that the expression "unjust or dishonest acquisition" in S. 3 of the Regulation is not intended to include every acquisition without a just title; for by that clause, acquisitions are protected that have been obtained by any title believed to be just and valid, though in reality insufficient. It must be necessary, therefore, for a plaintiff, in the first place, to show that the person under whom an occupant, by just title, acquired within the twelve years, derives his title, had acquired his possession by a title which he did not at the time believe to be just and valid (17). To avoid the effect of the lapse of time, the plaintiff must establish the existence of conscious injustice by proof (18). (*Mr. Justice Erskine.*) **SHEIKH IMDAD ALI v. MUSSUMAT KOOTBY BEGUM.** (1842) 3 M. I. A. 1 = 6 W. R. 24 (P. C.) = 1 Suth. 124 = 1 Sar. 227.

—*Unjust or dishonest acquisition—What amounts to—Onus of proof of.*

The respondent sued in 1825 for the recovery of her share of the inheritance of her mother, who had died in 1801. On the mother's death her entire estate was taken possession of by two sons of her predeceased son and held by them to the exclusion of the respondent. The said grandsons sold the property to the defendants in the suit in 1813 and 1814.

The respondent contended, relying upon S. 3 of Reg. II of 1805, that the suit was not barred, because her nephews had acquired possession of the property by unjust and dishonest means, and because, as the defendants' purchases had been made within 12 years prior to the suit, neither they nor any person under whom they claimed, had, during a period of 12 years, antecedent to the date of the suit, held under any fair title believed to have conveyed a right of possession and property. The respondent's case was that as her nephews must have known that she was still alive, their assumption of the entire property was a dishonest acquisition and could not have been claimed by them

BENGAL REGULATIONS—(Contd.)**Limitation Reg. II of 1805, S. 3—(Contd.)**

under any title which they believed at the time to be just and valid. Though there were many circumstances leading to a strong suspicion that that was the case, there was, however, no evidence of the nephews being aware of either.

Held, that, to avoid the effect of the lapse of time, the plaintiff must establish the existence of conscious injustice by proof, that the plaintiff had not done so, and that the suit was therefore barred (17-8). (*Mr. Justice Erskine.*) **SHEIKH IMDAD ALI v. MUSSUMAT KOOTBY BEGUM.** (1842) 3 M. I. A. 1=6 W. R. 24 (P.C.)=1 **Suth.** 124=1 **Sar.** 227.

—S. 3 Exception—Application of—Strictness in—Fraudulent or forcible dispossession—Proof strict of—Necessity.

The exception found in Bengal Reg. II of 1805, S. 3, is one which must be construed with some strictness, for the door would be opened widely to a large class of claims which ought properly to be barred by limitation, if at any period less than 60 years a plaintiff were enabled to evade the operation of the Statute of Limitations merely by alleging and giving some evidence of fraudulent or forcible dispossession. Such fraudulent or forcible dispossession must be clearly established (29). (*Sir Robert P. Collier.*) **MAHARAJAH RAJENDER KISHORE SINGH v. RAJAH SAHEB PERHLAD SEIN.** (1874) 3 **Suth.** 27=22 **W. R.** 165.

—Dispossession fraudulent or forcible within meaning of—Evidence.

The Rajah of Ramnugger sued the Rajah of Bettiah for the recovery of nine villages alleged to be within the limits of the Zemindary of Ramnugger. The plaintiff's case was that in 1840 or 1841 on the death of the Ranee of Ramnugger, the Government laid claim to the estate (which had since been adjudged to the plaintiff) as having escheated to them for want of heirs and took possession of it, and that shortly before or upon the Government taking such possession, the Rajah of Bettiah contrived to possess himself of the nine villages in question. The cause of action having admittedly arisen more than 12 years before suit, it would be barred but for the plaintiff's contention that he brought himself within the exception in S. 3 of Regulation II of 1805. The question for decision was whether the evidence was sufficient to satisfy their Lordships that the plaintiff had been dispossessed by fraud or violence within the meaning of the exception in S. 3.

In the suit as originally brought and heard before the Principal Sudder Ameen there was no allegation of violent or fraudulent dispossession. There was simply a statement of dispossession. Upon remand by the appellate Court, evidence of dispossession was brought forward for the first time, and it was to the following effect:—With respect to each of the nine villages, one or two witnesses deposed to the agents of the Rajah of Bettiah having come upon the land while the putwaree was in the act of collecting the rents; that they happened to have found upon him the rent-rolls and official documents connected with the land; that they took them forcibly from him, and expelled him and took possession. The same story was told in each of the cases, and it was also said that although the attention of the Government authorities was called to the matter they refused to take any notice of it. The putwaree then dispossessed was the putwaree acting on behalf of the Government, and the plaintiff himself stated more than once that he received all the villages appertaining to his Zemindary from the Government, who were in possession of them, without making any statement at all as to the alleged forcible dispossession. Further the Principal Sudder Ameen wholly disbelieved the plaintiff's evidence, and the attention of the High Court was never called to it.

BENGAL REGULATIONS—(Contd.)**Limitation Reg. II of 1805, S. 3 Excep.—(Contd.)**

Held, that no such fraudulent or forcible dispossession had been proved as would bring the plaintiff within the exception of S. 3 of Regulation II of 1805 (30). (*Sir Robert P. Collier.*) **MAHARAJAH RAJENDER KISHORE SINGH v. RAJAH SAHEB PERHLAD SEIN.** (1874) 3 **Suth.** 27=22 **W. R.** 165.

—S. 3, Cl. (3)—Rent—Arrears of—Suit for—Possession of land—Suit for, barred—Effect—Grant void under Regulation of 1793—Defendant's possession under.

The suit was brought by the respondent to recover arrears of rent for 6 years and 9 months preceding its commencement. The appellant and those under whom she claimed had been in peaceable and undisturbed possession of the property for more than 60 years. The property was in the town of N, and within and parcel of a four-annas share of a Zemindary, of which the respondent, as mother and guardian of her son, a minor, was the proprietor in possession. The appellant claimed under a grant of the year 1796 from the ancestor of the respondent, which purported to have been made for the setting up an idol, and concluded thus—“Having set up the said idol in the said house, you will enjoy the same without paying rent through sons and grand sons. For this purpose I have given you this *Bromuttur Pattro*.” The idol had remained, and its worship had been continued uninterruptedly from that time.” The suit, which was instituted in 1857, had been preceded by no demand of rent, nor any suit for the assessment of it; but the rent sued for was stated to be “in accordance with the rate of rent obtaining in lodging-houses at this place of N”; that rate being fixed by the Bengal Reg. XIX of 1793, S. 10; on which, indeed, the respondent's case entirely depended.

Held, that the suit was barred under cl. (3) of S. 3 of Bengal Reg. II of 1805 by the sixty years' possession of the appellant, and those under whom she claimed (220).

What is the cause of action in the present case, and when did it arise? In terms the suit is brought to recover rent for the last six or seven years, and the non-payment of that rent is, no doubt, in one sense, the cause of action. But the right to recover rent for the last six or seven years, depends on a possession founded on a grant avoided by the Regulation, which possession has been one and entire in character through the whole sixty years. It is the case of the plaintiff in the court below, that by reason of the character of the grant and the operation of the Regulation, his ancestor might have determined the possession in the first year of its existence, or claimed rent at the end of that year. An action brought by the plaintiff to recover the possession would, therefore, be barred and, if no action could be maintained directly to recover the possession of the land, none can be brought to recover the rent, which is the compensation for the occupation—that occupation having been always of one and the same character; in fact, rent free (218-20). (*Sir John Coleridge.*) **MUSSUMAT CHUNDRABULLEE DEBIA v. LUCKHEA DEBIA CHOWDRAIN.**

(1865) 10 M. I. A. 214=5 **W. R. P. C.** 1=1 **Suth.** 602=2 **Sar.** 119.

—Branch I—Scope and effect of.

The first branch of cl. (3) of Bengal Reg. II of 1805, in its very comprehensive language, embraces every then existing Regulation by which any Court in Bengal was authorised to take cognizance of any suit whatever; it, in effect, takes away that authorization if the cause of action shall have arisen sixty years before the institution of the suit; it distinguishes between the effect of the 12 years' limitation and that of sixty, by precluding all inquiry into any original defect in the title under which the possession for the latter period commenced; it makes it in effect, in cases in which the section applies, unavailing to show that the possession

BENGAL REGULATIONS—(Contd.)

Limitation Reg. II of 1805, S. 3, Cl. (3), Br. 1—
(Contd.)

of the defendant commenced under a grant made null and void by the Reg. XIX of 1793 (217-8). (*Sir John Coleridge.*) **MUSSUMAT CHUNDRABULLEE DEBIA v. LUCKHEA DEBIA CHOWDRAIN.**

(1865) 10 M. I. A. 214 = 5 W. R. 1 = 2 Sar. 119 = 1 Suth. 602.

Minority of Native Landholders Reg. XXVI of 1793.

—**S. 2—Age of majority—General rule as to—Effect on.** See UNDER THIS REGULATION, S. 2—BENGAL COURT OF WARDS REG. X OF 1793.

(1876) 3 I. A. 72 (74) = 1 C. 289 (291).

—**Applicability—Mahomedan proprietor of revenue-paying estates—Deed disposing of such estates—Minority of executant of.**

The question whether a Mahomedan was, when he executed two ikrars, a minor depended upon the question whether his minority was to be determined by the Regulation of 1793. It was found that he had reached fifteen but had not reached 18, the age fixed for the minority of Mahomedan proprietors of estates paying revenue to Government by Reg. XXVI of 1793, S. 2.

Semble the period of minority was governed by the Regulation (108).

In dealing with these ikrars, the executant must be assumed to be the proprietor of the revenue-paying estates referred to in them; and inasmuch as they contain dispositions of such estates, the period of his minority, at least for this purpose, would seem to be within the policy and terms of the Regulation and governed by it (108). (*Sir Montague E. Smith.*) **AMEEROONISSA KHATOON v. ABEDOONISSA KHATOON.**

(1875) 2 I. A. 87 = 15 B. L. R. 67 = 23 W. R. 208 = 3 Sar. 423 = 3 Suth. 87.

—**Bengal Court of Wards Reg. X of 1793, S. 33—Age of majority—General rule as to—Effect on.**

The effect of S. 2 of Reg. XXVI of 1793 and of S. 33 of Reg. X of 1793 is not to alter the general rule, but to enact that in particular cases the age of 18 shall be the age of majority (74). (Per *Sir James W. Colville* in the course of the argument.) **JUMOONA DASSYA CHOWDHURANI v. BAMASOONDERAI DASSYA CHOWDHURANI.**

(1876) 3 I. A. 72 = 1 C. 289 (291) = 25 W. R. 235 = 3 Sar. 602 = 3 Suth. 222.

Partition of Revenue-Paying Estates Reg. XIX of 1814.

—**Partition under—Evidence of—Division—Mode of—Divergence between area and rental between divided portions—Proof of title.**

Proceedings for partition having been instituted under Reg. XIX of 1814, it was proposed, in order to make equality of partition, that three villages should be divided in unequal proportions, and a goshwara was accordingly prepared by the Ameen, setting out in one column the extent of the shares to be allotted, and in another the assessed jumma of each share allotted. In a suit in 1873 by the representative of one of the shareholders to recover portions of the three villages, the only evidence that the partition had been completed was an *istahar* of the Deputy Collector, dated October 1864, directing the nazir to require the ryots to pay their rents according to the extent of the shares as set forth in the first-mentioned column of the goshwara; that is, according to the quantity instead of according to the quality and value which were the basis of the partition. *Held*, affirming the judgment of the High Court, that the plaintiff, having failed to prove any order for partition drawn up under S. 13 of the Regulation by the Collector, was not entitled to recover according to the quantity of the land; but, if at all, according to its value ascertained in the column

BENGAL REGULATIONS—(Contd.)

Partition of Revenue-Paying Estates Reg. XIX of 1814—(Contd.)

of the goshwara in which the assessed jumma was set forth. (*Sir Barnes Peacock.*) **HURRO SOONDARI DEBIA v. KESUB CHUNDER ACHARJYA.** (1879) 3 Suth. 643 =

Bald. 273 (275, 278) = 5 C. L. R. 257.

—**Partition under—Fairness of—Provisions directed to secure—Ss. 20, 22, 25.**

The provisions of Reg. XIX of 1814 have been carefully designed to secure a fair partition of the estate to be divided. The division is to be made, in ordinary cases, by a public officer (the ameen) acting under the orders of the Collector. Even if, under the 22nd section, the terms of the partition are proposed by the parties, or referred by them to arbitration, the law still requires the intervention of the ameen, before whom the accounts are to be produced and verified, and in whose presence and subject to whose inspection the division is to be made. When the terms have been so settled they must be sanctioned by the Collector, and afterwards by the superior revenue authorities. The partition, after it has been so sanctioned, is declared by S. 20 to be final, subject to the power reserved to the Governor-General in Council, by S. 25, of directing a fresh apportionment of the revenue in cases of proved error or collusion at any time within 10 years after the confirmation of the partition (119-20). (*Sir Montague E. Smith.*) **BYJNATH LALL v. RAMODEEN CHOWDRY.** (1874) 1 I. A. 106 =

21 W. R. 233 = 3 Sar. 333 = 2 Suth. 942.

—**Partition under—Interference with—Civil Courts—Jurisdiction.**

It appears to have been settled by decisions, and upon the construction of the Regulations, that a partition effected under Reg. XIX of 1814 cannot be disturbed by a Civil Court (120). (*Sir Montague E. Smith.*) **BYJNATH LALL v. RAMODEEN CHOWDRY.** (1874) 1 I. A. 106 =

21 W. R. 233 = 3 Sar. 333 = 2 Suth. 942.

—**Partition under—Objects of—Parties—Government if one.**

The object of a partition under the provisions of Reg. XIX of 1814 is not solely the division of the joint estate by metes and bounds, an object which might be effected by the private agreement of the parties. It has for a further object the apportionment of the public revenue assessed on the whole estate, so as to relieve each proprietor from the obligation to pay that revenue *in solido*, and to make him responsible only for the amount to be charged on his separate and defined share. To such a partition the state necessarily became a party, for the protection of the revenue, and it was one which could only be effected by the machinery of the Regulation (119). (*Sir Montague E. Smith.*) **BYJNATH LALL v. RAMODEEN CHOWDRY.** (1874) 1 I. A. 106 =

21 W. R. 233 = 3 Sar. 333 = 2 Suth. 942.

—**Partition under—Proceedings for—Parties to.**

(1) Government if one. See UNDER THIS REGULATION—PARTITION UNDER—OBJECTS OF.

(1874) 1 I. A. 106 (119).

(2) Mortgagee who had not foreclosed and obtained decree for possession if one. See UNDER THIS REGULATION—PARTITION UNDER—RIGHT TO ENFORCE.

(1874) 1 I. A. 106 (120).

—**Partition under—Right to enforce—Mortgagee who had not foreclosed and obtained decree for possession—Right of—If necessary party to proceedings for partition.**

A mortgagee who has not perfected his title by foreclosure, and the consequential decree for possession, can neither compel a partition nor be a party to the butwara proceedings under Regulation XIX of 1814 (120). (*Sir Montague E. Smith.*) **BYJNATH LALL v. RAMODEEN CHOWDRY.**

(1874) 1 I. A. 106 = 21 W. R. 233 = 3 Sar. 333 = 2 Suth. 942.

BENGAL REGULATIONS—(Contd.)**Partition of Revenue Paying Estates Reg. XIX of 1814—(Contd.)**

——*Partition under—Validity of, against mortgagee from co-sharer—Fraud in effecting partition—Effect.*

In the more improbable case of an unequal partition being effected by means of butwara proceedings by collusion between the mortgagor and his co-sharers with the object of defrauding the mortgagee, his remedy might be more difficult by reason of the finality of the partition, and the incapacity of the Civil Court to entertain a suit to disturb it. But the finality of such a partition cannot be greater than that of the purchase of an estate at a sale for arrears of the public revenue; and even in this latter case courts of justice have found the means of relieving the person injuriously affected by fraud (121). (*Sir Montague E. Smith.*) **BYJNATH LALL v. RAMODEEN CHOWDRY.** (1874) 1 I. A. 106 = 21 W. R. 233 = 3 Sar. 333 = 2 Suth 942.

Permanent Settlement Regulations of 1793.

——*Effect—Proprietors—Right in soil of—Effect on.*

I think it is to be collected from the Regulations of 1793, that the proprietors of land in India had an absolute ownership and dominion of the soil; that the soil was not vested generally in the sovereign; that the proprietors did not hold at the will of the sovereign, but held that property as their own with the power of disposing of it absolutely; and, if not disposed of, that it descended to their families. It is liable, indeed, to a tribute to Government, but it appears that the tribute was not fixed, but was increased at the arbitrary will of the Government; and that, if the tribute was not paid, Government had the power of taking possession of the lands for the purpose of obtaining payment. Still, notwithstanding these circumstances and these charges, I think it is impossible to read those Regulations without coming to the conclusion that the zemindars and talookdars were owners of the soil, subject only to a tribute to Government; and it was the object of those Regulations to make that tribute fixed and permanent. (*Lord Chancellor.*) **FREEMAN v. FAIRLIE.** (1828) 1 M. I. A. 305 (341-2) = 1 Sar. 123.

Putni Taluqs Reg. VIII of 1819.

——*Formalities prescribed by—Omission inadvertent of one of—Effect of—Validity of sale—Effect on.*

The inadvertent omission by a Zemindar of one of the formalities prescribed by Reg. VIII of 1819 does not render all the proceedings taken by him inoperative, or constitute his act of selling the tenure into an act of trespass (175). **RANEE SURNOMOYEE v. SHOOSHEE MOKHEE BURMONIA.** (1868) 2 Suth. 173.

——*Nature of—Self-contained statute—Tenancy Act of 1885 inapplicable to cases covered by this Regulation.*

The Putni Regulation is a self-contained statute. It lays down certain well-defined rules for the realization by the zemindar of arrears of rent from a tenure-holder; it makes the tenure primarily liable, and it gives to the zemindar the right of applying to the Collector for the periodical sale of defaulting taluqs. The said Regulation being thus a self-contained Act embodying the rules relative to the rights of zemindars and patni talukdars, the Legislature in enacting Act VIII of 1885 excluded in express terms from the operation of the Tenancy Act the special legislation relating to patni tenures. (*Mr. Amcer Ali.*) **FORBES v. BAHADUR SINGH.** (1914) 41 I. A. 91 = 41 C. 926 (941-2) = 23 I. C. 632 = (1914) M. W. N. 397 = 15 M. L. T. 380 = 18 C. W. N. 747 = 1 L. W. 1059 = 12 A. L. J. 653 = 27 M. L. J. 4.

——*Notice prescribed by—Publication of—Necessity—Zemindar's responsibility for.*

The due publication of the notices prescribed by the Regulation forms an essential portion of the foundation on which the summary power of sale is exercised; and the

BENGAL REGULATIONS—(Contd.)**Putni Taluqs Reg. VIII of 1819—(Contd.)**

Regulation makes the zemindar who institutes the proceeding exclusively responsible for its regularity (21). (*Lord FitzGerald.*) **MAHARAJAH OF BURDWAN v. SRIMATI TARA SOONDARI DEBIA.** (1882) 10 I. A. 19 = 9 C. 619 (622) = 13 C. L. R. 34 = 4 Sar. 414.

——*Notice prescribed by—Publication of—Proof of—Fact of service of notice itself in doubt.*

Where the fact of the service of the notice was itself in doubt owing to the evidence of it not having been secured according to the provisions of the Regulation—a result due to the neglect of those representing the zemindar—held, that the High Court was right in deciding that due publication had not been established. (*Lord FitzGerald.*) **MAHARAJAH OF BURDWAN v. SRIMATI TARA SOONDARI DEBIA.** (1882) 10 I. A. 19 = 9 C. 619 (623-4) = 13 C. L. R. 34 = 4 Sar. 414.

——*Notice prescribed by—Publication of—Receipt for—Objection to absence or form of—Maintainability—Fact of service not in dispute.*

Their Lordships do not intend at all to controvert a decision of the High Court of Bengal to the effect that if the notice prescribed by the Regulation itself has been duly published, if it is not matter of controversy, if the fact was ascertained that it was published, then one would not regard any objection either to the form of the receipt or the absence of the receipt itself. But that is where there is no controversy as to the fact of the service (21). (*Lord FitzGerald.*) **MAHARAJAH OF BURDWAN v. SRIMATI TARA SOONDARI DEBIA.** (1882) 10 I. A. 19 = 9 C. 619 (622-3) = 13 C. L. R. 34 = 4 Sar. 414.

——*Notice prescribed by—Publication of—Object of.*

It appears from the preamble of Reg. VIII of 1819 that one of the objects of the Regulation is to establish "such provisions as have appeared calculated to protect the under-lessee from any collusion of his superior with the zemindar, or other, for his ruin, as well as to secure the just rights of the zemindar on the sale of any tenure." And immediately afterwards occurs the statement that it has been deemed indispensable to fix the process by which the said tenures are to be brought to sale. The object of directing local publication of notices is to warn the under-lessees of the contemplated proceedings which may result in sweeping away their property, and also to act as advertisements to persons who may bid at the sale (34). (*Lord Hobhouse.*) **MAHARANI OF BURDWAN v. MURTUNJOY SINGH.** (1887) 14 I. A. 30 = 14 C. 365 (370-1) = 4 Sar. 772.

——*Notice prescribed by—Publication of—Object of—Provisions of—Strict compliance with—Necessity.*

Regulation VIII of 1819 is a very important regulation, and no doubt it was enacted for a certain and defined policy, and ought as a rule to be strictly observed (21). The object of the Regulation was that due service or publication should not be left matter of controversy. The evidence should be secured immediately afterwards, and exist in writing, and be referred to by the proper officer as part of the foundation of the sale (21). (*Lord FitzGerald.*) **MAHARAJAH OF BURDWAN v. SRIMATI TARA SOONDARI DEBIA.** (1882) 10 I. A. 19 = 9 C. 619 (622) = 13 C. L. R. 34 = 4 Sar. 414.

——*Sale under—Purchaser at—Rights of.*

The talook of G originally formed part of the great zemindary of Burdwan, and had been granted in Putnee by one of the Rajahs of Burdwan. In 1852 it was put up to sale by the Collector under the provisions of Bengal Reg. VIII of 1819, in order to realise the amount of arrears of rent due from the then Putneedar. The appellant became the purchaser, and entered into the receipt of the rents and profits of the talook, and it must be assumed that, as

BENGAL REGULATIONS—(Contd.)**Putni Taluqs Reg. VIII of 1819—(Contd.)**

Putneedar, he became entitled to the same rights in the talook which were enjoyed by the zemindar (38-9). (*Lord Kingsdown.*) JOYKISHEN MOOKERJEE *v.* COLLECTOR OF EAST BURDWAN. (1864) 10 M. I. A. 16=

1 W. R. P. C. 26=1 Suth. 542=2 Sar. 54.

—Sale under—Reversal of—Putni rent paid by purchaser to Zemindar subsequent to sale—Suit for recovery of—Maintainability—Limitation.

On the reversal of a sale for arrears of rent held under Bengal Putni Taluq Regulation VIII of 1819, the purchaser sued the Zemindar for, *inter alia*, the recovery of the putni rents paid to the Zemindar subsequent to the sale.

Held, that no suit for that amount would lie.

Quære as to the period of limitation applicable to such a suit, that provided by Art. 62, or that provided by Art. 97, of the Limitation Act of 1908. (*Sir Lawrence Jenkins.*) JUSCURN BOID *v.* PIRTHICHAND LAL.

(1918) 46 I. A. 52=46 C. 670 (680)=

21 Bom. L. R. 632=23 C. W. N. 721=

(1919) M. W. N. 258=30 C. L. J. 71=

26 M. L. T. 131=17 A. L. J. 514=50 I. C. 444=

36 M. L. J. 557.

—Sale under—Right to question—Interest in talook required for—Person not having even equitable interest—Right of.

Without laying down any general rule as to the degree of interest which might entitle a party to impeach the sale of a putni taluk under Regulation VIII of 1819, their Lordships are of opinion that the appellants, who have not even an equitable interest in the talook, have failed to show that they have acquired that interest in the talook which entitles them to dispute the sale in question (180). (*Sir James W. Colville.*) WATSON & CO. *v.* COLLECTOR OF RAJSHAHYE. (1869) 13 M. I. A. 160=

12 W.R.P.C. 43=3 B.L.R. 48=2 Suth. 269=2 Sar. 500.

—Sale under—Suit to set aside—Laches—Presumption adverse from. *See* LACHES—PRESUMPTION ADVERSE FROM—RENT SALE, ETC. (1869) 13 M. I. A. 160 (169).

—Sale under—Validity of—Sale in execution of decree against heirs of holder—Holding vested by foreclosure proceedings in third party prior to rent suit and symbolical possession given to him—Proceedings in rent suit conducted with knowledge of third party—Effect. *See* BENGAL REGULATIONS—RECOVERY OF ARREARS OF RENT, ETC., REG. VII OF 1799—RENT SALE OF HOLDING.

(1872) 14 M. I. A. 330 (343).

—S. 3, Cl. (3)—“Rent”—Meaning Putni tenure—Government revenue payable by putnidar in addition to rent—Payment not rent—Construction of kabuliyats—Later kabuliyat merely reciting prior arrangement or embodying new arrangement.

The respondent took from the appellant in putni the entire interests in an 8-anna share of Mahomed Aminpur and executed a kabuliyat whereby he undertook, in addition to paying an annual jumma to appellant, to deposit into the collectorate of the district the Government revenue fixed for the said 9-anna share. The kabuliyat provided for cancellation of the tenure in case of default in payment of the said Government revenue. A few years later, a new agreement was entered into between the parties which was embodied in an ekrar kabuliyat by which respondent agreed to pay an additional rent in respect of the putni. The fresh kabuliyat stated “Having according to the said proposal agreed to pay an additional rent of Rs. 1,000 in respect of the putni which I took . . . on the condition of paying to you a putni jumma of Rs. 6,000 per year and of Rs. 40,156-14-0, into the Collectorate, year by year, kist by kist, as Government revenue for the said 8-anna share, etc.” On a question arising as to whether the Government revenue which respon-

BENGAL REGULATIONS—(Contd.)**Putni Taluqs Reg. VIII of 1819, S. 3, Cl. (3)—(Contd.)**

dent undertook to pay into the Collectorate was rent within the meaning of Putni Regulation VIII of 1819, S. 3, cl. (3) and as such recoverable under the summary provisions enacted for the recovery of putni rents by it, *held*, that, though the payment of the Government revenue was part of the consideration to be rendered by respondent for the enjoyment of the tenure, it was not money payable to the landlord and was not rent within the meaning of the Regulation. *Held*, further, that the second kabuliyat did not embody a new arrangement thereby entered into but merely recited the previously existing arrangement between the parties. *Quære*, whether, even if it did embody a new arrangement, the provision therein would have the effect of making the Government revenue a part of the rent. (*Sir Arthur Wilson.*) MAHARAJAH BAHADUR SIR JOTINDRA MOHUN TAGORE *v.* SRIMATI BIBI JARAO KUMARI.

(1905) 33 I. A. 30=33 C. 140=3 C. L. J. 7=

10 C. W. N. 201=1 M. L. T. 8

—Ss. 6 and 11—Transfer of share in Putni talook—Validity—Consent of Zemindar—Necessity.

A transfer of a share in a putni talook by a registered putnidar without the express consent of the Zemindar and in disregard of Regulation VIII of 1819 is not binding on the Zemindar (176-7). (*Sir James W. Colville.*) WATSON & CO. *v.* COLLECTOR OF RAJSHAHYE.

(1869) 13 M. I. A. 160=12 W. R. P.C. 43=

3 B.L.R. 48=2 Suth. 269=2 Sar. 500.

—S. 8—Notice of sale under—Omission to specify all putnidars and balances due from them—Sale in case of—Validity.

Where the notice served under S. 8 of Reg. VIII of 1819 did not contain a specification of the balances due from all the putnidars, and it mentioned only one of the putnis, while the oral evidence made it clear that there were about forty astam cases in which the Zemindar was interested, *held*, that Ss. 8 and 10 of the Regulation were not complied with, and that the sale held under such notice was invalid. (*Lord Shaw.*) BHUPENDRA NARAYAN SINGH *v.* MADAR BUKSH. (1925) 52 I.A. 439=

53 C. 1=23 L. W. 9=92 I.C. 681=

A.I.R. 1925 P.C. 297.

—Notice of sale under—Publication—Onus of proof of—Duty of Zemindar.

The due publication of the notices prescribed by Regulation VIII of 1819 forms an essential portion of the foundation on which the summary power of sale is exercised, and makes the Zemindar who institutes the proceeding exclusively responsible for its regularity. If the notice itself has been duly published, if it is not a matter of controversy, if the fact was ascertained that it was published, an objection either to the form of the receipt or the absence of the receipt itself would not be upheld (21).

Where, however, the fact of the service of the notice was itself in doubt owing to the evidence of it not having been secured according to the provisions of the Regulation—a result due to the neglect of those representing the Zemindar—the finding of the High Court that due publication had not been established was maintained by the Judicial Committee (23-4). (*Lord FitzGerald.*) MAHARAJAH OF BURDWAN *v.* SRIMATI TARA SOONDARI DEBIA.

(1882) 10 I.A. 19=9 C. 619 (622-3)=

13 C.L.R. 34=4 Sar. 414.

—Notice of sale under—Publication or service of—Evidence of—Mode of. *See* UNDER THIS REGULATION, S. 8—NOTICE OF SALE UNDER—PUBLICATION OR SERVICE OF—OBJECT OF REGULATION AS REGARDS.

(1882) 10 I.A. 19 (21-2)=9 C. 619 (623).

BENGAL REGULATIONS—(Contd.)**Putni Taluqs Reg. VIII of 1819, S. 8,—(Contd.)**

—*Notice of sale under—Publication or service of—Object of Regulation as regards—Evidence of publication—Mode of service.*

The object of Bengal Reg. VIII of 1819 was that due service or publication of the notices prescribed by it should not be left matter of controversy. The evidence should be secured immediately afterwards, and exist in writing, and be referred to by the proper officer as part of the foundation of the sale. Accordingly if, immediately upon posting the notice, the peon posting it can find the defaulter or his manager, he is bound to ask for a receipt from the defaulter or his manager, signed under his hand, and if he gets such a receipt there is an end to all question as to the service. If he does not find the defaulter or his manager, or if that person will not sign a receipt, then he is to call in three substantial people of the village to attest the fact, which will be apparent to their eyes, that the notices in question have been published. If they object, as very likely villagers would object, to be parties to the proceedings for the enforcement of a sale, then he is obliged to go to the nearest moonsiff, and make a voluntary oath of the fact of service, which act is immediately recorded, and forms the foundation upon which the officer afterwards proceeds in carrying out his sale. Thus the evidence that the notice has been given is immediately preserved and the fact is not left to be matter of controversy afterwards (21-2) (*Lord Fitz Gerald*.) **MAHARAJAH OF BURDWAN v. SRIMATI TARA SOONDARI DEBIA.** (1882) 10 I. A. 19 = 9 C. 619 (623) = 13 C. L. R. 34 = 4 Sar. 414.

—*Rent sale—Zemindar's power of—Exercise of—Condition—Fulfilment of—Necessity.*

The power of sale given to a Zemindar by Regulation VIII of 1819 in the case of default in payment of the rent is a very summary remedy, which may be exercised immediately on arrears arising. But the power is given under important conditions the fulfilment of which is of the utmost consequence, not only to the person having a right to the talook, but to all those who have rights under him; not only to the putnidars, but to the sub-lessees, mortgagees, and other incumbrancers, whose rights may be affected or extinguished by the sale taking place (192-3). (*Lord Shaud*.) **NAWAB KHAJA AHSANULLA KHAN BAHADOOR v. HURRI CHURN MAZOOMDAR.**

(1892) 19 I. A. 191 = 20 C. 86 (89) = 6 Sar. 252.

—**S. 8, cl. (2)—Words—Substantial person—Meaning.**

It cannot be held as a matter of law that the word "substantial" in S. 8, cl. (2) of Bengal Regulation 8 of 1819 means a wealthy man from whom damages could be recovered by the putnidar, supposing the attestation to be false (79).

Where the evidence showed that the man objected to carried on the trade of a tailor, that he had lakhiraj lands, that he lived in the neighbourhood, was well-known, and was a "respectable" person, held that upon such evidence a court of fact was justified in coming to the conclusion that the man was a "substantial" man within the meaning of the said clause (79-80).

Wealth is only one element in the position and status of the witness. If, therefore, the witness lives in the neighbourhood, and if he be a respectable man and of good character, there is no reason why, upon evidence appearing of such facts, a Judge of fact, in estimating the position of the man, may not properly come to the conclusion that he is a substantial person within the meaning of the clause (79-80). (*Sir Montague E. Smith*.) **RAM SABUK BOSE v. MONMOHINI DOSSEE.**

(1874) 2 I. A. 71 = 14 B. L. R. 394 = 23 W. R. 113 = 3 Sar. 442 = 3 Suth. 72.

BENGAL REGULATIONS—(Contd.)**Putni Taluqs Reg. VIII of 1819, S. 8, cl. (2)—(Contd.)**

—*Notice of sale under—Service of—Irregularity—Objection founded on, in interests of under lessee—Putnidar if can avail himself of.*

It is suggested that this suit (suit brought to set aside the sale of a putni talook on the ground that the notice of sale was not served in accordance with the terms of Regulation VIII of 1819) is brought by the putnidar, and that an objection founded on the interests of the under-lessees is not available to her. But that suggestion proceeds on a misconception of the nature and force of the objection. Their Lordships have to construe the Regulation. They find a process prescribed by it, which its framers thought it indispensable to fix, for the observance of which they have declared the Zemindar to be exclusively answerable, and which is calculated to protect all persons interested in the estate against injury by the working of a very swift and summary remedy given to the Zemindar. The Zemindar has neglected to observe a substantial portion of that process. There is therefore material irregularity in his procedure, and of that irregularity the putnidar is entitled to avail himself as a "sufficient plea" within the meaning of the Regulation (35). (*Lord Hobhouse*.) **MAHARANI OF BURDWAN v. MURTUNJOY SINGH.**

(1887) 14 I. A. 30 =

14 C. 365 (371) = 4 Sar. 772.

—*Notice of sale under—Personal service on defaulter—What amounts to.*

A putni talook was sold under Reg. VIII of 1819. The requisite petition and notice were stuck up at the Collector's kucheree, and the requisite notice at the Zemindar's kucheree. The copy or extract which is next directed by the Regulation to be similarly published was not stuck up at the plaintiff's kucheree at Amerpore, or anywhere else in Amerpore, which was the putni talook in question. Service of that notice was effected on R, the plaintiff's putnidar's nephew and co-sharer in the talook, at her kucheree in Mahanund about 9 miles from Amerpore. The plaintiff's Mahanund kucheree was in the same house with that of R.

Quære: whether that service must be taken to be service on the plaintiff herself (33). (*Lord Hobhouse*.) **MAHARANI OF BURDWAN v. MURTUNJOY SINGH.**

(1887) 14 I. A. 30 = 14 C. 365 (370) = 4 Sar. 772.

—*Notice of sale under—Proof of due—Receipt by serving peon of—Failure to bring—Validity of sale—Effect on.*

In the case in 9 W. R. 242, the Chief Justice says: "This was a suit to cancel a sale of an under-tenure under Reg. VIII of 1819. The material part of Cl. (2), S. 8, Reg. VIII of 1819, so far as this case is concerned, is that the notice required to be sent into the mofussil shall be served. The Zemindar is exclusively answerable for the observation of the forms prescribed by that clause. The subsequent part of the section, which prescribes that the serving peon shall bring back the receipt of the defaulter or of his manager, or in the event of his inability to procure it, that he shall obtain that which by the Regulation is substituted for it, is merely directory, and if not done does not vitiate the sale, provided the notice is duly served." (77).

Their Lordships are disposed to agree with this opinion of the Chief Justice, confined as it is to cases where there is proof that the notice was duly served. The consequences of holding that a statutory sale of these putnees could be set aside because one of the witnesses to the notice turned out not to be substantial, when it was in fact served, would be to give too great effect to form at the expense of substance (78). (*Sir Montague E. Smith*.) **RAM SABUK BOSE v. MONMOHINI DOSSEE.**

(1874) 2 I. A. 71 = 14 B. L. R. 394 = 23 W. R. 113 = 3 Sar. 442 = 3 Suth. 72.

BENGAL REGULATIONS—(Contd.)**Putni Taluqs Reg. VIII of 1819, S. 8, cl. (2)—(Contd.)***—Notice of sale under—Validity of—Conditions—Personal service on defaulter—Sufficiency of.*

On the construction of S. 8, para. 2 of the Reg. VIII of 1819, the High Court have decided four points; first, that if there is a kucheree on the land of the defaulting putnidar, the notice must be published there; secondly, that by the land of the defaulter is meant that land which the Zemindar is seeking to sell for default of rent; thirdly, that if there is no such kucheree, the notice must be published at the principal town or village of the land in question; and fourthly, that it must be published in the manner required, and that service on the putnidar is not sufficient.

In all four of these propositions their Lordships agree. To hold otherwise might defeat some of the substantial objects of this Regulation (34). (*Lord Hobhouse.*) MAHARANI OF BURDWAN *v.* MURTUNJOY SINGH.

(1887) 14 I. A. 30 = 14 C. 365 (370) = 4 Sar. 772.

—Notice of sale under—Validity of—Conditions.

The notice of sale under Cl. (2) of S. 8 of Regulation VIII of 1819 ought to state that if the full amount due, and specified in the notice, be not paid before the date therein mentioned, the tenure of the defaulter will be sold by public sale. In order to have that notice in proper form it must contain, not merely a specification of the arrears, but a notification that the sale will proceed unless payment of the rent be made within the time limited (193). (*Lord Shand.*) NAWAB KHAJA AHSANULLA KHAN BAHADOOR *v.* HURRI CHURN MOZOOMDAR

(1892) 19 I. A. 191 = 20 C. 86 (90) = 6 Sar. 252.

—S. 8, Cl. (3)—Case falling under—Notice in terms of cl. (2) in case of—Validity—Practice permitting such notice—Effect.

In a case falling under Cl. (3) of S. 8 of the Regulation, the notice of sale given by the Zemindar was in terms of Cl. (2) of the Section. On objection taken to the validity of the notice, it was urged that that form of notice had been generally in use for a number of years.

Held, that no extent of general use of such a form of notice could enable parties to dispense with a material and essential part of it (195-6) (*Lord Shand.*) NAWAB KHAJA AHSANULLA KHAN BAHADOOR *v.* HURRI CHURN MOZOOMDAR.

(1892) 19 I. A. 191 = 20 C. 86 (92) = 6 Sar. 252.

—Case falling under—Notice in terms of cl. (2) in case of—Sale in pursuance of—Legality.

In a case falling under Cl. (3) of S. 8 of Regulation VIII of 1819, the notice, instead of being framed as clause (3) required, and so containing an intimation that payment of three-fourths of the arrear would prevent a sale, contained a distinct statement that, unless the whole of the arrears were paid, the sale would take place. In short, the notice followed the terms of Cl. 2; and it not only failed to give the intimation of the proportion of the arrear which if paid would prevent a sale, but gave an erroneous and misleading intimation, at least by implication, that payment of the whole arrear was necessary to prevent this.

Held, that the notice was essentially defective, and the sale was consequently bad, and must be set aside (194-5) (*Lord Shand.*) NAWAB KHAJA AHSANULLA KHAN BAHADOOR *v.* HURRI CHURN MOZOOMDAR.

(1892) 19 I. A. 191 = 20 C. 86 (91-2) = 6 Sar. 252.

—Notice of sale under—Defect in—Objection to validity of sale on ground of—Time for taking—Appeal—Maintainability for first time in.

It has been contended on the part of the appellant that the objection that the notice under Cl. 3 of S. 8 of the Regulation was essentially defective, and the sale was consequently bad, and must be set aside, came too late, because it was taken for the first time in the appeal to the High Court. No

BENGAL REGULATIONS—(Contd.)**Putni Taluqs Reg. VIII of 1819, S. 8, cl. (3)—(Contd.)**

doubt the objection was one which ought to have been taken before the Court of First Instance; but their Lordships are not prepared to hold that an objection of this kind, fatal to the whole proceedings, and appearing upon the face of the notice itself, was not competently raised before the High Court, and entertained by them. The objection, which is at the root of the whole proceedings, arises upon the notice which the Zemindar himself gave, and no inquiry of any kind is necessary; and their Lordships are of opinion that it was not too late to take such an objection before the High Court; and that the High Court properly disposed of it (195). (*Lord Shand.*) NAWAB KHAJA AHSANULLA KHAN BAHADOOR *v.* HURRI CHURN MOZOOMDAR.

(1892) 19 I. A. 191 = 20 C. 86 (92) = 6 Sar. 252.

—Notice of sale under—Publication of—Object of.

As observed by the High Court, the object of the publication of the notice under Cl. (3) of S. 8 of the Regulation, is to give not only to the defaulting putnidars, but darputnidars, mortgagees, and other encumbrancers, notice of the sale. It may well be, that the putnidar, darputnidar, mortgagees, or other encumbrancers would have available, for the purpose of saving the estate from sale 75 p. c. of the arrears due, but not the whole (194). (*Lord Shand.*) NAWAB KHAJA AHSANULLA KHAN BAHADOOR *v.* HURRI CHURN MOZOOMDAR.

(1892) 19 I. A. 191 = 20 C. 86 (91-2) = 6 Sar. 252.

—Notice of sale under—Validity—Condition

The notice, which is a condition precedent to any sale taking place under Cl. (3) of S. 8 of Regulation VIII of 1819 must in all material respects comply with the provisions of the clause. There should be intimation made to the debtor, in terms of the clause, not only of the balance due, but an intimation that unless the whole of the advertised balance shall be paid before the date in question, or so much of it as shall reduce the arrear, including any intermediate demand for the month of Kartick to less than a fourth of the total demand of the Zemindar, the sale will take place (194). (*Lord Shand.*) NAWAB KHAJA AHSANULLA KHAN BAHADUR *v.* HURRI CHURN MOZOOMDAR.

(1892) 19 I. A. 191 = 20 C. 86 (90-1) = 6 Sar. 252.

—S. 11, Cl. (1)—Sale of tenure free of incumbrances—Power of—Stipulation in engagements reserving power—Necessity.

Regulation VIII of 1819, S. 11, cl. (1) no doubt gives an express power to sell the tenure free of all incumbrances that may have accrued upon it by the act of the defaulting proprietor, his representatives, or assignees; but the power so given is confined to the case of tenures where the right of selling or bringing to sale for an arrear of rent, has been specially reserved by stipulation, in the engagements interchanged in the creation of the tenure (342). (*Sir Montague Smith.*) FORBES *v.* BABOO LUCHMEPUT SINGH.

(1872) 14 M. I. A. 330 = 10 B. L. R. 139 (P. C.) = 17 W. R. 197 = 2 Suth. 554 = 3 Sar. 27.

—S. 13, Cl. (4)—Putni rent—Arrears of—Deposit by darpatnidar of—Rights of darpatnidar on—Effect on, of provisions of Bengal Tenancy Act, 1885.

A darpatnidar who, with the object of averting a sale in pursuance of special proceedings under Regulation VIII of 1819 for the realisation of arrears of putni rent payable to the Zemindar by the putnidar, deposits the amount of the arrears in the Collector's court and is put by him in possession of the putni taluk acquires under sub-S. (4) of S. 13 of that Regulation a special lien which may well be called a statutory salvage lien and that lien is not affected by the provisions of the Bengal Tenancy Act.

Held, that such a darputnidar was entitled to sue for a declaration that the putni taluk obtained possession of by him in pursuance of proceedings under the Putni Regulation

BENGAL REGULATIONS—(Contd.)**Putni Taluqs Reg. VIII of 1819, S. 13, Cl. (4)—(Contd.)**

was not liable to be sold under the provisions of S. 165 of the Bengal Tenancy Act in execution of a decree for arrears of rent obtained by a person who, though originally owner of the estate, had parted with it at the time he instituted the suit for such arrears. (*Mr. Ameer Ali.*) **FORBES v. BAHADUR SINGH.** (1914) 41 I. A. 91 = 41 C. 926 (941-2) = 23 I. C. 632 = (1914) M. W. N. 397 = 15 M. L. T. 380 = 18 C. W. N. 747 = 1 L. W. 1059 = 12 A. L. J. 653 = 27 M. L. J. 4.

—**S. 14—Collector—Proceedings before—Nature of, administrative and not judicial—Title—Enquiry into—Collector—Jurisdiction of.**

The proceedings before the Collector (under S. 14 of Regulation VIII of 1819) are of an administrative rather than a properly judicial character. The Zemindar who has a power of compelling a sale is to exercise the power through the instrumentality of the Collector himself, who acts, not magisterially, but ministerially, and who has, in the true view of his functions, no capacity to give effect to any inquiry he may make into title comparable to the capacity possessed by an ordinary judicial tribunal (108). (*Viscount Haldane.*) **RAJA OF PACHETI v. KUMUD NATH CHATTERJI.** (1918) 45 I. A. 103 = 46 C. 1 (9) = 24 M. L. T. 66 = (1918) M. W. N. 441 = 8 L. W. 186 = 22 C. W. N. 1009 = 28 C. L. J. 165 = 20 Bom. L. R. 856 = 16 A. L. J. 569 = 5 Pat. L. W. 64 = 45 I. C. 827 = 35 M. L. J. 347.

—**Purchaser's right to indemnity under—Purchase being benami—Finding as to—Effect.**

Semble. A finding in a suit under S. 14 of Bengal Regulation VIII of 1819 as to the purchaser's benami character would be conclusive against any right to indemnity (58). (*Sir Lawrence Jenkins.*) **JUSCURN BOID v. PIRTHICHAND LAL.** (1918) 46 I. A. 52 = 46 C. 670 (681) = 21 Bom. L. R. 632 = 23 C. W. N. 721 = (1919) M. W. N. 258 = 30 C. L. J. 71 = 26 M. L. T. 131 = 17 A. L. J. 514 = 50 I. C. 444 = 36 M. L. J. 557.

—**Sale illegal under—Money paid to avert—Recovery back of—Suit for—Maintainability.**

The rule which prevents a person from recovering back money which he has paid on a claim in legal proceedings to which he might have set up a defence but has failed to do so has no application to a claim to recover back money paid to avert an illegal sale under S. 14 of Regulation VIII of 1819. In the case of an ordinary suit those who pay lose their right to resist, however good, because, having had the full opportunity of doing so which the law allows them once for all, they have not availed themselves of the opportunity so given. But S. 14 of the Regulation expressly recognises the right to bring a separate suit in an ordinary court, the proceedings before the Collector notwithstanding. If the purchaser at the sale impeached is made a party, the sale may even be set aside. All the taluqdar gets by demanding a summary investigation before the Collector is an award the application for which will not stop the sale. The only step by which the sale can be stopped is by a deposit of the full amount claimed, and when this is done the question of title remains capable of being raised in an ordinary suit (107). (*Viscount Haldane.*) **RAJA OF PACHETI v. KUMUD NATH CHATTERJI.** (1918) 45 I. A. 103 = 46 C. 1 (8) = 24 M. L. T. 66 = (1918) M. W. N. 441 = 8 L. W. 186 = 22 C. W. N. 109 = 28 C. L. J. 165 = 20 Bom. L. R. 856 = 16 A. L. J. 569 = 5 P. L. W. 64 = 45 I. C. 827 = 35 M. L. J. 347.

—**Suit against Zemindar for reversal of sale under—Parties—Purchaser if one—Indemnity to, in case of reversal of sale—Issue as to, and determination of right of—Duty of Court.**

S. 14 of the Regulation authorizes a suit against the

BENGAL REGULATIONS—(Contd.)**Putni Taluqs Reg. VIII of 1819, S. 14—(Contd.)**

Zemindar for the reversal of a sale under the Regulation, and then provides that "the purchaser shall be made a party in such suits, and upon decree passing for reversal of the sale the Court shall be careful to indemnify him against all loss at the charge of the Zemindar or person at whose suit the sale may have been made". The provision is imperative, and imposes on the court without qualification the duty it indicates.

To discharge this duty a distinct issue should be framed as between the purchaser and the person chargeable under the section whether, in case the sale is reversed, the purchaser has suffered any and what loss against which he ought to be indemnified by that person. On that issue there ought to be a finding and a decision, and then any contest on this head would be finally closed subject to such right of appeal as there might be (58). (*Sir Lawrence Jenkins.*) **JUSCURN BOID v. PIRTHICHAND LAL.** (1918) 46 I. A. 52 = 46 C. 670 (680-1) = 21 Rom. L. R. 632 = 23 C. W. N. 721 = (1919) M. W. N. 258 = 30 C. L. J. 71 = 26 M. L. T. 131 = 50 I. C. 444 = 17 A. L. J. 514 = 36 M. L. J. 557.

—**Suit against zemindar for reversal of sale under—Purchaser's right to indemnity on reversal of sale—Failure to determine, in such suit—Fresh suit by purchaser for the purpose—Maintainability.**

How far the remedy provided by S. 14 of Bengal Reg. VIII of 1819 in a purchaser's favour excludes all other remedies, apart from any determination of an issue, is a question of some nicety. There is much to be said in favour of its exclusive character on the score of policy and convenience.

A patni taluk was sold for arrears of rent under the Bengal Patni Reg. VIII of 1819. The purchaser paid in the entire amount of the purchase money and received a certificate of payment under S. 15 of the Regulation. He also received the usual order for possession. A darpatnidar, who was desirous of contesting the right of the Zemindar to make the sale, sued her for its reversal and obtained a decree for the reversal of the sale. In that suit, however, the court failed to apply the provision of S. 14 of the Regulation in a manner that would be conclusive as to the purchaser's right to be indemnified. The purchaser thereupon instituted a suit to recover from the Zemindar a specified sum, the aggregate of several sums of money being (a) the amount of rent arrears due and paid by the Collector to the Zemindar out of the purchase-money; (b) the expenses of the sale appropriated by the Collector out of the purchase-money; (c) the patni rents paid to the Zemindar subsequent to the sale; and (d) interest on those several sums and on the balance of purchase-money left in the hands of the Collector.

Quere, whether the suit was competent and was not barred by S. 14 of the Regulation. (*Sir Lawrence Jenkins.*) **JUSCURN BOID v. PIRTHICHAND LAL.**

(1918) 46 I. A. 52 (59, 56) = 46 C. 670 (681-2) = 21 Bom. L. R. 632 = 23 C. W. N. 721 = (1919) M. W. N. 258 = 30 C. L. J. 71 = 26 M. L. T. 131 = 17 A. L. J. 514 = 50 I. C. 444 = 36 M. L. J. 557

Recovery of arrears of Rent and Revenue Reg. VII of 1799.

—**Rent sale of holding—Validity—Sale in execution of decree against heirs of holder—Holding vested by foreclosure proceedings in third party prior to rent suit and symbolical possession given to him—Proceedings in rent suit conducted with knowledge of—Effect—Tender of rent arrears by mortgagee—Purchaser—Necessity.**

S, a Mahomedan, held the suit taluks in Pergunnah Havalee by an hereditary tenure created by sunnuds granted prior to 1793 to his ancestors. By the sunnads the suit

BENGAL REGULATIONS—(Contd.)**Recovery of arrears of Rent and Revenue Reg. VII of 1799—(Contd.)**

talooks were given by way of *istemrar* to the grantee and his descendants on a fixed and absolute juma. The sunnuds did not, in terms, give the Zemindar power to sell the tenure itself free from incumbrances.

In March 1850, the appellant advanced a certain sum to S, and to secure that advance the latter made, in ordinary form, a conditional sale of the suit talooks to him, to be absolute if the money was not repaid on 13—3—1851. The mortgage-debt not having been paid, the appellant took proceedings to foreclose under Reg. XVII of 1806; and the foreclosure was completed in due course in August, 1852. Thereupon, on 28—1—1853, the appellant commenced a suit against S to obtain possession of the talooks. The suit was decreed by the Zillah Judge on 18—12—1854, and that decree was ultimately affirmed by the P. C. by order in council, dated 3—2—1866, which declared that the appellant was entitled to the possession of the mortgaged premises as absolute owner.

Shortly after the decree of the Zillah Judge of 18—12—1854, in the appellant's suit for possession, *viz.*, on 6—1—1855; the Zemindar, P, brought a summary suit in the Collector's court against the heirs of S for arrears of rent. An *ex parte* decree was made in that suit on 26—2—1855 against the heirs of S for the amount of the arrears claimed. On 19—3—1855 the Zemindar applied for the execution of his decree by sale of the suit talooks, and they were sold accordingly on 26—4—1855 to the Respondent, J.

On 24—3—1856, the appellant commenced the suit out of which the appeal arose to set aside the sale and for possession of the suit talooks against the Zemindar, P, the purchaser, J, and the heirs of S. The purchaser, J, was only the Mookhtar of the Zemindar, P, and purchased at a grossly inadequate price. It appeared from the evidence that both the Zamindar and the purchaser had the fullest notice of the title of the appellant and of his claim to possession before the decree for sale, and that having that notice, the Zemindar proceeded, without notice to the appellant, to obtain a decree for sale *ex parte* against the heirs of S.

Held, reversing the High Court, that the sale to J was invalid, and should be set aside, that the appellant was entitled to possession, and to be registered as the holder of the talookas, from the date of the decree of the Zillah Judge of 18—12—1854 (344).

Before the Zamindar took proceedings against the heirs of S the title of the appellant had passed beyond the stage of being an incumbrance only on the tenure. He had become the absolute owner of the tenure itself, and the heirs of S, against whom the summary suit was brought, had no title or interest whatever left in it. They were not the "holders of any tenure", to use the words of Reg. VII of 1799, and were certainly not "proprietors" in the words of the Reg. VIII of 1819 (343).

The judgment below was also grounded on the fact, that the heirs were in actual possession, and that the name of S, their ancestor, was on the Register. This was so, but they were holding possession wrongfully. Not only was their title gone, but a decree for possession had been obtained against them, and executed so far as it was possible to do so, *viz.*, by delivery of symbolical possession. Their possession, therefore, was in no sense lawful, and their mere *de facto* possession was known by the Zemindar to be wrongful. With this knowledge the Zemindar could not properly treat the heirs as holders of tenure, so as to affect the rights of the appellant, of whose title and efforts to obtain possession he had notice (343).

Quare, whether the appellant ought to have made a tender of the arrears of rent to stop the proceedings in the summary

BENGAL REGULATIONS—(Contd.)**Recovery of arrears of Rent and Revenue Reg. VII of 1799—(Contd.)**

suit against the heirs to which he was no party (344). (*Sir Montague Smith.*) **FORBES v. BABOO LUCHMEEPUR SINGH.**

(1872) 14 M. I. A. 330 =
10 B. L. R. 139 (P. C.) = 17 W. R. 197 = 2 Suth. 554 =
3 Sar. 27.

———Revenue—Monthly instalment—Arrear of—Sale for, before close of year—Validity—Condition. *See* BENGAL REGULATIONS—REG. XIV OF 1793—BENGAL RECOVERY OF ARREARS OF RENT, ETC.

(1837) 1 M. I. A. 383 (404-5).

———Cl. (7)—*Rent sale of holding—Validity—Holding validly vested in third party before sale—Effect.*

The language of cl. (7) of Reg. VII of 1799 is not well-adapted to meet the case of incumbered tenures, but the words, if the defaulter be the holder of any tenure, it may be sold, may fairly mean that the tenure the defaulter holds, or has, such as it is in his hands, may be sold, and it does not seem to be a forced construction, that the decisions above referred to have put on the Act, in holding that if the tenure has passed to another, and is no longer in him, the alleged manner enabling it to be sold for his debt, and that if he has an incumbered tenure, then only the interest which he has in it is subject to the power of sale (341-2). (*Sir Montague Smith.*) **FORBES v. BABOO LACHMEEPUR SINGH.**

(1871) 14 M. I. A. 330 = 10 B. L. R. 139 (P. C.) =
17 W. R. 197 = 2 Suth. 554 = 3 Sar. 27.

Registry of Deeds Reg. XX of 1812.

———S. 2, cl. (5)—*Copy from Registry—Admissibility—Conditions.*

A Mahomedan executed a hibbanamah in favour of his son. The document contained an appointment by the father of one K to be the guardian of his son for the business of a durgah (of which the son was appointed muttawallee by the document) during his minority.

The original of that deed was not produced. It appeared upon the son's own evidence that the original deed had been delivered to the guardian K, but that person was not called as a witness, nor was his absence explained. The document actually tendered as evidence purported to be a copy of the deed from the Registry. That document showed that the instrument, if really executed, was signed by numerous subscribing witnesses; but none of them were called to prove its existence and execution.

Held, that, assuming that secondary evidence had been admissible, neither of the two conditions required to make the copy statutory evidence of the deed by virtue of Reg. XX of 1812, S. 2, cl. 5, was complied with (102).

It was not shown that the original was "lost", destroyed, or not forthcoming, that is to say, its non-production was not satisfactorily accounted for, nor was there any proof by any of "the subscribing witnesses" that the original had been duly executed (102). (*Sir Montague E. Smith.*) **AMEER-ROONISSA KHATOON v. ABEDOONISSA KHATOON.**

(1875) 2 I. A. 87 = 15 B. L. R. 67 = 23 W. R. 208 =
3 Sar. 423 = 3 Suth. 87.

Resisting Process Reg. XI of 1796.

———*Attachment by court and subsequent declaration of forfeiture—Proceedings prior to—Regularity of—Presumption of—Irregularity—Effect of.*

In 1799 an insurrection broke out in Benares, in which the three eldest sons of one U were accused of being implicated, the fourth son being then a minor. The supposed delinquents were summoned to appear and answer the charge against them, but they absconded and could not be found. After certain proceedings had taken place, an order was pronounced by the Governor-General in Council on 30-1-1800

BENGAL REGULATIONS—(Contd.)**Resisting Process Reg. XI of 1796—(Contd.)**

under Reg. XI of 1796, declaring the estates of the supposed delinquents to be forfeited, and directing the Collector of Benares to hold them subject to the disposal of the Government. Under that order all the estates held in the name of the eldest son were confiscated.

It was said that the proceedings were irregular. It was not disputed that process was issued against the parties, that they absconded, that their lands were attached by the Collector under an order from the Magistrate, that six months elapsed without their appearance, that the case was reported to the Governor-General in Council, and that a sentence of forfeiture was pronounced. But it was contended that the attachment ought only to have issued after certain proclamations had been made in a particular form and with certain ceremonies, and that there was no evidence that those forms and ceremonies had been strictly observed.

Held, that, after the issuing of the attachment by the Court and the subsequent declaration of forfeiture, the Court must presume all things previous to the attachment to have been regularly and legally done, and that there was no sufficient evidence to rebut that presumption (254).

Quære, what might have been the effect of any such irregularity if it had been proved to exist (254). (*Mr. Pemberton Leigh.*) MUSSAMAT GOLAB KOONWAR *v.* THE COLLECTOR OF BENARES. (1847) 4 M. I. A. 246 = 7 W. R. 47 (P. C.) = 1 Suth. 186 = 1 Sar. 343.

—Cases provided for by—Proceedings for forfeiture of estate in.

Regulation XI of 1796 provides for two cases: (1) Resistance to process of the courts; (2) for cases of persons charged with offences of a criminal nature, who shall abscond or conceal themselves, so that, upon process issued against them, they cannot be found.

In the second class of cases, proclamations shall be issued by the Magistrate requiring the absent party to appear to answer the charge within a period not less than a month. In default of appearance, if the absentee be a proprietor paying revenue immediately to the Government, the Magistrate is to order the attachment of any lands of the absentee within his jurisdiction by issuing his precept to the Collector of the District, directing him to attach the lands and hold them till further notice.

Then follows the sixth and last clause, which is in these words:—"Should the absentee neglect to attend for a period of six months after the lands have been ordered under attachment, the Magistrate is to report the case to the Governor General in Council, who will pass such order upon it and upon the future disposal of the lands as he may judge proper."

No words can be more general and extensive than these. But it was agreed that they could not be intended to include a forfeiture or confiscation of the lands, because in the other case provided for by the Regulation, namely, that of resistance to process, forfeiture of the lands is expressly enacted.

The two cases are obviously different. But it will be found on examination that the terms of the enactment applicable to the first case confirm the construction which we put upon the clause now in question.

In case of resistance to process, the Magistrate is to declare the forfeiture; but that sentence is to be reviewed by the Nizamut Adawlut, which may either confirm or modify it. If confirmed, the proceedings are to be transmitted, before the sentence is carried into execution, to the Governor-General in Council, "who will finally determine whether the sentence of forfeiture shall be put in force or commuted to a fine, or otherwise; and who, whenever he may order the land or lease of the offender to be forfeited to Government, will at the same time cause the necessary instructions for the future disposal of the land to be conveyed to the Collector

BENGAL REGULATIONS—(Contd.)**Resisting Process Reg. XI of 1796—(Contd.)**

through the Board of Revenue." These words are substantially the same as those of the 6th section. We have no doubt, therefore, of the right of the Governor-General in Council to pronounce an order of confiscation in such cases as the present (252-3). (*Mr. Pemberton Leigh.*) MUSSUMAT GOLAB KOONWAR *v.* THE COLLECTOR OF BENARES. (1847) 4 M. I. A. 246 = 7 W. R. 47 (P. C.) = 1 Suth. 186 = 1 Sar. 343.

—Confiscation under—Property liable for—Property of person other than delinquent.

In the absence of clear words indicating such an intention, it cannot be assumed that the Legislature intended by Regulation XI of 1796 to authorise the confiscation of the property of any person other than the delinquent (238). (*Sir James W. Colville.*) JUGGOMOHUN BUKSHEE *v.* ROY MOTHORANATH CHOWDRY. (1867) 11 M. I. A. 223 = 7 W. R. P. C. 18 = 1 Suth. 673 = 2 Sar. 246.

—Construction—Strictness in—Necessity. See UNDER THIS REGULATION—NATURE OF, PENAL.

(1867) 11 M. I. A. 223 (237).

—Forfeiture of estate—Order of Governor-General in Council of—Legality—Criminal offence—Person charged with—Absconding of or concealing by—Order against him in case of.

In 1799 an insurrection broke out in Benares, in which the three eldest sons of one U were accused of being implicated, the fourth son being then a minor. The supposed delinquents were summoned to appear and answer the charge against them, but they absconded and could not be found. After certain proceedings had taken place, an order was pronounced by the Governor-General in Council on 30—1—1800, declaring the estates of the supposed delinquents to be forfeited, and directing the Collector of Benares to hold them subject to the disposal of the Government. Under that order all the estates in the name of the eldest son were confiscated. The confiscation was thus founded not on any supposed act of rebellion, but on the failure of parties summoned to appear, to come in under the summons. The question was whether, under Bengal Regulation XI of 1796, the Government had authority to pronounce a sentence of forfeiture in the case, even if all necessary forms had been observed.

Held, that the Governor-General in Council had the right to pronounce an order of confiscation in such cases (253). (*Mr. Pemberton Leigh.*) MUSSUMAT GOLAB KOONWAR *v.* COLLECTOR OF BENARES. (1847) 4 M. I. A. 246 = 7 W. R. 47 (P. C.) = 1 Suth. 186 = 1 Sar. 343.

—Hindu Law—Joint family—Members of—Forfeiture of ancestral estate declared against some—Benefit of, if enures to other members.

The next proposition of the appellants was a very singular one, namely, that the forfeiture declared, under Reg. XI of 1796, against three out of four brothers constituting a joint Hindu family was to enure for the benefit of the fourth, in direct opposition both to the letter and spirit of the Regulation, which declares that the forfeited lands shall be at the disposal of the Governor-General in Council; neither principle nor authority was advanced in support of such a proposition, and it is obvious that it cannot be maintained (254). (*Mr. Pemberton Leigh.*) MUSSUMAT GOLAB KOONWAR *v.* THE COLLECTOR OF BENARES.

(1847) 4 M. I. A. 246 = 7 W. R. 47 (P. C.) = 1 Suth. 186 = 1 Sar. 343.

—Hindu Law—Joint family—Members of—Forfeiture of ancestral estate declared against some—Maintenance of widow of ancestor—Right of—Effect on.

Held, that a forfeiture declared under Reg. XI of 1796 against some of the members of a joint Hindu family did

BENGAL REGULATIONS—(Contd.)**Resisting Process Reg. XI of 1796—(Contd.)**

not affect the right of the widow of an ancestor of the family to maintenance out of the ancestral estate (258). (*Mr. Pemberton Leigh.*) **MUSSUMAT GOLAB KOONWAR v. THE COLLECTOR OF BENARES.** (1847) 4 M. I. A. 246 =

7 W. R. 47 (P. C.) = 1 Suth. 186 = 1 Sar. 343.

———*Hindu Law—Joint family—Members of—Forfeiture of ancestral estate declared against some—Shares of other members—Effect on.*

Held, that a forfeiture declared against three out of four brothers constituting a joint Hindu family did not affect the rights of the fourth brother in the ancestral property of the family and that he was accordingly entitled to his fourth share in the same (255). (*Mr. Pemberton Leigh.*) **MUSUMAT GOLAB KOONWAR v. THE COLLECTOR OF BENARES.** (1847) 4 M. I. A. 246 = 7 W. R. 47 (P. C.) =

1 Suth. 186 = 1 Sar. 343.

———*Nature of, penal—Construction—Strictness in—Necessity.*

Bengal Reg. XI of 1796 is a highly penal one, and should be construed strictly (237). (*Sir James W. Colville.*) **JUGGOMOHUN BUKSHEE v. ROY MOTHORANATH CHOWDRY.** (1867) 11 M. I. A. 223 = 7 W. R. P. C. 18 =

1 Suth. 673 = 2 Sar. 246.

———*Sale under—Sub-tenures or incumbrances created by delinquent—Effect on.*

There is no pretence for saying that a sale under the Regulation can carry with it the consequences of a sale for arrears of public revenue; that it sweeps away all sub-tenures or incumbrances created by the delinquent, or those through whom he claims (239). (*Sir James W. Colville.*) **JUGGOMOHUN BUKSHEE v. ROY MOTHORANATH CHOWDRY.** (1867) 11 M. I. A. 223 = 7 W. R. P. C. 18 =

1 Suth. 673 = 2 Sar. 246.

———**S. 4—Farm of land enjoyed by joint family as part of joint estate—Delinquent member of joint family—Confiscation in case of—Effect of, on rights of other members of family—Farm taken in name of one of members.**

A held a sudder farm, part of Government Khas Mehals, paying revenue directly to Government. Although A was the sole registered tenant, yet he was a member of a joint undivided Hindu family. A having been charged with a criminal offence, absconded in order to avoid the process of the Foujdari Court when the Governor-General, under the provisions of Bengal Reg. XI of 1796, confiscated the lands, and afterwards sold them by auction.

Held, that the sale was not effectual to pass the interests in the lands sold of the respondents, the other members of the joint family of the delinquent, A (239-40).

The Regulation does not contemplate the forfeiture of the tenure, as between landlord and tenant. What it contemplates is the confiscation and sale of the tenure. The tenure in question appears to be alienable. It was open to A to put his co-sharers in the estate into the full enjoyment of this farm, and to execute jointly with them, if they were so minded, sub-leases of the lands. Their Lordships are, therefore, unable to affirm the broad proposition, that under the Regulation it was competent to Government to confiscate and sell this farm, so as to give to the purchaser a good title against the respondents (239-40). (*Sir James W. Colville.*) **JUGGOMOHUN BUKSHEE v. ROY MOTHORANATH CHOWDRY.** (1867) 11 M. I. A. 223 =

7 W. R. P. C. 18 = 1 Suth. 673 = 2 Sar. 246.

———*Joint family possessed of Zemindary—Delinquent one of a—Confiscation of estate of—Effect on rights of other members—Delinquent registered proprietor—Delinquent not such proprietor—Distinction.*

Again, suppose that the absentee is one of a joint family

BENGAL REGULATIONS—(Contd.)**Resisting Process Reg. XI of 1796—(Contd.)**

Possessed of a zemindary, of which one member only is registered as owner. Their Lordships cannot think that upon the true construction of Reg. XI of 1796 the fact of such registration would either justify the confiscation of the whole zemindary, if the absentee were the sole registered proprietor, or prevent the confiscation of the share of the absentee if he were not the registered proprietor (238-9). (*Sir James W. Colville.*) **JUGGOMOHUN BUKSHEE v. ROY MOTHORANATH CHOWDRY.** (1867) 11 M. I. A. 223 =

7 W. R. P. C. 18 = 1 Suth. 673 = 2 Sar. 246.

———*Joint proprietor or joint farmer of land—Confiscation of estate of—Effect of, on interest of co-owners.*

Reg. XI of 1796 makes no express provision for the case of joint proprietors of land, or persons jointly holding a sudder farm of land. Let it be assumed that such a joint proprietorship, or joint holding, is ostensible as well as real, and that it appears on the Collector's books, can it be doubted that in such a case the words "land or other real property held by the absentee" in S. 4 of the Regulation would be limited to his undivided share in the actual lands or farm (238). (*Sir James W. Colville.*) **JUGGOMOHUN BUKSHEE v. ROY MOTHORANATH CHOWDRY.** (1867) 11 M. I. A. 223 = 7 W. R. P. C. 18 =

1 Suth. 673 = 2 Sar. 246.

Revenue-Free Lands Regulation VIII of 1800.

———**S. 21—Registered owner—Transferee from—Registration of name of—Collector's duty—Dispute possible as to title of transferee after death of transferor—Effect.**

A, one of the brothers who had obtained a share at a partition between them, had his share registered on the Collector's books as owner, and by deed of sale conveyed such share to his daughter, who was also his heir. The Collector, upon the objection of one of A's brothers (who denied A's right to alienate on the ground that it was ancestral property), refused to register the daughter's name as proprietor.

Held, that the Collector was bound by Bengal Reg. VIII of 1800, S. 21, to register her name, but that such mutation was to be without prejudice to any other question of title or right that might be raised against her, or her representatives, in any other suit, or proceeding. (*Lord Justice Turner.*) **RANEE COWULBAS KOONWUR v. BABOO LOLL BAHADUR SINGH.** (1861) 9 M. I. A. 39 = 1 Sar. 831.

Revenue-Free Lands (Badshahi Grants)**Reg. XXXVII of 1793.**

———*Registers made pursuant to—Evidentiary value of, as to title—Omission to register—Presumption from.*

Though the Registers made pursuant to Bengal Reg. XXXVII of 1793 are not all of the nature of conclusive evidence of title (for the Regulations themselves provide against that), yet this act of registration after a proclamation amounts to a public, open and notorious assertion of title on the one side, and the omission to register, unexplained by proof of the ill-health of the claimant, or absence in a distant country, or ignorance, afford an equally strong presumption of the non-existence of any title on the other. (*Mr. Baron Parke.*) **MEER USUD-OOLLAH v. MUSSUMAT BEEBY IMAMAN.** (1836) 1 M. I. A. 19 (45-6) =

5 W. R. 26 = 1 Suth. 46 = 1 Sar. 89.

Revenue-Free Lands (Non-Badshahi Grants)**Reg. XIX of 1793.**

———**S. 10—Applicability and effect of.**

S. 10 of Regulation XIX of 1793 relates solely to lands which, on the 1st of December, 1790, were *mal* or rent-paying lands; it treats the grant of rent-free tenure in such lands not as voidable, but as absolutely void; it reserves

BENGAL REGULATIONS—(Contd.)**Revenue-Free Lands (Non-Badshahi Grants) Reg. XIX of 1793, S. 10—(Contd.)**

to the Government no right in such lands unless they happened to be held *khas*; and it positively declared that no length of possession should give validity to any such grant. It further expressly authorised the land-owner to dispossess the grantee by the high hand, without having recourse to the machinery provided by other sections of the Regulation for the resumption or assessment of resumable *lakhiraj* tenures; or to any other legal proceeding (166-7). (*Sir James Colville.*) **HURRYHUR MOOKHOPODHYA v. MADUB CHUNDER BABOO.** (1871) 14 M. I. A. 152 =

20 W. R. P. C. 459 = 8 B. L. R. 566 = 2 Suth. 484 = 2 Sar. 713.

———*Claim under—Suit by Zemindar or putnidar to enforce—Onus of proof in—Shifting of—Presumptions arising from long and uninterrupted possession of defendants or their predecessors in interest.*

In a suit brought by a Zemindar or a putnidar to enforce a claim under S. 10 of Reg. XIX of 1793, *held*, that, if that class of cases was taken out of the special and exceptional legislation concerning resumption suits, the onus would be on the plaintiff to prove a *prima facie* case, to give some evidence that the suit land was once *mal* (489).

The plaintiff may prove a *prima facie* case by proving payment of rent at some time since 1790, or by documentary or other proof that the land in question formed part of the *mal* assets of the decennial settlement of the estate. His *prima facie* case once proved, the burden of proof is shifted on the defendant, who must make out that his tenure existed before December 1790 (489).

Where the defendants or those through whom they claim have been long in possession of the tenure impeached, effect will be given to those presumptions arising from long and uninterrupted possession, which were excluded only by the exceptional procedure applied to resumption suits under Reg. II of 1830, and by relieving defendants from a burden which every year made it more difficult to support (489).

An admission by the defendants that the suit lands were within the plaintiff's estate is not sufficient to meet the burden of proof thrown on the plaintiff, because it is only an admission that the lands were within the ambit of the estate and not that they had ever been *mal* lands (489). **NOBOKISTO MOOKERJEE v. KOYLASH CHUNDER BHUTTA-CHARJEE.** (1871) 2 Suth. 484 =

14 M. I. A. 152 = 20 W. R. 459 = 8 B. L. R. 566 = 2 Sar. 713.

———*Claim under—Suit by Zemindar or putnidar to enforce—Procedure prescribed by S. 30 of Reg. II of 1819—Applicability of, to such a suit.*

The invocation of S. 30 of Reg. II of 1819 in a suit brought by a Zemindar or putneedar to enforce a claim under S. 10 of Reg. XIX of 1793 is not mere matter of form to be rejected as surplusage, because the effect of it is to cause the case to be tried according to the procedure and presumptions prescribed by that enactment, and the enactments *in pari materia* greatly to the advantage of the plaintiff, and, consequently, to the prejudice of the defendant. It would be a mistrial to try such a suit under the procedure prescribed by S. 30 of Reg. II of 1819, and to remand the suit to enable the plaintiff to strike out all reference to that section, and to have the suit tried upon the amended plaint is not only correct but an indulgence to the plaintiff, whose suit, if not so remanded, ought to be dismissed. **NOBOKISTO MOOKERJEE v. KOYLASH CHUNDER BHUTTA-CHARJEE.** (1871) 2 Suth. 484 (488) = 14 M. I. A. 152 =

20 W. R. 459 = 8 B. L. R. 566 = 2 Sar. 713.

———*Mal lands of estate fraudulently made lakhiraj after 1—12—1790—Resumption of—Suit for—Proof of—*

BENGAL REGULATIONS—(Contd.)**Revenue-Free Lands (Non-Badshahi Grants) Reg. XIX of 1793, S. 10—(Contd.)**

Onus—Evidence—Shifting of onus—Conditions—Admission by lakhirajdar that lands were within plaintiff's estate—Effect.

Appellant, a Durpatnidar, sued to obtain a declaration that certain lands which the respondents claimed to hold as lakhiraj land were so held by them under an invalid title; that they were the *mal* lands of the appellant, liable, as such, to pay rent to him, and to have them assessed accordingly. The plaint expressly stated that the suit was brought under cl. 1 of S. 30 of Reg. II of 1819.

The Courts below tried the suit, as if it were one properly brought under Reg. II of 1819, placing the onus of proof on the respondents. They decided in favour of the appellant. On a special appeal preferred by the respondents, the High Court held that the onus had been wrongly thrown on the respondents, and remanded the suit accordingly. After remand the appellant amended his plaint pursuant to the order of remand by striking out all reference to the Reg. II of 1819, and making it a plaint for the resumption of land fraudulently made lakhiraj after 1—12—1790, and, therefore, falling within S. 10 of Reg. XIX of 1793.

Held, that the onus was on the plaintiff to prove that his land was once *mal* (172).

If this class of cases is taken out of the special and exceptional legislation concerning resumption suits, it follows that it lies upon the plaintiff to prove a *prima facie* case. His case is that his *mal* land has, since 1790, been converted into lakhiraj. He is surely bound to give some evidence that his land was once *mal* (172).

Held, further, that the plaintiff might show that the suit land was once *mal* by proving payment of rent at some time since 1790, or by documentary or other proof that the land in question formed part of the *mal* assets of the estate at the Decennial Settlement, and that the *prima facie* case of the plaintiff once proved, the burthen of proof would be shifted on to the defendant, who must make out that his tenure existed before December, 1790 (172-3).

Held also, that an admission by the defendant that the suit lands were within the plaintiff's estate was not sufficient to meet the burthen of proof thrown upon the plaintiff (173-4).

It was at most an admission that the lands were within the ambit of the estate, not that they had ever been *mal* lands (174). (*Sir James Colville.*) **HURRYHUR MOOKHOPODHYA v. MADUB CHUNDER BABOO.**

(1871) 14 M. I. A. 152 = 20 W. R. P. C. 459 = 8 B. L. R. 566 = 2 Suth. 484 = 2 Sar. 713.

Security from foreign litigants Reg. XIV of 1829.

———**S. 2, Cl. (1)—Repeal of, by Act III of 1845.**

Quære. Whether Act III of 1845 had the effect of repealing S. 2, cl. (1) of Bengal Reg. XIV of 1829. (*Lord Kingsdown.*) **WISE v. JUGBUNDOO BOSE.**

(1859) 7 M. I. A. 431 = 12 W. R. 229 = 1 Sar. 698.

———**S. 2, Cl. (1)—Security for costs—Furnishing of—Failure as regards—Dismissal of appeal on ground of—Conditions.**

An appeal was presented to the Sudder Court by a party then temporarily absent in England, but having real estates and factories within the jurisdiction of the Court. No security was furnished by the appellant's *vakil* within 6 weeks after lodging the appeal, as required by S. 2, cl. (1) of Ben. Reg. XIV of 1829. The respondent first put in an answer to the reasons of appeal filed by the appellant, and afterwards filed a petition for dismissal of the appeal for failure to furnish security within the time allowed by the Regulation. The Sudder Court accepted the respondent's contention, and dismissed the appeal.

BENGAL REGULATIONS—(Contd.)**Security from foreign litigants Reg. XVI of 1829—(Contd.)**

Held, that the dismissal was wrong.

The Sudder Court had not, under the Regulation, any power *ex mero motu* to dismiss the appeal, as the appellant was guilty of no default under that Regulation, not having been called upon by the respondent or the court to furnish security for costs, or of laches, in not voluntarily offering security. The Regulation provides only that a suit or appeal should not be proceeded with, until security is furnished. (*Lord Kingsdown.*) **WISE v. JUGBUNDOO BOSE.** (1859) 7 M. I. A. 431 = 12 W. R. 229 = 1 Sar. 698.

—Security for costs—Furnishing of—Waiver by respondent of—Filing answer to appeal before objecting to want of security for costs—Effect.

Where the respondent filed an answer to an appeal filed by a foreign litigant, before objecting to the want of security for costs, *Semble*, there was a waiver by the respondent of the want of security for costs, required by S. 2, cl. (1) of Ben. Reg. XIV of 1829. (*Lord Kingsdown.*) **WISE v. JUGBUNDOO BOSE.** (1859) 7 M. I. A. 431 = 12 W. R. 229 = 1 Sar. 698.

Southal Parganas Permanent Settlement Reg. III of 1872.

—See SONTAL PARGANAS PERMANENT SETTLEMENT REGULATION (BENGAL REG. III OF 1872).

Zillah Courts Reg. III of 1793.

—Object of—Bengal Limitation Reg. II of 1805—Object of—Distinction.

The object of Bengal Reg. III of 1793 and II of 1805 appear to be to protect the title of parties who have been in possession under a *bona fide* title, or what is supposed to be a *bona fide* title for the period of twelve years (253). (*Lord Kingsdown.*) **RAJAH ENAYET HOSSEIN v. SAYUD AHMED REZA.** (1858) 7 M. I. A. 238 = 1 Sar. 633.

—S. 5—Bengal Reg. II of 1805—Fraud.

The Bengal Regulations of Limitation (Reg. III of 1793, S. 15, and Reg. II of 1805) held conclusive in a question of title, where adverse possession had been held for more than twelve years, and the fraud alleged as taking the case out of the Regulations was not proved. **RAJAH DUNDIAL SINGH v. RAJA ANUND KISHWAR SINGH.** (1837) 1 M. I. A. 482 = 1 Sar. 142.

—S. 13—Proclamation under, in suit by one of several claimants to an estate—Effect of, on scope of suit.

On the death of J's widow, who had inherited his property, disputes arose as to the succession to the widow's estate. K, who claimed under a gift from the widow, took possession of her estate and property. His right was disputed by the other claimants and disturbances arose in consequence. An attachment effected by the Judge of the City of Patna was subsequently set aside, K was again put in possession, and the other claimants were left to their remedy by regular suit.

The 1st respondent filed a suit against K, alleging that his (1st respondent's) branch and the appellant's branch were entitled to the property in equal moieties. The appellant filed another suit against K, alleging his right to the whole by descent; and also a will made to him by the widow, transferring the property.

On the appellant's suit being called, the Court issued an order, purporting to do so under S. 13 of Reg. III of 1793, directing a proclamation to be made calling upon all persons

BENGAL REGULATIONS—(Contd.)**Zillah Courts Reg. III of 1793, S. 13—(Contd.)**

claiming the property of J's widow to appear in six weeks and prosecute their claims.

Thereupon N filed his plaint against K, stating that he was the younger brother of the appellant, and alleging that, according to the custom of the family, the youngest brother ought to succeed to the *raj* (the suit property) and *musnud*, and that, if his claim on that ground should be rejected, the property should be divided equally among the heirs.

A fourth suit was filed by the Collector claiming the property on behalf of the Government in case none of the claimants could establish a title.

The Court held against the claim of K, and passed decrees the effect of which was to give an eighth part of the whole to the appellant, another eighth to N, and one quarter to the 1st respondent and others. Appeals preferred from those decrees, then by K against each of the three original plaintiffs, and one by the appellant against the 1st and others entitled to shares under the decrees, were dismissed, and the decrees below affirmed.

On appeal to the P.C. by the appellant, he contended that the only real issue in the case was whether K was entitled to the *raj* by virtue of the deed of gift, or otherwise, that the claims of the appellant and the respondents were not directly put in issue, and that the Courts below erred in adjudicating upon their claims *inter se*.

Held, that the objection was not tenable (349-50). It is manifest from the whole course of the proceedings that all parties well knew, and acted upon the knowledge, that the suits were not only to decide upon the claims of K, but to determine also what parties were entitled to the property the subject of the suit. Further, in the very suit in which the appellant was the plaintiff the Court directed a proclamation to be issued, under S. 13 of Reg. III of 1793, to all claimants to the property. Lastly, no objection was raised by the appellant to the nature of the proceeding until after the decree had been pronounced giving him only a small share of the property claimed by him (350). (*Dr. Lushington.*) **GHIRDHAREE SING v. KOOLAHUL SING.**

(1841) 2 M. I. A. 344 = 6 W. R. 1 (P. C.) = 1 Suth. 98 = 1 Sar. 200.

—S. 14—Application of—Execution purchaser—Private purchaser—No distinction between.

With respect to the operation of Reg. III of 1793, S. 14, no distinction can be made in favour of a person claiming under an execution sale, as contradistinguished from the representatives of any person claiming under an ordinary assignment or conveyance (378-9). (*Lord Justice Selwyn.*) **RAJAH ENAYET HOSSAIN v. GHIRDHAREE LALL.**

(1869) 12 M. I. A. 366 = 11 W. R. P. C. 29 = 2 B. L. R. P. C. 75 = 2 Suth. 202.

—Mahomedan Law—Intestacy—Division of estate on foot of—Suit for—Limitation—Starting point—Will and gift deed executed by deceased—Possession of eldest son under, for more than 12 years prior to suit with consent of all heirs—Effect.

D, a Mahomedan, died in 1841 leaving a widow, five sons, and several daughters. The appellant was the eldest son, and one of the younger sons was C. Prior to his decease, D executed a deed of gift giving one-third of his immoveable property, and the whole of the moveable property specified in the Schedule thereto, to the appellant. D also executed a will of even date with the deed of gift, and thereby constituted the appellant his executor and representative, and the testator directed that out of every kind of property belonging to him (after deducting one-third) of which he had made the deed of gift to the appellant, the remaining two-thirds should be divided into

BENGAL REGULATIONS—(Contd.)**Zillah Courts Reg. III of 1793, S. 14—(Contd.)**

three portions, whereof one portion was to be applied by the executor for charitable and religious purposes, and the remaining two-thirds, after payment of debts, the executor was to pay to the testator's heirs, male and female, and salary-holders, in certain proportions as therein mentioned.

Disputes arose among D's heirs respecting the said two instruments, which led to a summary suit under Act XIX of 1841, in which the appellant was placed in possession of the whole of D's estate. Afterwards the members of D's family acquiesced in the said deed and will, renounced their claims as heirs, and received certain stated allowances given by the will out of D's estate. In 1846, C, the youngest son of D, in consideration of advances made to him, executed a bond, and was afterwards sued by the bond-holder. That suit resulted in a decree against C, and ultimately an execution sale in 1853 of his share in D's estate. M became the purchaser at the said sale, and he conveyed the property purchased by him to the respondent.

In a suit brought in 1859 by the respondent against the appellant and the other heirs of D on the footing of an intestacy distinctly alleging the Mahomedan law, and praying for the division of the estate of an intestate under that Mahomedan law, and specifically claiming the share to which C would have been entitled in the case of an intestacy, *held*, that, under S. 14 of Reg. III of 1793, limitation commenced to run from 1842, when the appellant was put in possession, and that the suit was accordingly barred (378). (*Lord Justice Selwyn.*) **RAJAH ENAYET HOSSEIN v. GIRDHAREE LALL.** (1869) 12 M. I. A. 366 =

11 W. R. P. C. 29 = 2 B. L. R. P. C. 75 = 2 Suth. 202.

———*Mortgage by conditional sale—Foreclosure of—Proceedings for—Limitation of 12 years from expiration of date fixed for payment—Not absolute and not applicable to all cases.*

It cannot be laid down as a rule universally true, that, under Bengal Regulation III of 1793, S. 14, a mortgagee's proceeding for a foreclosure under a mortgage, of the class of Bye-bil-waffa simply, cannot be preferred after 12 years from the expiration of the time which the instrument fixes as the period of redemption by payment, and on the expiration of which the conditional sale will become absolute, for this indiscriminating ground of decision would include alike adverse occupations, and those which had not the semblance even of such a character, and would establish a bar arising from simple occupation, and not from the laches of the demandant or of others before him (353).

In considering the effect of a legislative bar on the suit of a plaintiff, created as it is here by general words, it is often important to regard the nature and object of the suit; the nature of the title to which the bar is set up; who the parties are who raise the objection, and against whom it is raised. The bar from a year's possession under that Regulation does not depend solely on the length of possession, it may exist in favour of one occupant and not of another; it may be powerful against one demand, or one sort of claim, and be, at the same time, inoperative as against others. The time may run from a date prior or subsequent to the plaintiff's title to possession. A "cause of action" is not prolonged by mere transfer of the title. (*Lord Kingsdown.*) **PRAN-NATH ROY CHOUDHRY v. ROOKEA BEGUM.**

(1859) 7 M. I. A. 323 = 4 W. R. 37 = 1 Suth. 367 = 1 Sar. 692.

———*Possession of property held under joti tenure—Suit for—Limitation—Starting point—Decree in suit to which joti tenant not party adjudging lands to third party—Dispossession by order of Court of joti tenant in pursuance of.*

BENGAL REGULATIONS—(Contd.)**Zillah Courts Reg. III of 1793, S. 14—(Contd.)**

A Zemindar dispossessed his tenants, called the Moonshees, of lands held by them under a *joti* tenure, in consequence of which there ensued a litigation between them in 1814. A decree was made in favour of the Moonshees, when the Zemindar assessed the *joti* lands at a rent. The rent fell into arrear, and under a decree the *joti* lands were, in 1836, sold in satisfaction of arrears, and purchased by J. J was put in possession in 1839. Another suit was pending between the Moonshees and their mortgagee, in which the question was whether the *joti* lands in question were included in the mortgage. That suit was decided in favour of the mortgagee in 1841, J, the then *joti* tenant, not being a party to it, and continuing in possession of his *joti* lands. Disputes arising between the mortgagee and J, the Sudder Court, by an order made in 1845, directed the *joti* lands to be put in possession of the mortgagee. In 1856, J's representative J having died in the interval, instituted the suit out of which the appeal arose, to set aside the said order of the Sudder Court and to recover possession of the *joti* lands. The Courts below held that the suit was barred by limitation under Bengal Regulation III of 1793, S. 14, being of opinion that possession was adverse to J from 1841.

Held, reversing the Courts below, that the cause of action arose only in 1845 and that the suit was not barred (485-6).

J was not a party to the mortgagee's suit, and the decree made therein in 1841, was, therefore, not binding on him. J's representative is, therefore, perfectly correct in maintaining that J was dispossessed only by virtue of the decision of the Sudder Court in 1845, and that was within the period of 12 years from the institution of the suit (485-6). (*Lord Justice Turner.*) **TARAKANT BANNERJEE v. PUDDO-MONEY DOSSEE.** (1866) 10 M. I. A. 476 =

5 W. R. P. C. 63 = 1 Suth. 631 = 2 Sar. 184.

———*Revenue sale purchaser of Zemindary—Suit for recovery of lands in Zemindary—Limitation—Starting point—Date of sale—Date of dispossession of purchaser.*

In December 1833 A purchased a Zemindary at a sale under Reg. XI of 1822. Possession of the Zemindary, including certain mouzahs, was ordered to be delivered to the purchaser, and his agent was put into possession of the mouzahs as part of the Zemindary. His possession of the mouzahs was disputed by persons claiming as Talookdars, who insisted that they were in possession of the mouzahs in that character at the time of the sale. Litigation ensued, in which the Sudder Court held that the Talookdars had been in possession of the mouzahs in question, and ordered the possession to be restored to them, the purchaser being left to institute a regular suit to set aside such possession. Under this order the Talookdars were put into possession of the mouzahs in 1840 and 1841. A, the purchaser, died in 1840 or 1841, leaving his widow, who adopted a minor to her husband.

In a suit instituted in 1853 by A's widow for recovery of possession of the mouzahs, *held*, that the period of 12 years applicable to the suit had to be calculated not from 1833, the date of the sale, but from 1840 or 1841, when the possession was taken from the purchaser, and that in that view the death of the purchaser and the minority of the heir clearly took the case out of the Regulation of Limitations (169-70). (*Lord Justice Turner.*) **WISE v. BHOOBUN MOYEE DEBIA CHOWDRAINEE.**

(1863-5) 10 M. I. A. 165 = 2 Sar. 91 = 1 Suth. 563 = 3 W. R. 5.

———*Suit instituted after period of 12 years allowed by—Onus on plaintiff to show circumstances taking the case out of the rule of limitation.*

BENGAL REGULATIONS—(Contd.)**Zillah Courts Reg. III of 1793, S. 14—(Contd.)**

Where a suit is instituted admittedly beyond the period of 12 years allowed by Bengal Reg. III of 1793, S. 14, it is incumbent upon the plaintiff to show some circumstances which would take the case out of the operation of the ordinary rule (377). (*Lord Justice Selwyn.*) **RAJAH ENAYET HOSSEIN v. GIRDHAREE LALL.** (1869) 12 M. I. A. 366 = 11 W. R. P. C. 29 = 2 B. L. R. P. C. 75 = 2 Suth. 202.

———**Exception—Applicability—Mesne profits—Erroneous proceedings for—Exemption from limitation in case of.**

In 1827, A instituted a suit against his brother, B, to recover a share of what was, in fact, a very small part of their joint estate. Pending the suit, a compromise was entered into by them in 1829, by which they agreed to divide the entire estate in certain proportions; and it was further stipulated that, in the event of either of the parties not agreeing to act according to the terms of the compromise, they had no objection to the Court's insisting upon and enforcing the observance of the said compromise. On a petition made to the Sudder Court to enforce the compromise, that Court in 1832 confirmed the agreement, ordered possession to be given to A, and directed the suit to be struck off the file. The Court, however, gave no directions as to the mesne profits. In the same year A presented a petition to the Sudder Court, founded on the order for possession, for mesne profits of his share of the estate. On that petition an order was made by a single Judge of that Court awarding mesne profits from the date of the decision of the Court to the date of possession. But his order was reversed on appeal in 1853 on the ground that a single Judge had no jurisdiction to make a Supplemental order for mesne profits. A therefore instituted in the same year the suit out of which the appeal arose for wasilat.

Held, that, as A was continually endeavouring, by resort to competent Courts, to recover his rights, he was not ousted from availing himself of the exception in S. 14 of Bengal Reg. III of 1793 by reason that part of the proceedings was erroneous (318).

Such erroneous proceedings did not operate as a total abandonment of his rights (317-8). (*Lord Kingsdown.*) **DOORGAPERSAUD ROY CHOWDRY v. TARAPERSAUD ROY CHOWDRY.** (1860) 8 M. I. A. 308 = 4 W. R. 63 = 1 Suth. 427 = 1 Sar. 774 = 2 Sev. 60 (a).

———**Applicability—Proceedings in competent courts in part erroneous—Effect.**

A party who had been endeavouring, by resort to competent Courts, to recover his rights, is not ousted from availing himself of the exception in S. 14 of Bengal Regulation III of 1793 by reason that part of the proceedings was erroneous (318). (*Lord Kingsdown.*) **DOORGAPERSAUD ROY CHOWDRY v. TARAPERSAUD ROY CHOWDRY.**

(1860) 8 M. I. A. 308 = 4 W. R. 63 = 1 Suth. 427 = 1 Sar. 774 = 2 Sev. 60 (a).

———**Clear and positive proof—What amounts to.**

"Clear and positive proof" in the exception to S. 14 of Bengal Reg. III of 1793, is such as, upon the case made, leaves no reasonable doubt as to the matter required to be proved, the truth of which it establishes to a moral certainty; and it is by the combined effect of the whole evidence that the Court has to judge, whether the proof is "clear and positive" (54). (*Sir Joseph Napier.*) **GOPEE KISHEN GOSHAMEE v. BRINDABUN CHUNDER SIRCAR CHOWDHRY.**

(1869) 13 M. I. A. 37 = 12 W. R. P. C. 36 = 3 B. L. R. 37 = 2 Suth. 261 = 2 Sar. 479.

———**Debt due under kararnamah—Acknowledgment of—Validity—Conditions.**

In a suit based on a kararnamah executed by the defendant in favour of the plaintiff the defendant set up the plea of limitation, and, in answer to the same, the plaintiff relied

BENGAL REGULATIONS—(Contd.)**Zillah Courts Reg. III of 1793, S. 14, Exception—(Contd.)**

upon the exception to S. 14 of Bengal Reg. III of 1793.

Held, that, upon the true construction of the Statute in question, in order to bring the case within the exception, it was sufficient for the plaintiff to show, by "clear and positive proof," that within the prescribed period he asserted his claim to what was secured to him by the kararnamah, and that the defendant admitted that claim to be as of right (53).

It was not necessary that a precise sum should have been mentioned by either party, or that a promise to pay should have been made by the defendant (53-4). (*Sir Joseph Napier.*) **GOPEE KISHEN GOSHAMEE v. BRINDABUN CHUNDER SIRCAR CHOWDHRY.** (1869) 13 M. I. A. 37 = 12 W. R. P. C. 36 = 3 B. L. R. 37 = 2 Suth. 261 = 2 Sar. 479.

———"Good and sufficient cause for not suing"—What amounts to.

To claim a deduction under S. 14 of Bengal Reg. III of 1793, the plaintiff must show that during the period to be deducted, he was, in the words of the Regulation, "from good and sufficient cause precluded from obtaining redress."

In a suit by a zemindar to recover property appertaining to his zemindary, it appeared that the plaintiff's title to the zemindary was established in the Courts of India in 1846, that he was put in possession of the property in June, 1848, that between May 1854 and some day in the beginning of 1858, it was again under attachment.

Held, that it could not be said that, in those circumstances he was between 1848 and 1858 precluded from maintaining a suit for protecting his zemindary, and recovering lands taken from it by encroachment (341-2). (*Sir James Colville.*) **RAJAH SAHEB PERHLAD SEIN v. MAHARAJAH RAJENDAR KISHORE SING.** (1869) 12 M. I. A. 292 =

12 W. R. P. C. 6 = 2 B. L. R. P. C. 111 = 2 Suth. 225 = 2 Sar. 439.

———"Good and sufficient cause for not suing—Meaning.

Their Lordships will not say that "other good and sufficient cause" in the exception to S. 14 of Bengal Reg. III of 1793 are not words so comprehensive that they might by possibility extend to anything that may in the ordinary meaning of those words constitute "a good and sufficient cause" (235-6). (*Lord Kingsdown.*) **GOVERNMENT OF BENGAL v. MUSSUMAT SHURRUFFUTOONNISSA.**

(1860) 8 M. I. A. 225 = 3 W. R. 31 = 1 Suth. 405 = 1 Sar. 749.

———**Execution sale—Possession wrongfully taken under—Suit for recovery of—Limitation for—Suspension of—Suit by person claiming title from judgment-debtor prior to sale—If saves time for suit by person claiming as heir of judgment-debtor.**

In a suit brought by B against three widows as representatives and co-sharers of the estate of one H, deceased, he obtained a decree against the survivor of them, the other two having died before decree. In execution of that decree one-half of the suit mahal was sold and was purchased by B. But he nevertheless managed to obtain possession of the whole mahal in 1845. The appellant, claiming to be the heir of the said ladies, instituted a suit more than 12 years after the date of B's taking possession, to recover the moiety not included in the judicial sale but taken possession of by B.

It appeared that G had, claiming title to the whole mahal under a title derived from the widows prior to the sale to B, sued, *inter alia*, B, the tenants on the mahal, and the appellant, for the recovery of possession of the whole mahal. In that suit G, no doubt, alleged that the execution sale at which B purchased was improperly conducted, and, there-

BENGAL REGULATIONS—(Contd.)

Zillah Courts Reg. III of 1793, S. 14, Exception—(Contd.)

fore, that it ought to be set aside. That suit was decided against G, on the ground that he was not owner as alleged, and that he had no right to contest the judicial sale.

Held, that the pendency of G's suit did not prevent the running of the 12 years, and that it afforded no good and sufficient cause within the meaning of Reg. III of 1793, for taking the case out of the operation of the limitation (259). **MUSSUMAT JUSWANT KOONWAR v. MUSSUMAT PARABUTTY KOONWAR.** (1872) 7 M. J. 258.

———*Mortgage—Conditional sale—Mortgage by—Foreclosure of—Proceedings for—Good and sufficient cause for not instituting—Litigation as to ownership of equity of redemption—Pendency of.*

The pendency of litigation as to the ownership of the equity of redemption, between the heirs of the mortgagor and a party claiming as a purchaser, is a "good and sufficient cause" within the exception to S. 14 of Bengal Reg. III of 1793, why a mortgagee should not have instituted proceedings for foreclosure, within the period of twelve years prescribed by the Regulation (356-7). (*Lord Kingsdown.*) **PRANNATH ROY CHOWDRY v. ROOKEA BEGUM.**

(1859) 7 M. I. A. 323 = 4 W. R. 37 = 1 Suth. 367 = 1 Sar. 692.

———*Pendency of another litigation regarding the same subject-matter—Reg. II of 1805, S. 3—Possession which operates as a bar to suit under—Nature of, necessary.*

A died in 1813. At A's death, one of his heirs, entitled to a share of the succession of his estate, obtained possession, claiming the entirety under a deed of gift. Another heir also claimed the entirety, first under a will, and in the alternative, as customary heir. Suits were brought by the two claimants, in the course of which questions were raised as to who would be entitled, in case both claimants should fail but from the frame of the suits it was impracticable to deal with those questions till the adverse claims to the entirety were disposed of. Ultimately, in the year 1842, those claims were disposed of by the Judicial Committee of the Privy Council in one of the suits, which in substance negatived the claims of both parties to the entirety, and decreed that the heirs of A, according to the *Shiah* law of inheritance were entitled, and directed the mesne profits to be brought into Court and divided among such heirs. A suit was in consequence instituted in the year 1852, by one of the heirs of A, to carry into execution the decree of the Judicial Committee of the Privy Council made in 1842.

Held, first, that although the claim which accrued so long ago as the death of A would have been, in ordinary circumstances, barred by the Bengal Regulations of Limitation, III of 1793, S. 14, and II of 1805, S. 3, yet that as the pendency of the appeal rendered it impracticable to bring the suit until the question was disposed of by the decree of the Privy Council in 1842, such suit was to be considered as supplemental to that decree, and that, as the suit was brought within twelve years from that date, it was not barred by those Regulations.

Secondly, that although one of the original claimants had obtained possession under an order of the Court, and retained the same till the final decree in 1842, it was not such a quiet and undisturbed possession, in the circumstances, as to operate by Bengal Reg. II of 1805, S. 3, as a bar to the suit ultimately instituted by one of the heirs entitled to the inheritance. (*Lord Kingsdown.*) **RAJAH ENAYET HOSSEIN v. SAYAD AHMED REZA.** (1858) 7 M. I. A. 238 = 1 Sar. 633.

———*Residence of plaintiff at distance from Court if a—Good and sufficient cause for not suing—Owner negligent—*

BENGAL REGULATIONS—(Contd.)

Zillah Courts Reg. III of 1793, S. 14, Exception—(Contd.)

Purchaser bona fide from person held out by, as owner—Question between.

The respondent sued to recover her share of the inheritance of her mother, who died nearly 25 years before suit. On the mother's death her entire estate was taken possession of by two sons of a predeceased son of hers and was dealt with by them as if it were entirely their own to the exclusion of the respondent. The defendants, who were in possession of the suit property, were purchasers of that property from the nephews of the respondent, the grandsons of the deceased. Though for the entire period of 25 years the respondent must have had notice that her rights were being usurped by others, she made no inquiry whatever nor instituted any proceedings to assert her claim, but permitted her nephews to hold themselves out to the world as the sole owners of the estate. The defendants were *bona fide* purchasers for value.

Held, that the question being between the purchasers of an estate from persons who had been thus permitted to hold themselves out to the world for more than 12 years before the purchase, and an owner, by whose neglect they had been thus enabled to assume the character of proprietors, the Court ought to have some other facts than mere distant residence, to make out the proof of some good and sufficient cause that had precluded an earlier assertion of right that must have been well known to the claimant from the beginning (14-5). (*Mr. Justice Erskine.*) **SHEIK IMDAD ALI v. MUSSUMAT KOOTBY BEGUM.** (1842) 3 M.I.A. 1 =

6 W.R. 24 (P.C.) = 1 Suth. 124 = 1 Sar. 227.

———*Suit directed by summary decision neglected for 13 years—Effect.*

By a judgment dated January, 1839, the Sudder Dewanny Adawlut decided that the appellants could not, in execution of a decree obtained by them against the respondent's husband, proceed against the respondent's property in a summary mode, and that the appellants' remedy, if any, was to commence a regular suit to make the property amenable for the costs awarded to them. No further proceedings were taken on the part of the Government to realise the payment of those costs by means of the sale of that particular property, until the year 1852, when they instituted a suit for the purpose. To get over the plea of limitation under S. 14 of Bengal Reg. III of 1793, they relied upon the exception to that section.

Held, that the exception to S. 14 of Reg. III of 1793 had no application to the case (235).

Giving the most extensive meaning to the words, "other good and sufficient cause" in the exception, it is impossible to say that "either from minority or other good and sufficient cause," the appellants were precluded from obtaining redress (236). (*Lord Kingsdown.*) **GOVERNMENT OF BENGAL v. MUSSUMAT SHURRUFFUTOONNISSA.**

(1860) 8 M. I. A. 225 = 3 W. R. 31 = 1 Suth. 405 = 1 Sar. 749.

———*S. 16—Intent and effect of—Money paid under decree subsequently superseded or reversed—Suit for recovery of—Maintainability.*

The provision in S. 16 of Bengal Reg. III of 1793 applies only to cases in which the question to be determined in the cause is the same question as has been already heard and determined, and not to cases in which new circumstances have intervened, and altered the nature and character of the question to be determined. The intent of the Regulation is only to prevent the re-trial of the same question (211).

The suit was by D to recover from T the sums which the latter had recovered from D under the decrees in a suit which had been instituted by T against D. The decrees in

BENGAL REGULATIONS—(Contd.)**Zillah Courts Reg. III of 1793, S. 16—(Contd.)**

that prior suit had become final, not having been appealed against. But D contended that those decrees were really dependent and subordinate decrees and that they had in effect been superseded or reversed by an order of His Majesty in yet another prior suit instituted by T against D and that he was by reason of such supersession or reversal entitled to recover back from T the amounts recovered by him under the decrees in question.

Held, that S. 16 of Bengal Reg. III of 1793 was no bar to D's right to recover the sums in question (211).

It is obvious that there is an essential difference between the question whether T was entitled to recover against D before the order of Her Majesty in Council was pronounced, and the question whether, after that order was pronounced, he was entitled to hold the money which he had previously recovered (211). (*Lord Justice Turner.*) SHAMA PURSHAD ROY v. HURRO PURSHAD ROY.

(1865) 10 M.I.A. 203 = 3 W.R. (P.C.) 11 = 2 Suth. 103.

Zillah Courts, Ceded Provinces Reg. II of 1803.

—S. 18—*Suit and decree therein during operation of—Repeal of Regulation after decree and pending appeal by Reg. II of 1805—Cognizance of latter Regulation—Duty of appellate Court.*

The suit was commenced in the year 1803. In the month of August the plaint was filed in the Zillah Court, and at the time the Regulation for the limitation of suits applicable to the suit was S. 18 of Reg. II of 1803, by which it was generally provided that the suits of which the cause of action had accrued more than 12 years before could not be supported in the courts to which that Regulation applied. Upon the foundation of that Regulation the Zillah Court decided, and decided very properly, that the suit could not be entertained. From that decision the plaintiff appealed to the Provincial Court; and at that time also the Regulation of 1803 was in operation. While that appeal was pending, Regulation II of 1805 was passed, which corrected the Regulation of 1803. The question was whether, upon the true construction of Regulation II of 1805, the appellate Court was bound to take cognizance of that Regulation.

Held, that it was so bound. (*Mr. Justice Bosanquet.*) LALL DOKUL SINGH v. LALL ROODER PURTAB SINGH. (1835) 5 W. R. 95 (P.C.) = 1 Suth. 20 (21-2) = 1 Sar. 879.

—S. 18, Cl. (3)—*Lunatic—Suit by committee on behalf of—Lunacy during a portion of the period prescribed for bringing suit, though not at its commencement—Effect.*

In a case in which the cause of action for a suit arose in 1836, the party entitled to seek redress was found, in 1844, a lunatic by a *Commission de lunatico inquirendo* in England. In 1844, a committee to his estate was appointed, who, in 1848, more than 12 years from the time when the cause of action arose, brought a suit on behalf of the lunatic's estate.

Held, that the committee was not barred by Bengal Reg. II of 1803, S. 18, cl. (3) from filing his plaint.

In computing the limitation of 12 years mentioned in cl. (3) of S. 18 of the Regulation, there should not be reckoned any time elapsing while the person for the time being entitled to seek redress was not free from disability. (*Lord Justice Knight Bruce.*) TROUP v. THE EAST INDIA COMPANY. (1857) 7 M. I. A. 104 = 4 W. R. 111 = 1 Suth. 287 = 1 Sar. 600.

—“Other good and sufficient cause”—*Insanity if included in.*

The words “other good and sufficient cause” in cl. (3) of S. 18 of Bengal Reg. II of 1803 must include insanity (whether there has been a commission of lunacy or committee of the Estate appointed, or any analogous measure, or not).

BENGAL REGULATIONS—(Contd.)**Zillah Courts, Ceded Provinces Reg. II of 1803, S. 18, Cl. (3)—(Contd.)**

(*Lord Justice Knight Bruce.*) TROUP v. THE EAST INDIA COMPANY. (1857) 7 M.I.A. 104 (125) =

4 W.R. 111 = 1 Suth. 287 = 1 Sar. 600.

—“Precluded”—*Period of disability—Disability during any part of period if enough.*

The word “precluded” in cl. (3) of S. 18 of Bengal Reg. II of 1803 must necessarily be understood as referring to some time or period. It does not mean “precluded” during the whole of the term of 12 years, or at its commencement, but means, in effect, “precluded” during any part of it (125). (*Lord Justice Knight Bruce.*) TROUP v. THE EAST INDIA COMPANY. (1857) 7 M.I.A. 104 = 4 W.R. 111 =

1 Suth. 287 = 1 Sar. 600.

Regs. of 1781 and 1787.

—Art. 20—*Scope and effect—Repeal of, by Regulation of 1796—Zemindar—Loan to, without consent of Revenue Officers—Suit upon, after repeal of Art. 20 of Regulations of 1781 and 1787—Maintainability—Jurisdiction of Civil Courts.*

There is nothing in the Regulations of 1781 or 1787 which, either in the terms or the spirit of them, appear to their Lordships to make it illegal for a zemindar to contract a debt, or for any other native to take an obligation from a zemindar, without the consent of the officers of Revenue; such an obligation, if founded on a valuable consideration, would be equally binding upon the conscience of the zemindar, and the demand and the payment would be equally legal, as if such consent had been obtained and registered, though no Court of Justice might have jurisdiction to enforce the right. Whatever may have been the notions of public policy, upon which the Native Courts were for some time restrained from taking cognizance of such transactions, those notions have not been deemed upon experience to be well founded, since that part of the 20th article of the Regulations of 1781 and 1787 has been expressly rescinded by the Regulation of the 20th October 1796. (*Mr. Justice Bosanquet.*) GOPEE MOHUN THAKOOR v. RAJA RADHANAT.

(1834) 5 W. R. 72 = 1 Suth. 8 (11) = 1 Sar. 42.

Reg. XIV of 1793.

—*Revenue—Arrear of—Sale for—Collector's order for—Objection to, on ground of omission to assign special reason—Appeal—Maintainability for first time in.*

In a case in which the fact that a sale was ordered by the Governor-General in Council under Regulations XIV of 1793 and VII of 1799 was undoubted, *held*, that the objection that the Governor-General ought to have assigned some special reason for the sale could not be raised for the first time in an appeal to the P. C.

If such an objection could be tenable under any circumstances, it cannot be allowed at this late stage, in as much as if it had been urged in the Courts below, it might have been at once disposed of by proof of the fact that there were such reasons, and that they were assigned in the order. (*Mr. Baron Parke.*) KIRT CHUNDER ROY v. THE GOVERNMENT AND OTHERS. (1837) 1 M. I. A. 383 (409) =

5 W. R. 41 (P. C.) = 1 Suth. 63 = 1 Sar. 131.

—*Revenue—Arrear of—Sale of entire zemindary for—Validity—Reg. I of 1801, S. 6—Reg. V of 1812—Effect.*

The question was whether Regulation XIV of 1793 authorized a sale of the whole zemindary, or only of such a part as might be reasonably sufficient to satisfy the arrears; that is, whether, if more than such a portion was sold, the sale was invalid, and the purchaser acquired no title.

After referring to that Regulation and to the provisions of Regulation I of 1801, S. 6, and Regulation V of 1812, their Lordships observed:—“It would be difficult to find language better calculated to do away with all objection, on the ground

BENGAL REGULATIONS—(Contd.)**Reg. XIV of 1793—(Contd.)**

of excess, as to the validity of sales made by order of the Revenue Board, under the sanction of the Governor-General, where an arrear existed, and it is impossible to deny that such a provision is founded on just views of convenience and policy; for if sales were to be questioned, and conveyances annulled by Courts of Judicature, on the ground that too much had been ordered to be sold according to *their* view of the value of the estate, no title would be safe, no purchaser could be sure of holding his estate; for nothing could be more doubtful and uncertain than the determination of questions of probable value by the Judges of the Adawlut Courts. All this mischief is obviated by the Regulation of 1812, by which the discretion as to *quantum* is vested in the Board of Revenue, and sales by public auction under their authority are rendered absolutely secure from all objection as to excess. The law therefore is clear that, if there be an arrear of the annual assessment, or of a *fixed monthly kist or instalment* of that assessment unpaid on the first day of the following month, the Governor-General in Council may order a sale, and the Board of Revenue may direct the *whole* estate of the defaulting zemindar to be sold." (*Mr. Baron Parke.*) KIRT CHUNDER ROY v. THE GOVERNMENT AND OTHERS. (1837) 1 M. I. A. 383 (407-8) =

5 W. R. 41 (P. C.) = 1 Suth. 63 = 1 Sar. 131.

—Revenue—Arrear of—Security for—Acceptance by Collector of—Power of—Effect of.

An arrear of revenue cannot be considered as having been paid within the meaning of Regulation XIV of 1793, merely because the Collector received a security for the sum payable. The duty of the Collector was to receive in cash, and if he assured the zemindars that they had saved their estate by having given the security, he went beyond his authority. (*Mr. Baron Parke.*) KIRT CHUNDER ROY v. THE GOVERNMENT AND OTHERS.

(1837) 1 M. I. A. 383 (412-3) = 5 W. R. 41 (P. C.) = 1 Suth. 63 = 1 Sar. 131.

—Revenue—Monthly instalment—Arrear of—Sale for—Validity—Written instrument—Necessity.

It is no doubt most desirable that the Collectors should take, in every instance, a written engagement signed by the parties to be charged. It appears by the recital in Regulation XIV of 1793, that it is intended that he should do so for his own protection from vexatious suits, and unquestionably he ought to do it for the benefit of zemindars also; but, although such an instrument was supposed by the Governor-General in Council, in enacting that Regulation to be likely to exist, its existence is not made, either expressly or by implication, a condition precedent to the right to enforce the payment of the revenue by monthly instalments. If the annual amount of revenue be fixed and agreed for by the zemindar, though not by writing, to be paid by *certain ascertained* monthly instalments, the powers given by the Regulation attach. The kist or instalment in such case is "payable monthly" within the provisions of the Regulation of 1793. The want of a written instrument constitutes no objection, provided the monthly instalments be fixed and determined. But the existence of that certainty in the amount of the monthly payment is an essential requisite in order to authorise a sale within the year. If that requisite be complied with, and an arrear exist, the Regulations XIV of 1793 and VII of 1799 clearly authorize a sale by the Governor-General in Council within the year. (*Mr. Baron Parke.*) KIRT CHUNDER ROY v. THE GOVERNMENT AND OTHERS. (1837) 1 M. I. A. 383 (405-6) =

5 W. R. 41 (P. C.) = 1 Suth. 63 = 1 Sar. 131.

—Revenue—Monthly instalment—Arrear of—Sale for, before close of year—Validity—Condition.

BENGAL REGULATIONS—(Concl'd.)**Reg. XIV of 1793—(Contd.)**

From the Regulations XIV of 1793 and VII of 1799 it is clear that the Governor-General in Council may legally order a sale for the arrears of a monthly instalment before the close of the year, but in order to warrant that act, there must be an arrear of a previous year or of a monthly instalment. (*Mr. Baron Parke.*) KIRT CHUNDER ROY v. THE GOVERNMENT AND OTHERS.

(1837) 1 M. I. A. 383 (404-5) = 5 W. R. 41 (P. C.) = 1 Suth. 63 = 1 Sar. 131.

Reg. I of 1845.

—Applicability—Sales not effected under the Regulation—Applicability to.

The provisions of Reg. I of 1845 are limited to sales effected under that Regulation (143). (*Lord Justice Turner.*) RANEE SURNOMOYEE v. MAHARAJAH SUTTEESCHUNDER ROY BAHADUR.

(1864) 10 M. I. A. 123 = 2 W. R. 13 = 2 Sar. 60 = 1 Suth. 548.

BENGAL SETTLEMENT BY EAST INDIA CO.

—Nature of—Settlement of inhabited district obtained by conquest or cession—Settlement of uninhabited district.

The settlement of the East India Company in Bengal was effected by leave of a regularly established Government, in possession of the country, invested with the rights of sovereignty, and exercising its powers; by permission of that Government Calcutta was found, and the factory fortified in a district purchased from the owners of the soil, by permission of that Government, and held under it, by the company, as subjects owing obedience, as tenants rendering rents, and even as officers exercising, by delegation, a part of its administrative authority. Therefore, Calcutta district was acquired in a country peopled and having a Government of its own. MAYOR OF THE CITY OF LYONS v. HON. EAST INDIA CO. (1836) 1 M. I. A. 175 =

1 Moo. P. C. 175 = 3 State Tr. (N. S.) 647 = 1 Sar. 107.

BENGAL SETTLEMENT MANUAL, R. 745.

—Bengal Alluvion and Diluvion Act of 1847—Assessment proceedings under legally initiated—Rule 745 if a bar to.

Rule 745 of the Bengal Settlement Manual is not a bar to assessment proceedings under Act IX of 1847 even if legally initiated (249). (*Lord Shaw.*) SECRETARY OF STATE FOR INDIA v. JATINDRA NATH CHOWDHURY.

(1924) 51 I. A. 241 = 51 C. 802 = (1924) M. W. N. 588 = 35 M. L. T. (P. C.) 146 = 29 C. W. N. 1 = 80 I. C. 1023 = A. I. R. 1924 P. C. 175 = 47 M. L. J. 48.

—Lease incorporating—What amounts to.

The villages comprising the lands on which the said assessment was imposed were part of an estate called Debnathpur, bearing Towzi No. 4908 of the Backergunj collectorate owned and possessed by the plaintiffs.

On the 1st September, 1839, a grant was made by the Government to Debnath Roy, benamidar for the plaintiffs' predecessor in title, of a tract of the jungle and forest land then known as Tushkhali but later as Debnathpur. The grant was an ijara lease for 20 years, and was rent free.

Debnath Roy, taking advantage of rules recently framed by the Government, obtained a grant on the 17th November, 1856, of the portion of waste land in the Sunderbans estimated to contain 34,000 bighas. The transaction was evidenced by a pottah and a kabuliyat. The grant was at a progressive rate for a term of 99 years, to take effect from 1st September, 1839, and power was reserved to the Government to make a survey and measurement at any time between the 20th and 30th years from that date to ascertain the area of the land granted and to calculate the stipulated

BENGAL SETTLEMENT MANUAL, R. 745— (Contd.)

revenue. In the course of a survey of the leased lands directed by the Commissioner of the Sunderbans in 1858, a map was prepared in or about 1863, and it was determined that the grant included an area of only 14,505 bighas, 5 cottahs. That led to a litigation, as the result of which a doul, of 9th April, 1870, was executed in favour of the plaintiffs' predecessors in title of 33,441 bighas, 17 cottahs, 7 chittacks of land known as Debnathpur for the remaining 68 years of the 99 years' lease.

Held, that R. 745 of the Bengal Settlement Manual was not expressly incorporated in the lease of the respondents (249). (*Lord Shaw*.) SECRETARY OF STATE FOR INDIA *v.* JATINDRA NATH CHOWDHURY.

(1924) 51 I. A. 241 = 51 C. 802 (811) =

(1924) M. W. N. 588 = 35 M. L. T. (P. C.) 146 =

29 C. W. N. 1 = 80 I. C. 1023 = A. I. R. 1924 P.C. 175 =
47 M. L. J. 48.

BERAR.

—Inam rules of—Scope and effect of. *See* INAM—GRANT OF—MALE DESCENDANTS.

(1925) 52 I. A. 294 (301-2) = 52 C. 971.

BHALE SULTAN CHHATTRIS OF SULTANPUR.

—Inheritance—Daughters and their issue—Exclusion of, from separated estate of father—Custom of—Proof of.

Held, on the evidence, that a custom amongst the Bhale Sultan Chhatris of Sultanpur was proved, excluding daughters and their issue from succession to the separated estate of their father. (*Sir Andrew Scoble*.) BAJRANGI SINGH *v.* MANOKARNIKA BAKHSH SINGH.

(1907) 35 I. A. 1 (9-10) = 30 A. 1 (15-6) =

12 C. W. N. 74 = 9 Bom. L. R. 1348 = 6 C. L. J. 766 =
3 M. L. T. 1 = 5 A. L. J. 1 = 11 O. C. 78 = 17 M. L. J. 605.

—Origin of. *See* EVIDENCE ACT, S. 48, EXPL.

(1907) 35 I. A. 1 (9) = 30 A. 1 (14-5).

BIHAR.

—Land tenures in. *See* LAND TENURES—BIHAR.

BILL OF EXCHANGE.

—*See* NEGOTIABLE INSTRUMENT—BILL OF EXCHANGE.

BILLS OF EXCHANGE ACT OF 1882, S. 64.

—Alteration referred to in—Accident—Alteration due to, if included.

S. 64 of the Bills of Exchange Act of 1882 (corresponding to S. 87 of the Negotiable Instruments Act) relates only to alterations effected by the will of the person by whom or under whose directions they are made and does not apply to a change due to pure accident. (*Lord Buckmaster*.) HONGKONG AND SHANGHAI BANKING CORPORATION *v.* LO LEE SHI. (1928) 110 I. C. 127 = 28 L. W. 880 =
A. I. R. 1928 P. C. 116 = 55 M. L. J. 627 (630-1).

BOHRA TRIBES.

—Business and habits of.

Bohra Brahmins belong to the Bohra tribe, or brotherhood, whose members follow the business of money-lending—an astute class well accustomed to keep books and record events from which large pecuniary results might follow, and fully alive to the importance of preserving those records, and producing them when engaged in legal controversies in which they might be decisive. (*Lord Atkinson*.) LAL KUNWAR *v.* CHIRANJI LAL. (1909) 37 I. A. 1 (3) =
32 A. 104 (107-8) = 7 M. L. T. 57 = 11 C. L. J. 172 =
14 C. W. N. 285 = 12 Bom. L. R. 244 = 5 I. C. 249 =
20 M. L. J. 182.

BOITOKANAH.

—Meaning of.

Boitokanah appears to mean a house, or the part of a house, used for sitting or reception rooms, where entertain-

BOITOKANAH—(Contd.)

ments are usually given, and business transacted. The ladies of the family do not commonly enter these rooms, which, when in the same house with the Zenana, are usually the outer rooms (396). (*Sir Montague E. Smith*.) GANENDRO MOHUN TAGORE *v.* RAJAH JUTTENDRO MOHUN TAGORE.

(1874) 1 I. A. 387 = 14 B. L. R. 60 =
22 W. R. 377 = 3 Sar. 395 = 3 Suth. 47.

BOMBAY ACTS.

ABOLITION OF TOWN DUTIES, ETC., ACT XIX OF 1844.

AHMEDABAD TALUKDARI ACT VI OF 1862.

CITY IMPROVEMENT ACT IV OF 1898.

CITY LAND REVENUE ACT II OF 1876.

CITY MUNICIPAL ACT III OF 1888.

DEKHAN AGRICULTURISTS' RELIEF ACT XVII OF 1879.

DISTRICT POLICE ACT IV OF 1890.

GUJARAT TALUQDARS' ACT VI OF 1888.

HEREDITARY OFFICES ACT III OF 1874.

NAWAB OF SURAT ACT XVIII OF 1848.

REVENUE JURISDICTION ACT X OF 1876.

TITLES TO RENT-FREE ESTATES ACT XI OF 1852.

TRAMWAYS ACT I OF 1874.

Abolition of Town Duties, etc., Act XIX of 1844.

—Cesses on trades—Effect of Act on.

Act XIX of 1844 simply abolished cesses on trades and did not render payment thereof illegal. If the parties who before the Act were legally liable to the payment of such a cess had chosen to continue it afterwards as a voluntary contribution, they would have been quite at liberty to do so (106-7). (*Lord Macnaghten*.) SHRI KALYANRAJI *v.* MOFUSSIL COMPANY, LTD. (1890) 17 I. A. 103 =
14 B. 526 (532) = 5 Sar. 578.

—Cesses on trades—Lago payable to proprietor of local temple on all cotton bought in and exported from place—Enforceability of.

The plaintiff in the suit was the managing proprietor of a temple in Broach. In that capacity he claimed to be entitled to a lago, or perquisite or tax, of two annas per bale on all cotton bought in and exported from Broach.

From time immemorial, before and up to the year 1844, that lago was claimed and received as of right by the managing proprietor of the temple for the time being, and it was assumed that the claim had a legal origin, and that, but for Act XIX of 1844, it would have been enforceable in a Court of Law. The question was whether it was a cess or tax on a trade within the meaning of that Act and was therefore incapable of being enforced in a Court of Law.

Held, that it properly came within the description of a cess or tax on a trade, and, having been abolished by the Act, it was incapable of being enforced in a Court of Law (106).

It is a cess of a mixed kind, local and indirect, upon a particular trade—the trade of a cotton buyer carried on in Broach—attaching when the article of merchandise in which the trader deals is bought in Broach and exported from Broach (106). (*Lord Macnaghten*.) SHRI KALYANRAJI *v.* MOFUSSIL COMPANY, LTD. (1890) 17 I. A. 103 =
14 B. 526 (530-1) = 5 Sar. 578.

—Cesses on trades and professions—Meaning.

It was argued that the expression "cesses on trades and professions" in Act XIX of 1844, having regard to the expressions found in the immediate context, ought to be confined to cesses in the nature of license duties for carrying on trades or professions. There is no sufficient reason for giving the expression "cesses on trades and professions" the restricted meaning to which it is desired to confine it. The Act

BOMBAY ACTS—(Contd.)**Abolition of Town Duties, etc., Act XIX of 1844—(Contd.)**

abolishes cesses "of every kind" on trades "under whatever name levied" (105-6). (*Lord Macnaghten.*) **SHRI KALYANRAJI v. MOFUSSIL CO., LTD. (1890) 17 I. A. 103 = 14 B. 526 (530-1) = 5 Sar. 578.**

——*Town duties—Lago payable to proprietor of local temple on all cotton bought in and exported from that place if comes under.*

The suit was brought by the plaintiff, the managing proprietor of a temple in Broach, claiming to be entitled in that capacity to a lago, or perquisite or tax, of two annas per bale on all cotton bought in and exported from Broach.

Held, that the lago in question did not come under the head of "town duties" within the meaning of Act XIX of 1844 (105). (*Lord Macnaghten.*) **SHRI KALYANRAJI v. MOFUSSIL COMPANY, LTD. (1890) 17 I. A. 103 = 14 B. 526 (530) = 5 Sar. 578.**

——*Town duties—Meaning of.*

The expression "town duties" in Act XIX of 1844 is not to be confined to duties "appropriated by law or custom to municipal purposes," but extends to duties or cesses on goods brought into or carried out of a town, although levied by private persons (105). (*Lord Macnaghten.*) **SHRI KALYANRAJI v. MOFUSSIL COMPANY, LTD. (1890) 17 I. A. 103 = 14 B. 526 (530) = 5 Sar. 578.**

Ahmedabad Talukdari Act VI of 1862.

——*Applicability—Kasbati lessees.*

Bombay Act VI of 1862 does not apply to kasbati lessees at all for the reasons given in the publication of Mr. Peile dated 1867 in connection with the Act. They never were talukdars of Ahmedabad in the true sense. They did not lose their ancient right of ownership of their land by taking leases, as did the grassias, and therefore did not suffer the injustice which the statute was designed to remedy (249). (*Lord Atkinson.*) **SECRETARY OF STATE FOR INDIA v. BAI RAJBAL. (1915) 42 I. A. 229 = 39 B. 625 (661-2) = 19 C. W. N. 1087 = 18 M. L. T. 179 = 17 Bom. L. R. 730 = 13 A. L. J. 953 = 2 L. W. 731 = (1915) M. W. N. 563 = 30 I. C. 303 = 29 M. L. J. 242.**

——*Construction of—Policy of Act to be regarded in matter of.*

The method adopted by the Ahmedabad Talukdari Act VI of 1862 may have been a very arbitrary way of dealing with creditors, but that was the policy of the Act, and in construing the Act it must be remembered that it recites that the talukdari estates could not be lawfully charged, encumbered, or alienated. It is said that that recital was wrong. The High Court state it to be wrong, and they state moreover that it was put in merely as a justification to the Government for dealing in the summary manner in which they did with the creditor's rights. All that may be true. It may be true that the statement of the law is wrong, and the motive assigned may be true for aught their Lordships know. But supposing it is, it must be remembered that that was the idea in the mind of the Legislature, and all the provisions affecting creditors must be construed with reference to that idea, under which every benefit given to the creditor out of the talukdari estate would be in the nature of an indulgence, because he got something which he could not enforce by law (98). (*Lord Hobhouse.*) **WAGHELA RAJSANJI v. SHEIKH MASLUDIN. (1887) 14 I. A. 89 = 11 B. 551 (562-3) = 5 Sar. 16.**

——*Debts and liabilities dealt with by—Straining of literal ordinary meaning of words of Act—Propriety.*

The Ahmedabad Talukdari Act is designed to set up the order of talukdars in an unembarrassed state, and to restore

BOMBAY ACTS—(Contd.)**Ahmedabad Talukdari Act VI of 1862—(Contd.)**

them their land within a period of, at most, twenty years, and it deals first with debts and liabilities existing at the commencement of the period of management, and secondly, with debts or liabilities incurred during the period of management. In such an Act their Lordships think it impossible to come to any other conclusion than that it was intended to deal with all debts and liabilities which could possibly impose a charge on the talukdar at the end of twenty years, and that to strain words from their literal ordinary meaning would be an erroneous construction of the Act (99). (*Lord Hobhouse.*) **WAGHELA RAJSANJI v. SHEIKH MASLUDIN. (1887) 14 I. A. 89 = 11 B. 551 (564) = 5 Sar. 16.**

——*Object and policy of.*

The object of the Talukdari Act (VI of 1862) was to maintain the status and order of talukdars, which the Government as a matter of policy thought it important to maintain. They were a class of gentlemen who had been living beyond their means; they had got very much embarrassed, and they did not perform those political objects which the Government thought of great importance to have performed in various parts of the country. Many Acts of the kind have been passed relating to different parts of the country, and all with the same object. The method adopted was, where a talukdari estate had reached a certain pitch of embarrassment, to make a declaration placing it under the management of an officer who was to manage for a term of years which might extend to 20 years. During that time he was to maintain the talukdar and his family, to pay all the expenses of the management, and then to apply the surplus to liquidate or settle the debts of the talukdar, in liquidation or settlement of the debts and liabilities to which at the time of the declaration the talukdar was subject, either personally or in respect of his landed estates. But at the end of the twenty years the estate was to be restored to the talukdar absolutely free of incumbrance excepting the Government tax. If the debts amounted to more than the surplus rents during the term would suffice to pay, those debts were not to be paid at all. That was the policy of the Act (97-8). (*Lord Hobhouse.*) **WAGHELA RAJSANJI v. SHEIKH MASLUDIN. (1887) 14 I. A. 89 = 11 B. 551 (562-3) = 5 Sar. 16.**

——**Ss. 9 and 12—Debt or liability chargeable on talukdari estate—Liability inchoate at commencement of management and reaching maturity during period thereof if a—Proceedings against talukdar converting liability into money—Absence of—S. 12—Incurred—Meaning of.**

Defendant was the talukdar of Ahmedabad. He attained his majority in 1863, and, towards the end of 1863, his estate was placed under management under the Ahmedabad Talukdari Act.

In 1858, while the defendant was a minor, his mother, acting as his guardian, executed a sale deed in respect of land belonging to the defendant's estate in discharge of a debt binding upon the defendant. The land sold was represented to be rent free and was sold as being rent free. The mother entered into a covenant to indemnify the purchaser against any claim on the part of the Government to receive rent from the land sold. For the due performance of that covenant, she, by the sale deed, created a charge upon the other talukdari estates of the defendant.

In the year 1871, the Government claimed rent against the purchaser in respect of the land sold by the mother, and that right to rent was finally established by decree about the year 1875, that is, during the period of management of the talukdari officer.

In a suit by the purchaser to enforce the covenant, *held*, reversing the High Court, that the case fall under S. 9, or under S. 12, of the Ahmedabad Talukdari Act VI of 1882,

BOMBAY ACTS—(Contd.)**Ahmedabad Talukdari Act VI of 1862, Ss. 9 and 12—(Contd.)**

and that the charge created by the covenant was not enforceable against the talukdari estate of the defendant (100).

It is true that when the management commenced the liability was not one that was measurable in money. It may not have been the subject of a claim against the estate. But it does not at all follow that it was not a liability which S. 9 was calculated to bar. All liabilities were to be notified, and even if there were any so situated that the creditor could get nothing, the intention of the Legislature to bar every liability that existed then is a plainly expressed intention (99-100).

As to S. 12, the High Court seem to think that, as there was no debt when the period of management commenced, and there were no proceedings subsequently to which the talukdar was a party which converted the liability into a money claim, no debt was "incurred" subsequently within the meaning of that section. That is not the meaning of the word "incurred". The word "incur" is constantly used in the sense of meeting with, of being exposed to, of being liable to; and in that sense the talukdar did incur debt. The liability was inchoate in 1858, and it reached its maturity sometime between 1871 and 1875. If it was not a liability existing in the year 1863 when the period of management commenced under S. 9, then it must be either a debt or liability incurred during the period of management. It is not necessary to decide under which section the case falls (100). (*Lord Hobhouse.*) **WAGHELA RAJSANJI v. SHEIKH MASLUDIN.** (1887) 14 I. A. 89 =

11 B. 551 (565-6) = 5 Sar. 16.

—S. 12—Incurred—Meaning of. See UNDER THIS ACT, SS. 9 AND 12.

City Improvement Act IV of 1898.

—Ss. 41 and 45—Street schemes in Bombay—Compulsory expropriation and impropriation of owners of land of adjoining street—Compulsory impropriation—Payment for—Owner's liability for—Street to be formed—Meaning of—Bombay City Municipal Act III of 1888, Ss. 297, 300 and 301.

Not a word is said in Ss. 41 and 45 of the City of Bombay Municipal Act III of 1888 to indicate either (1) that the building line of the street must, once indicated, remain by reason of that original indication, and not be open to change or putting forward. Should experience suggest this to be for the best; nor (2) is anything said to indicate that the street taken over "to be formed" is anything different in dimensions from the street to be handed back when formed (241-2).

Ss. 41 and 45, the one as to taking over a street "to be formed" and the other as to handing the formed street back, are correlative to each other. The section does not mean merely "intended to be formed" when a notice is made, but it refers to that ground and no other which is used as a street and for the purposes thereof, and that no transfer from the municipality is effected to the board of anything else. If, therefore, a line originally indicated is changed the line of the street to be formed is changed and the whole transaction is modified in this sensible and practical manner. It is only in this way that the word "revest" in the Corporation becomes intelligible. What is to revest in the municipality is just that which when formed as a street had been the subject of that interim divesting to the Board as the street-forming authority. And the whole theory of the trustee's case—namely, that in virtue of a notice taking over from the municipality a certain street of Bombay to be formed as a new street by the Board thereby vested the whole of the old street in it, although a strip of the old street never was formed as a new street—falls to the ground (242).

BOMBAY ACTS—(Contd.)**City Improvement Act IV of 1898, Ss. 41 and 45—(Contd.)**

When therefore the regular line of a street was altered and the owner of adjacent land required to set forward his building on part of the old street, *held*, that the strip of the old street which was never formed into the new street had never vested in the Improvement Trust, that it remained the property of the Municipal Corporation, and that when such owner of adjacent land was ordered by the Commissioner to set forward his building upon it, it became his property in virtue of S. 301 (3) of the Municipal Act of 1883.

Held, further, that as the Act made no provision for payment by such an owner, no price was payable by him for the projection on which he was required or allowed to build. (*Lord Shaw.*) **RATNALAL CHUNILAL PANALAL v. MUNICIPAL COMMISSIONER OF BOMBAY.**

(1918) 45 I. A. 233 = 43 B. 181 =

21 Bom. L. R. 114 = 29 C. L. J. 138 = 17 A. L. J. 1 = 25 M. L. T. 103 = 9 L. W. 171 = (1919) M. W. N. 321 =

23 C. W. N. 441 = 48 I. C. 404 = 36 M. L. J. 1.

City Land Revenue Act II of 1876.

—Certified extract of Rent-roll of "quit and ground rent" land—Statements in, as to nature of tenure of land—Correctness of—Government's right to dispute, as against mortgagee acting on faith of extract.

The appellants (mortgagees of certain land in the City of Bombay) sued the Secretary of State for India for a declaration that the land mortgaged was of quit and ground rent tenure and that the defendant was estopped from treating the land as of sanadi tenure and had no right to resume possession of the same. The case for the appellants was that they advanced the mortgage amount to the mortgagor, relying on statements in certified extracts from the rent-roll of quit and ground rent land, kept in the office of the Collector of Bombay, to the effect that the land was of quit and ground rent, and not of sanadi tenure. They (appellants) alleged that by reason of the references and omissions in the copies of the extracts, as well as in the Collector's notice and in certain bills sent in by the Collector for the rent due, the action of the Collector had estopped the defendant from denying that the land was of quit rent as distinguished from sanadi tenure.

Held, that the defendant was not estopped from treating the land as sanadi as distinguished from quit rent tenure (191). (*Viscount Haldane.*) **MERWANJI MUNCHERJI CAMA v. SECRETARY OF STATE FOR INDIA.**

(1915) 42 I. A. 185 = 39 B. 664 (681) = 19 C. W. N. 1056 = 2 L. W. 701 = (1915) M. W. N. 536 = 13 A. L. J. 1026 = 30 I. C. 539 = 29 M. L. J. 299.

—Object and scope of—Register maintained under Act—Purpose of.

The Act (Bombay City Land Revenue Act, 1876) must be treated as defining the extent of the rights of any one who consults the maps, register, and records at the office, and in order to ascertain these rights the Act must be read as a whole and its purpose ascertained. The Act is one which makes provision for the administration and collection of the land revenue of the Government in the City of Bombay. It is for this purpose only that it sets up machinery. The object is to ascertain who is liable to pay. The Collector is a revenue official, and it is only in so far as the collection of revenue is concerned that he is entrusted with the duty of preparing a register and keeping records. The public are given access to these only in order to satisfy themselves that they are being properly assessed. The Act does not purport to establish a system of registration of title, which is to supersede other means of conveying or registering the title to land or to relieve purchasers or mortgagees from the ordinary obligation to see that they get what they have contracted to get. No doubt the register is of considerable

BOMBAY ACTS—(Contd.)**City Land Revenue Act II of 1876—(Contd.)**

use even for conveyancing purposes. But neither the language of the statute nor the character of the officials, who have the duty of keeping it, is such as to indicate an invitation to the public to rely on statements in the records as to title which may have to be made incidentally, but which are not expressed and do not purport to be decisive either of the rights of the Government or of those of the individual as to matters which go beyond liability to contribute to land revenue (1901). (*Viscount Haldane.*) **MERWANJI MUNCHERJI CAMA v. SECRETARY OF STATE FOR INDIA.**

(1915) 42 I. A. 185 = 39 B. 664 (680-1) =
19 C. W. N. 1056 = 2 L. W. 701 = (1915) M. W. N. 536 =
13 A. L. J. 1026 = 30 I. C. 539 = 29 M. L. J. 299.

—**S. 35—Rent-roll of quit and ground rent land—Entry in—Title of Government if affected by.**

It is unnecessary to deal separately with the question raised under S. 35 of the Act (Bombay City Land Revenue Act, 1876) as to whether any right, title, or interest of the Government could be affected by the registered entry (191). (*Viscount Haldane.*) **MERWANJI MUNCHERJI CAMA v. SECRETARY OF STATE FOR INDIA.**

(1915) 42 I. A. 185 = 39 B. 664 (681-2) =
19 C. W. N. 1056 = 2 L. W. 701 =
(1915) M. W. N. 536 = 13 A. L. J. 1026 =
30 I. C. 539 = 29 M. L. J. 299.

City Municipal Act III of 1888.

—**Object of.**

The main object of the City of Bombay Municipal Act, III of 1888, was to set up with sufficient powers a street-making authority, and, when its function as such was expired, to have the street which had been reconstructed or made by the board thereupon handed back to the corporation (241). (*Lord Shaw.*) **RATANLAL CHOONILAL PANALAL v. MUNICIPAL COMMISSIONER OF BOMBAY.**

(1918) 45 I. A. 233 = 43 B. 181 (195) =
21 Bom. L. R. 114 = 29 C. L. J. 138 = 17 A. L. J. 1 =
25 M. L. T. 103 = 9 L. W. 171 =
(1919) M. W. N. 321 = 23 C. W. N. 441 =
48 I. C. 404 = 36 M. L. J. 1.

—**S. 296—Public street—Projected improvement of—Acquisition of extra ground contiguous to, but beyond, actual limits of widened street—Power of Municipality—Acquisition with intention of erecting new buildings thereon and afterwards of reselling the land with the buildings on it.**

The question was whether the defendants, the Municipality of Bombay, were not entitled under the City of Bombay Municipal Act, 1888, to acquire compulsorily the property of the deceased appellant in connection with a projected improvement of a public street. The Municipality proposed in improving a certain street, not only to widen it, but to take a certain amount of extra ground contiguous to, but beyond, the actual limits of the widened street, with the avowed intention of erecting new buildings thereon and afterwards reselling the land with the buildings on it.

Held, affirming the High Court, that the Municipality had power, under S. 296 of the City of Bombay Municipal Act, read with Ss. 90-2 thereof, to acquire the suit property for the said purposes. (*Lord Dunedin.*) **KHANDARAO VITHOBA KOSE v. MUNICIPAL CORPORATION OF BOMBAY.**

(1923) 51 I. A. 14 = 48 B. 185 = 19 L. W. 1 =
22 A. L. J. 11 = A. I. R. 1924 P. C. 3 =
(1924) M. W. N. 77 = 26 Bom. L. R. 193 =
10 O. & A. L. R. 121 = 28 C. W. N. 375 =
33 M. L. T. 462 = 39 C. L. J. 201 = 79 I. C. 948 =
46 M. L. J. 169.

BOMBAY ACTS—(Contd.)**City Municipal Act III of 1888—(Contd.)**

—**Ss. 296, 297 and 301—Acquisition of land—Powers of Municipality—Formation of regular line—Public street—Collateral object—Basis of compensation.**

There is nothing in the City of Bombay Municipal Act which prescribes the frame of mind in which the Commissioner is to exercise the power given by S. 297 of the Act, or which restricts the objects for which he is to exercise them to the mere regulation of the street in question or to the creation or preservation of a regular line in it (129).

Elphinstone Road, which was within the area of the Municipal Corporation of Bombay, intersected at right angles and by level crossings two railway lines, which ran parallel with and close to one another. The appellants were the owners of a plot of land fronting the road and lying in the north-east angle between the road and the railways. The Municipal Commissioner for the City of Bombay, purporting to act under S. 297 of the City of Bombay Municipal Act, 1888, prescribed a line on the north side of the road as the regular line of the street, which was so drawn that part of the appellants' land, namely, the front part, fell within it, and he duly gave notices and took possession of that land in order that, within S. 299 of the Act, that part of the appellants' land might thus be acquired by the Corporation, and might thenceforward be deemed part of the Elphinstone Road. In point of fact, the line so prescribed was in substitution for an earlier prescribed line. The Commissioner acted in good faith, for the benefit, as he supposed, of the Corporation which he represented, and, as he conceived, in the discharge of his duty. The appellants contended that the compensation to be paid to them must be calculated according to the provisions of the Land Acquisition Act, 1894, and not according to the provisions of S. 301 of the City of Bombay Municipal Act, because the Commissioner acted not with a single eye to the creation and preservation of a regular boundary to Elphinstone Road as an end in itself, but with the ulterior object of extending the road in order to be able to raise it by an incline to the level of the necessary over-bridge.

Held, that there was nothing in the Act which either entitled the appellants to investigate his motives or had the effect of invalidating his action on account of the purpose, with which in fact he prescribed the regular line of the street, and that, accordingly, the compensation payable was to be calculated according to S. 301 of the City of Bombay Municipal Act, and not under the Land Acquisition Act.

The "preservation of the line of the street" is not laid down as the definite and sole object for which the power is to be exercised. It may be the immediate effect of that exercise, but certainly it is not more (129). (*Lord Sumner.*) **NARMA v. MUNICIPAL COMMISSIONER FOR BOMBAY.**

(1918) 45 I. A. 125 = 42 B. 462 = 23 C. W. N. 110 =
20 Bom. L. R. 937 = (1918) M. W. N. 840 =
8 L. W. 548 = 48 I. C. 63 = 24 M. L. T. 297.

—**Ss. 297, 300 and 301—Street—Formation—Owner of adjoining land ordered to set forward his building—Ownership of such parts. See BOMBAY ACTS—CITY IMPROVEMENT ACT (IV OF 1898), SS. 41 AND 45.**

(1918) 45 I. A. 233 = 43 B. 181.

—**S. 310 (2)—Scope and effect—Compulsory appropriation—Payment by owner in respect of.**

While the City of Bombay Municipal Act III of 1888 makes provision for the compulsory expropriation of an owner, it makes no provision whatever for a payment by the owner in respect of what may be termed compulsory appropriation. What the Legislature has done, and all that it has done upon that subject, is contained in S. 310, sub-S. 2, of the Act (244). (*Lord Shaw.*) **RATANLAL CHOONI-**

BOMBAY ACTS—(Contd.)**City Municipal Act III of 1888, S. 310 (2)—(Contd.)**

LAL PANALAL v. MUNICIPAL COMMISSIONER FOR BOMBAY. (1918) 45 I. A. 233 = 43 B. 181 (198) =

21 Bom. L. R. 114 = 29 C. L. J. 138 = 17 A. L. J. 1 =

25 M. L. T. 103 = 9 L. W. 171 = (1919) M. W. N. 321 =

23 C. W. N. 441 = 48 I. C. 404 = 36 M. L. J. 1.

Dekhan Agriculturists' Relief Act XVII of 1879.

—Special relief under—Right to—Suit in form one for redemption but in reality not so.

Special relief under the Dekhan Agriculturists' Relief Act cannot be granted in a suit, which is, in form, a suit for redemption, but in reality, is a suit to recover property of which the rightful owner has been deprived by fraud. (*Lord Macnaghten.*) MUSSAMMAT BACHI v. BIKHCHAND JIOMAL. (1910) 8 A. L. J. 105 = 13 Bom. L. R. 56 =

15 C. W. N. 297 = 9 I. C. 393 = 9 M. L. T. 199 =

13 C. L. J. 69 = (1911) 2 M. W. N. 59 = 21 M. L. J. 89.

District Police Act IV of 1890.

—Ss. 25 and 25-A—Action of Government and of District Magistrate under—Propriety of—Questioning of, in Civil Courts—Permissibility.

There is no issue before their Lordships with regard to the propriety of applying Ss. 25 and 25-A of the Act under the circumstances which had arisen, and they express no opinion about it, but they are not to be taken as suggesting that any question could be raised as to the action of the Government and District Magistrate in itself. Those who are called on to apply such an Act as this have not only the power but the duty of enforcing it when, in their judgment, a case has arisen which calls for its application. They are the best and the only judges in that matter (347-8). (*Viscount Sumner.*) BHAGCHAND DAGADUSA v. SECRETARY OF STATE FOR INDIA. (1927) 54 I. A. 338 = 51 B. 725 =

32 C. W. N. 61 = 26 L. W. 809 = 104 I. C. 25 =

25 A. L. J. 641 = 29 Bom. L. R. 1227 =

(1927) M. W. N. 561 = 46 C. L. J. 76 = 1 Luck. 291 =

A. I. R. 1927 P. C. 176 = 53 M. L. J. 81.

—Incidence of tax under—Determination of—Executive or Judicial Act.

In regard to each of the Ss. 25 and 25-A of the Bombay District Police Act IV of 1890, it is to be noticed that the determination of the incidence of the tax is an executive and not a judicial act. It is a function of the Government in the one case, and of the District Magistrate in the other, but in both cases its character is the same (344). (*Viscount Sumner.*) BHAGCHAND DAGADUSA v. SECRETARY OF STATE FOR INDIA. (1927) 54 I. A. 338 = 51 B. 725 =

32 C. W. N. 61 = 26 L. W. 809 = 104 I. C. 25 =

25 A. L. J. 641 = 29 Bom. L. R. 1227 =

(1927) M. W. N. 561 = 46 C. L. J. 76 = 1 Luck. 291 =

A. I. R. 1927 P. C. 176 = 53 M. L. J. 81.

—Tax under—Retrospective imposition—Invalidity on ground of—Payment imposed de futuro—Dates being mere elements in calculation—Discrepancy in, as to date of commencement of first year—Effect—Irregularity merely.

Where the payment imposed was imposed *de futuro* and the dates were mere elements in a calculation of the amounts and dates of the instalments, held, that a discrepancy as to the date of commencement of the first year was a mere irregularity, that there was nothing retrospective about the matter, and that the tax was not illegal on the ground of its being a retrospective imposition (349). (*Viscount Sumner.*) BHAGCHAND DAGADUSA v. SECRETARY OF STATE FOR INDIA. (1927) 54 I. A. 338 = 51 B. 725 =

32 C. W. N. 61 = 26 L. W. 809 = 104 I. C. 25 =

25 A. L. J. 641 = 29 Bom. L. R. 1227 =

(1927) M. W. N. 561 = 46 C. L. J. 76 = 1 Luck. 291 =

A. I. R. 1927 P. C. 176 = 53 M. L. J. 81.

BOMBAY ACTS—(Contd.)**District Police Act IV of 1890 Ss. 25 and 25-A—(Contd.)**

—Taxation—Power of, under sections—Exercise of, if restricted to one occasion only—Exhaustion of, by single exercise.

There is nothing in either of the Ss. 25 and 25-A of the Act to restrict the exercise of the taxing function to one occasion and one occasion only. The powers which they give are not exhausted by a single exercise. The finality referred to in S. 25-A, sub-S. 4, relates exclusively to the Commissioner's function of review. The directions of the District Magistrate are not capable of being challenged otherwise than is thereby provided, but it is quite a different thing to say that the giving of one direction exhausts all the Magistrate's powers and leaves him thereafter incapable of any substituted or amending action. Such a provision would be appropriate only to the judgment of a Court and not to administrative action such as this. Such a construction would tend to deprive the enactment of its practical utility (344). (*Viscount Sumner.*) BHAGCHAND DAGADUSA v. SECRETARY OF STATE FOR INDIA.

(1927) 54 I. A. 338 = 51 B. 725 = 32 C. W. N. 61 =

26 L. W. 809 = 104 I. C. 25 = 25 A. L. J. 641 =

29 Bom. L. R. 1227 = (1927) M. W. N. 561 =

46 C. L. J. 76 = 1 Luck. 291 = A. I. R. 1927 P. C. 176 =

53 M. L. J. 81.

—Taxation of section of inhabitants—Legality of—Complicity active on their part—Proof of—Necessity.

The Act does not require proof of the active complicity of a section of the inhabitants before such an order as the Act contemplates can be made. To imply such a requirement would defeat the objects of the Act. It is the essence of measures of this kind, which in one form or another are not uncommon, that one class has to pay for the misdeeds of another, but this in itself constitutes no objection to the course that was taken (347). (*Viscount Sumner.*) BHAGCHAND DAGADUSA v. SECRETARY OF STATE FOR INDIA. (1927) 54 I. A. 338 = 51 B. 725 = 32 C. W. N. 61 =

26 L. W. 809 = 104 I. C. 25 = 25 A. L. J. 641 =

29 Bom. L. R. (1227) = 1927 M. W. N. 561 =

46 C. L. J. 76 = 1 Luck. 291 = A. I. R. 1927 P. C. 176 =

53 M. L. J. 81.

—Ss. 25, 25-A and 79—Additional Police—Compensation for damage by rioting—Taxation for—Notification as to—Irregularities in—What amount to—Effect.

Where there has been substantial conformity with the provisions of S. 25-A of the Act, mere errors of form in the Notification issued by the Government do not vitiate the proceedings, and, in any case, errors and irregularities in the Notification are cured by S. 79 of the Act (346).

In consequence of rioting in a municipal district the Government of Bombay made an order under S. 25 of the Bombay District Police Act IV of 1890, for the employment of additional police there, and an order under S. 25-A of the Act, for compensation for damage done, and directed that the expense in both respects should be recovered to a large extent from the Mahomedan weavers, who as a class were responsible for the rioting. It was found impossible to collect from the weavers. Accordingly by a Notification dated 6-6-1923, the Government directed that the sums still required for both purposes should be recovered by the Collector from the shop-keepers, who were in a position to pass the charge on to weavers. The earlier orders were not formally cancelled. As regards the cost of the additional police, the Government's direction was actually expressed to be in supersession of the previous notifications dealing with the incidence of the payments, and the substituted incidence, which was in other words a new tax, was described alike for the police and for the compensation payments. There were,

BOMBAY ACTS—(Contd.)

District Police Act IV of 1890 Ss. 25 25-A and 79
—(Contd.)

however, no words showing expressly, as to the compensation charge also, that the taxing part of the notification was new.

Held, that being, in fact, a substitution for the previous tax and sufficiently so described in the case of the police charges, it was a mere defect of form not to have reiterated the words showing expressly, as to the compensation charge also, that the taxing part of the notification was new (346). (*Viscount Sumner.*) **BHAGCHAND DAGADUSA v. SECRETARY OF STATE FOR INDIA.** (1927) 54 I. A. 338 =

51 B. 725 = 32 C. W. N. 61 = 26 L. W. 809 =
104 I. C. 25 = 25 A. L. J. 641 = 29 Bom. L. R. 1227 =
(1927) M. W. N. 561 = 46 C. L. J. 76 = 1 Luck. 291 =
A. I. R. 1927 P. C. 176 = 53 M. L. J. 81.

—**Ss. 25 (4) and 26 (1)—Collection of tax through Municipality, when there is one—Provision as to—Mandatory—Non-compliance with—More than mere irregularity.**

The provision in Ss. 25 (4) and 26 (1) of the Bombay District Police Act of 1890, that, when Government decrees integrally a levy for the recovery of the cost of additional police, its execution must be put into and left in the hands of the municipality, when there is one, until default is made, is more than a form, which might be waived, or a matter, in which irregularity is excused. It cannot be a mere irregularity to disregard an express statutory prescription, however honestly or excusably, nor is a short cut permissible because the prescribed course promises little advantage. The Police Act interposes between the punitive action of the Government and the incidence of the burden on the individual the executive action of a municipality which may be supposed to feel a responsibility towards its rate-payers and to mitigate, from their point of view, the severity of the chastisement. It has, therefore, a constitutional importance, which must be recognised, whether the practical moment of this arrangement is really considerable or not (352). (*Viscount Sumner.*)

BHAGCHAND DAGADUSA v. SECRETARY OF STATE FOR INDIA. (1927) 54 I. A. 338 = 51 B. 725 =

32 C. W. N. 61 = 26 L. W. 809 = 104 I. C. 25 =
25 A. L. J. 641 = 29 Bom. L. R. 1227 =
(1927) M. W. N. 561 = 46 C. L. J. 76 = 1 Luck. 291 =
A. I. R. (1927) P. C. 176 = 53 M. L. J. 81.

—**S. 25-A, sub-Ss. 1 (a) and 1 (b)—Magistrate's action under—Judicial or Executive—Action under sub-S. 1 (b) taken under instructions or on recommendations from superiors—Validity—Commissioner's sanction—Mode of giving.**

Whatever may be said of the inquiry under S. 25 A, sub-S. 1 (a), into claims to be compensated for the damage sustained, the magistrate's action under S. 25-A, sub-S. 1 (b), is not a judicial proceeding, and there is nothing in the Act which requires that his action in this matter should be taken wholly on his own initiative or without instructions or recommendations from his superiors. Even the Commissioner's sanction is only stated to be previous; it is not required to be given once for all. Nothing prevents it from being given from time to time or after consultation, nor is there anything about it which confines it to starting the magistrate on a course of action, which he is thereafter to pursue independently and alone (344). (*Viscount Sumner.*) **BHAGCHAND DAGADUSA v. SECRETARY OF STATE FOR INDIA.** (1927) 54 I. A. 338 = 51 B. 725 =

32 C. W. N. 61 = 26 L. W. 809 = 104 I. C. 25 =
25 A. L. J. 641 = 29 Bom. L. R. 1227 =
(1927) M. W. N. 561 = 46 C. L. J. 76 = 1 Luck. 291 =
A. I. R. 1927 P. C. 176 = 53 M. L. J. 81.

Guzarat Talukdars' Act VI of 1888.

—**Ss. 73 and 68—Effect on kasbati lessees—'Right of occupancy'—Meaning of.**

BOMBAY ACTS—(Contd.)

Guzarat Talukdars' Act VI of 1888. Ss. 73 and 68
—(Contd.)

It is seriously contended that the effect of this substitution of the words "the right of occupancy" for the words "the right or interest of a taluqdar" in or to his holding (in S. 73 of Bombay Act VI of 1888) is that a kasbati's interest in a leasehold held for a term of years is changed in its nature and becomes a hereditary and transferable property, notwithstanding that by the very conditions of the lease his interest is limited to a term, and he is restrained from alienation; and notwithstanding also that by S. 68 of this Code it is enacted that an occupant is entitled to the use and occupation of his land for the period, if any, to which his occupancy is limited. These two sections, in their Lordships' view, plainly mean that a lessee, whether a true "talukdar" or a "thakur", "mewassie", "kasbati", or "naik", is bound by the terms of his lease, one term of which is that he shall only occupy for the term of years for which a lease for years is granted, and *prima facie* no longer (250). (*Lord Atkinson.*) **SECRETARY OF STATE FOR INDIA v. BAI RAJBAL.** (1915) 42 I. A. 229 = 39 B. 625 (663) =

19 C. W. N. 1087 = 18 M. L. T. 179 =
17 Bom. L. R. 730 = 13 A. L. J. 953 = 2 L. W. 731 =
(1915) M. W. N. 563 = 30 I. C. 303 = 29 M. L. J. 242.

Hereditary Offices Act III of 1874.

—**Contribution illegally levied under—Suit for refund of—Limitation—Suit in time from date of levy—Suit out of time from date of order imposing contribution—Effect.**

In 1906 an order was made under Bombay Act III of 1874 deciding that the respondents were representative watan-dars and making the remuneration for the watan services a charge on lands in the possession of appellants. The order was illegal inasmuch as, as early as 1864, the same had in proceedings under Act XI of 1852 been finally declared to be free of assessment. The order of 1906 was confirmed in 1908 by a Government resolution, and entries in accordance with it were made in the watan register. In a suit brought by the appellant in 1913 for a declaration that the lands in his possession were not liable for such a contribution, and for a return of the contribution levied on him, *held*, that the suit was not barred because the appellant had failed to file a suit to set aside the order imposing the contribution within the period limited for filing such a suit (394).

If the order was illegal, the plaintiff was not bound to file a suit to set it aside, but was entitled to wait until it was enforced against him, and the attempt to enforce it against him gave him a good cause of action, which was admittedly within time (394). (*Sir John Wallis.*) **LAXMANRAO MADHAVRAO v. SHRINIWAS LINGO.**

(1927) 54 I. A. 380 = 51 B. 830 = 46 C. L. J. 393 =
39 M. L. T. 527 = 29 Bom. L. R. 1484 =
A. I. R. 1927 P. C. 217 = 27 L. W. 642 = 53 M. L. J. 475.

—**Contribution under—Illegal levy of—Suit for refund of—Civil Courts—Jurisdiction—Bombay Act X of 1876, S. 4—Effect. See BOMBAY ACTS—REVENUE JURISDICTION ACT X OF 1876, S. 4—BOMBAY HEREDITARY OFFICES ACT III OF 1874.** (1927) 54 I. A. 380 (395) =
51 B. 830.

—**Retrospective operation of.**

The provisions of Bombay Act III of 1874 are in some degree retrospective (166). (*Sir Robert P. Collier.*) **ADRI-SHAPPA BIN GADGIAPPA v. GURUSHIDAPPA.**

(1880) 7 I. A. 162 = 4 B. 494 (503) = 7 C. L. R. 1 =
4 Sar. 154 = 3 Suth. 757.

Nawab of Surat Act XVIII of 1848.

—**Distribution of Nawab's property by Governor of Bombay in Council pursuant to—Petition to P. C. against—Maintainability.**

BOMBAY ACTS—(Contd.)**Nawab of Suart Act XVIII of 1848—(Contd.)**

The proceeding of the Governor of Bombay in Council distributing the Nawab's property pursuant to the power given by Act XVIII of 1848 is not an act of a Court, Judge, or Judicial Officer, within the meaning of S. 3 of the Statute, 3rd and 4th Will. IV., c. 41, but is the act of a person or body not in any sense judicial; delegated and authorised to perform a particular function as to the responsibility for the exercise of which, or as to any appeal from that exercise, they were exempted by the legislature which created them.

Held, therefore, that without a special reference by the Queen in Council under S. 4 of 3rd and 4th Will. IV., c. 41, and as a matter of right, a petition complaining of such a proceeding of the Governor of Bombay in Council could not be entertained by the Judicial Committee (509). (*Lord Justice Knight Bruce.*) **NAWAB OF SURAT, In re.** (1854) 5 M. I. A. 499.

—*Distribution of Nawab's property by Governor of Bombay in Council pursuant to—Proceeding relating to—Judicial or Administrative.*

The intention of Act XVIII of 1848 was not to create a Court; its intention was to delegate, either arbitrarily, or subject to certain limitations of discretion, the administration and distribution of the Nawab's property, but in such a way that the administration and distribution should not be judicially questioned. The Indian Legislature vested the power of dealing with the Nawab's property in a particular individual or a particular body, and declared that its acts shall not be liable to be questioned in any Court of Law or Equity. The proceeding of the Governor of Bombay in Council distributing the Nawab's property pursuant to the power given by Act XVIII of 1848 is not an act of a Court, Judge, or Judicial Officer within the meaning of S. 3 of the Statute, 3rd and 4th Will IV., c. 41, but is the act of a person or body not in any sense judicial; delegated and authorised to perform a particular function as to the responsibility for the exercise of which, or as to any appeal from that exercise, they were exempted by the legislature which created them (508-9). (*Lord Justice Knight Bruce.*) **NAWAB OF SURAT, In re.** (1854) 5 M.I.A. 499.

Revenue Jurisdiction Act X of 1876.

—**S. 4—Bombay Hereditary Offices Act III of 1874—Illegal levy of contribution under—Suit for refund of—Civil Courts—Jurisdiction of, to entertain suit.**

Where, in a case in which there had been an adjudication under Bombay Act XI of 1852 that the lands in plaintiff's possession were not liable to contribution under Bombay Act III of 1874, the Government illegally imposed and levied a contribution on the plaintiff under that Act, *held*, that a suit by the plaintiff for the recovery of the amount so collected from him was not barred under S.4 of Act X of 1876 (395). (*Sir John Wallis.*) **LAXMANRAO MADHAVRAO v. SHRINIWAS LINGO.** (1927) 54 I.A. 380=51 B. 830=46 C.L.J. 393=39 M.L.T. 527=29 Bom. L. R. 1484=A.I.R. 1927 P. C. 217=27 L.W. 642=53 M. L.J. 475.

—*Civil Courts—Suit to recover office and alter Watan register—Jurisdiction to entertain.*

Under S. 4 of the Bombay Revenue Jurisdiction Act X of 1876, a Civil Court has no jurisdiction to entertain a suit for declaration that the plaintiffs were watandar patils and kulkarnies of the village, and for cancellation of the watan register. The words of the section are wide enough to preclude the Courts from entertaining any claim to the watan offices in opposition to the claim of the hereditary offices recognised or appointed under the Act, and also any claim for the cancellation of the watan register (393-4). (*Sir John*

BOMBAY ACTS—(Contd.)**Revenue Jurisdiction Act X 1876—(Contd.)**

Wallis.) **LAXMANRAO MADHAVRAO v. SHRINIWAS LINGO.** (1927) 54 I. A. 380=51 B. 830=46 C.L.J. 393=39 M.L.T. 527=29 Bom. L.R. 1484=A.I.R. 1927 P.C. 217=27 L. W. 642=53 M.L.J. 475.

—**Ss. 12 and 4—Reference to High Court under S. 12—Lands held under treaty or on political tenure—Meaning.**

Under S. 12 of the Bombay Revenue Jurisdiction Act X of 1876 the Government has a general power to refer questions arising in the investigation of claims to the High Court of Bombay for decision. By S. 4 of that Act, however, the jurisdiction of the Civil Courts is ousted in regard to any claim against the Government relating to lands held under treaty, or to lands granted or held as jagir or saranjam or on other political tenure, or to lands declared by Government, or by any officer duly authorised in that behalf, to be held for service.

The question referred to the High Court under S. 12 of Bombay Act X of 1876 in the case before their Lordships was whether the application in or about the year 1864 of the Summary Settlement under Bombay Acts II and VII of 1863 to certain lands then held by T, which subsequently devolved on B, was valid and legal. The High Court held that it had jurisdiction to entertain the reference, and decided that the lands in question were not held either under treaty or on political tenure and that the application of the summary settlement to the lands in question had been valid.

Held, affirming the High Court, that it had jurisdiction to decide the question referred, and that its decision was correct. (*Viscount Haldane.*) **MAHARAJA OF KOLHAPUR v. BALA MAHARAJ.** (1923) 50 I.A. 308=48 B 1=

33 M.L.T. 378=(1923) M.W.N. 638=A.I.R. 1923 P. C. 194=26 Bom. L. R. 252=77 I. C. 100=28 C. W. N. 906.

Titles to Rent-Free Estates Act XI of 1852.

—*Inam Commissioner—Decision of, as such—Confirmation of, by Government on appeal—What amounts to—Rules under Act—Rule 8, Proviso 5—Category under which lands should be dealt with—Decision of—Jurisdiction of Government as to.*

Watan lands in a village of which the respondent's ancestors were originally watandars were under attachment for failure to pay the jodi (quit rent). Those lands were included as kamavishi (lands under management) in a grant of the village in Jaghir in 1874 by the Peishwa to the appellant's ancestors. The Jagirdhar's possession of the watan lands as kamavishi continued under British rule. In 1864, however, the Inam Commissioner under Act XI of 1852 recommended that the watan lands (except a small part) should belong to the Jagirdars free of assessment, on the ground that the kamavishi management had assumed a permanent character. His recommendation was approved by the Revenue Commissioner and the Government.

Held, that the recommendation of the Inam Commissioner was a decision by him as Inam Commissioner (387); that the approval by the Government was on appeal from such decision (389); that the Government had, as the supreme authority under Act XI of 1852, jurisdiction to decide whether the lands should be dealt with in the one way or the other, and that its decision was not without jurisdiction by virtue of proviso 5 to R. 8 of the Rules under Act XI of 1852 (389). (*Sir John Wallis.*) **LAXMANRAO MADHAVRAO v. SHRINIWAS LINGO.** (1927) 54 I.A. 380=

51 B. 830=46 C.L.J. 393=39 M.L.T. 527=29 Bom. L. R. 1484=27 L. W. 642=A. I. R. 1927 P. C. 217=53 M. L. J. 475.

—**Rule 8, Proviso 5 of Rules under—Jurisdiction of Government to decide whether watan lands should be dealt**

BOMBAY ACTS—(Contd.)**Titles to Rent-Free Estates Act XI of 1852**
—(Contd.)

with under one category or another. See UNDER THIS ACT—INAM COMMISSIONER—DECISION OF, AS SUCH.

(1927) 54 I.A. 380 (389)=51 B. 830.

Tramways Act I of 1874.

—S. 30—Purchase of undertaking of Tramway Company under—Date of taking—Notice of purchase—Date of service of—Award—Date of—Execution of conveyance—Date of.

In the case of a purchase by the Corporation of the City of Bombay of the undertaking of the Bombay Tramway Company under S. 30 of the Bombay Tramways Act I of 1874, a question was raised as to the date to be fixed as the date of taking the purchase.

Held, that the proper date to be fixed was when the relation of vendor and purchaser was definitely created by the service of a proper notice to purchase, and not the date of the award fixing the value of the corporeal property of the Tramway Company.

To fix the date of the execution of the conveyance would lead to great practical difficulties. The profits would vary from day to day and the average profits for three years could never be ascertained.

In this case the appellate Court fixed the date of the award as the proper date, and, having regard to the course taken by both parties in that Court, their Lordships held that neither party could without the consent of the other family insist that the date held by their Lordships to be the proper date ought to be adopted. (*Lord Lindley*.) BOMBAY TRAMWAY COMPANY v. MUNICIPAL CORPORATION OF BOMBAY. (1904) 31 I.A. 169=28 B. 502 (528-9)=9 C.W.N. 337=6 Bom. L. R. 739=8 Sar. 653.

—Track rent—Liability of Tramway Company to Corporation after service of notice of purchase for—Agreement between Corporation and Company that Company should pending ascertainment and payment of purchase-money work tramways and receive income and profits—Effect.

In a case in which the Corporation of the City of Bombay purchased the undertaking of the Bombay Tramway Company under S.30 of the Bombay Tramways Act I of 1874, the Tramway Company contended that what was called track rent payable to the Corporation ought to cease on the date of the service of the notice to purchase. It appeared, however, that pending the ascertainment and payment of the purchase-money, the Tramway Company agreed to continue to work the tramways on the undertaking that they received "the income and profits of the tramway business during such period."

Held, that so long as the Tramway took the profits, they must pay the ordinary expenses of working and the rent in question. (*Lord Lindley*.) BOMBAY TRAMWAY Co. v. MUNICIPAL CORPORATION OF BOMBAY.

(1904) 31 I.A. 169=28 B. 502 (529)=9 C.W.N. 37=6 Bom. R.R. 739=8 Sar. 653.

—Validity—Arrangement by Corporation with third party that he should find purchase-money and work tramway after its acquisition by Corporation—Effect.

The Corporation of the City of Bombay purchased the undertaking of the Bombay Tramway Company under the provisions of S. 30 of the Bombay Tramways Act I of 1874. The Tramway Company contended that the notice served by the Corporation of their intention to purchase the Company's undertaking was altogether invalid because the Corporation were acting beyond their powers, viz., not for themselves but for and on behalf and on account of a person named B. It appeared that though the Corporation had made arrangements with B by which he was to find the

BOMBAY ACTS—(Contd.)**Tramways Act I of 1874 S. 30—(Contd.)**

money for the purchase, and to work the tramways when acquired by the Corporation, yet the Corporation were acting as principals and not as B's agents. *Held*, that the notice was not invalid on that account.

There is nothing in the Tramways Act which expressly or impliedly prohibits such a transaction; nothing to show that if the Corporation exercise the power conferred upon them by S. 30 and acquire the tramways. They are bound to keep them in their own hands and to work them themselves. Whether they can carry out their agreement with B without obtaining further powers is a matter which does not concern the Tramway Company. (*Lord Lindley*.) BOMBAY TRAMWAY COMPANY v. MUNICIPAL CORPORATION OF BOMBAY.

(1904) 31 I.A. 169=28 B. 502 (527-8)=9 C.W.N. 337=6 Bom. L.R. 739=8 Sar. 653.

BOMBAY CHARTER OF JUSTICE, 1823—Reserving clause in—Scope of.

We are inclined to hold that, as the reserving clause is fully satisfied by confining it to civil cases, that construction is conformable with the general usage where the English law prevails (484). (*Dr. Lushington*.) THE QUEEN v. EDULJEE BYRAMJEE.

(1846) 3 M.I.A. 468=5 M. P. C. 276=1 Sar. 305.

BOMBAY LAND REVENUE CODE V OF 1879, Ss. 48, 3 (20) and 214 and R. 5 of Rules of 1907—Grantee of village—Ryots agricultural assessment—Right to, in virtue of grant—Conversion of land into building site—Building assessment coming into being on—Grantee's right to.

The Act of 1879 by S. 48 does not provide for an additional assessment; it only provides for an altered assessment to be imposed according to rules.

In virtue of the grant of a village by the ryots agricultural assessment in respect of the lands used for agricultural purpose went to the grantee.

Held, that, when the cultivation for agricultural purposes was given up and the land was used for building and a building assessment came into being, that assessment would come to the person to whom the agricultural amount which it displaced should go. (*Viscount Dunedin*.) BOMANJI ARDESHIR WADIA v. SECRETARY OF STATE FOR INDIA.

(1928) A.I.R. 1929 P.C. 34

BOMBAY REGULATIONS.

ACKNOWLEDGMENT OF DEBTS, INTEREST, MORTGAGES REG. V OF 1827.

CIVIL COURTS (LAW TO BE OBSERVED) REG. IV OF 1827.

CIVIL COURT, SURAT REG. I OF 1800.

COLLECTORS OF LAND REVENUE REG. XVI OF 1827.

DEKKHAN AND KHANDESH (POONA, AHMEDNAGAR AND KHANDESH) DISTRICTS REG. XXIX OF 1827.

PUNCHAYAT REG. VII OF 1827.

SUITS IN CIVIL COURTS REG. II OF 1800.

Acknowledgment of Debts, Interests, Mortgages Reg. V of 1827.

—S. 1—Applicability—Hereditary office—Fees incident to—Suit to recover—Limitation—Possession of office held for 30 years by third party—Effect.

In a suit brought by the plaintiffs-respondents to recover from the appellants, the owners of the village of D, the amount of the arrears of certain hereditary rights of office, due to the plaintiffs from the appellants, on the

BOMBAY REGULATIONS—(Contd.)**Acknowledgment of Debts, Interest, Mortgages
Reg. V of 1827, S. 1—(Contd.)**

ground that the plaintiffs were the hereditary Mujoomdars Parcks and Mehta of a pergunna, and that the owners of the village of D which was situate within the pergunna were bound to pay to the hereditary Mujoomdars and their officers, a certain sum annually, *held*, that S. 1 of the Regulation was inapplicable to the case (33-4).

Seemle if the appellants had been able to show that some persons other than the plaintiffs had been for more than 30 years in the possession of the office of Mujoomdar for the pergunna in question, the title of the possessor might have been set up by the appellants in answer to the respondents' claim, as otherwise they would have been liable to a double payment (34). (*Mr. Justice Erskine.*) **BEEMA SHUNKER v. JAMAS-JEE SHAPOR-JEE.** (1837) 2 M. I. A. 23 =

5 W. R. 121 = 1 Suth. 84 = 1 Sar. 149.

—Object of.

The object of S. 1 of Bombay Reg. V of 1827 appears to have been to prevent the title of the actual possessor of any lands, houses, hereditary offices, or other immoveable property, from being questioned, after an uninterrupted possession, as proprietor, for more than 30 years (34). (*Mr. Justice Erskine.*) **BEEMA SHUNKER v. JAMAS-JEE SHAPOR-JEE.** (1837) 2 M. I. A. 23 = 5 W. R. 121 =

1 Suth. 84 = 1 Sar. 149.

—S. 2—Applicability—Hereditary office—Fees incident to—Arrears of—Suit for recovery of.

S. 2 of Bombay Reg. V of 1827 refers to suits for damages for injuries to the person, and for the recovery of privileges of caste. It is wholly inapplicable to a suit brought by the holders of certain hereditary offices for the recovery from the appellant of the arrears of fees incident to such offices payable to them by the appellant (34). (*Mr. Justice Erskine.*) **BEEMA SHUNKER v. JAMAS-JEE SHAPOR-JEE.**

(1837) 2 M. I. A. 23 = 5 W. R. 121 = 1 Suth. 84 = 1 Sar. 149.

—S. 3—Debt—Meaning of.

The debt pointed to by S. 3 of Bombay Reg. V of 1827 is confined to demands founded upon the contract of the parties, for the terms of which the Government in India justly thought it unsafe to rely upon the fading memory of witnesses, beyond the period of 6 years (35). (*Mr. Justice Erskine.*) **BEEMA SHUNKER v. JAMAS-JEE SHAPOR-JEE.** (1837) 2 M. I. A. 23 = 5 W. R. 121 =

1 Suth. 84 = 1 Sar. 149.

—Money debt—Revenue of village—Suit to recover—Nature of—Limitation

In a suit for the recovery of possession of a village, together with its revenue for 11 years, *held*, that the Court below very properly restrained the recovery of the revenue to 6 years prior to suit (53).

The liability to refund the money received is a money debt within the meaning of S. 3 of Bombay Reg. V of 1827 (53). (*Mr. Justice Bosanquet.*) **COLLECTOR OF KAIRA v. MODEE PESTON-JEE.**

(1838) 2 M. I. A. 37 = 3 Moo. P. C. 368 = 1 Sar. 215.

—Ss. 3 and 4—Applicability—Hereditary office—Fees payable to—Suit for arrears of—Nature of—Limitation.

The suit was to recover from the appellants, the owners of village D, the amount of the arrears of certain hereditary rights of office, alleged to be due to the plaintiffs from the appellants.

The plaintiff's suit was founded upon the allegation that they were the hereditary Mujoomdars, Parck and Mehta of a pergunna, and that the owners of village D which was situate within the pergunna were bound to pay to the hereditary Mujoomdars and their officers, a certain sum annually. The plaintiffs claimed to recover the arrears payable for

BOMBAY REGULATIONS—(Contd.)**Acknowledgment of Debts, Interest, Mortgages
Reg. V of 1827, Ss. 3 and 4—(Contd.)**

24 years prior to suit. The appellants insisted that the plaintiffs were in no event entitled to more than the amount of 6 years' arrears. The Court below *held* that the plaintiffs were entitled to recover the amount of 12 years' arrears.

Held, affirming the Court below, that the case fell within S. 4, and not within S. 3 of Bombay Reg. V of 1827, and that the plaintiffs were entitled to recover the amount of 12 years' arrears (35-6.)

The suit is not one for debt or damages within the meaning of S. 3. The respondent's claim does not rest upon any contract, express or implied, made by the appellants, to pay the amount sued for, but arises out of a grant, made by the sovereign proprietor of the territory, of which a part has since been given to the appellants, by which the possessors of land, within that territory, are bound to contribute, in certain proportions, to the maintenance of certain hereditary officers, created by the grant; imposing an obligation on the officers to perform certain duties, when required; and an obligation on each land owner to pay an annual stipend for the maintenance of the office. The question is, not whether such an obligation might be enforced, by a suit, in the nature of an action of debt; but whether a claim be constituted in a debt, within the province of this Regulation; and their Lordships are of opinion that it is not (34-5).

Neither can the suit be looked upon as a suit for damages within the meaning of the Regulation. For the respondents are not suing for damages, sustained by them in consequence of any tortious interference with the hereditary rights, or for any breach of contract by the appellants, but seek in this suit to recover the payment of the specific sums granted to them, in respect of the lands occupied by the appellants (35-6). (*Mr. Justice Erskine.*) **BEEMA SHUNKER v. JAMAS-JEE SHAPOR-JEE.** (1837) 2 M. I. A. 23 =

5 W. R. 121 = 1 Suth. 84 = 1 Sar. 149.

—S. 7, Cl. (2)—Applicability—Peishwa—Claim preferred before, in 1813—No adjudication upon—Adverse possession for 30 years before suit in such a case—If a bar to claim.

Cl. 1 of S. (1) of Bombay Regulation V of 1827 provided that: "Whenever lands, houses, hereditary offices, or other immoveable property, have been held without interruption for a longer period than thirty years, whether by any person as proprietor, or by him and his heirs, or others, deriving right from him, such possession shall be received as proof of a sufficient right of property in the same." And cl. (2) of S. 7 of that Regulation provided, "Also, if the claimant have within the time of limitation preferred his claim to any authority (arbitration included) competent to try it, and satisfactory reason be shown why a decision was not passed (such reason nowise affecting the justice of the demand), then the period of limitation shall be reckoned from the date of the last proceeding known to the defendant in such case."

Held that a claim preferred before the Peishwa in 1813, previous to the British rule, but upon which no adjudication was made was sufficient to bring the claimant within the exception of cl. (2) of S. 7 of the above-mentioned Regulation, notwithstanding adverse possession for 30 years previous to the institution of the suit (153-4).

The Peishwa was then the supreme power in the State, and had authority to decide between the parties (154). (*Lord Campbell.*) **JEWAJEE v. TRIMBUCKJEE.**

(1842) 3 M. I. A. 138 = 6 W. R. 38 (P. C.) = 1 Suth. 141 = 1 Sar. 257.

Civil Courts (Law to be observed) Reg. IV of 1827.**—Nature of—Declaratory or prospective.**

BOMBAY REGULATIONS—(Contd.)**Civil Courts (Law to be observed) Reg. IV of 1827—(Contd.).**

There is nothing in Regulation IV of 1827 (Bombay) which is declaratory. The provisions there enacted are evidently prospective only. (*Mr. T. Erskine.*) MUSSUMAT KEEMEE BAE v. LATCHMAN DASS NARAIN DASS.

(1837) 1 M. I. A. 470 (481) = 5 W. R. 59 (P. C.) = 1 Suth. 75 = 1 Sar. 141.

—S. 26—Effect—Custom—Personal law—Applicability—Presumption—Onus of proof—Mahomedan—Succession to—Females—Exclusion of—Custom of.

The suit related to the succession to the estate of a deceased Mahomedan, who was a member of the family of Talpur Mirs of Sind, who were a branch of the large Baluchi tribe. The plaintiff, the son of the brother of the deceased by the half-blood, alleged, however, that the rights of inheritance were not to be determined according to Mahomedan Law, but that they were regulated by a custom well known and distinctly ascertained, by which, notwithstanding the provisions of the Koran, women were excluded from any share in the inheritance of a paternal relation. The plaintiff alleged that, by S. 26 of Bombay Regulation IV of 1827, which had by notice been extended to the district of Sind, a presumption ought to be made in favour of the existence of a usage or custom where it was known that that usage or custom was prevalent. The plaintiff based his argument upon the words of the Regulation.

Held, over-ruling the contention, that it was incumbent upon the plaintiff to allege and prove the custom on which he relied (14).

Under the Regulation, it lies upon the person asserting that he is ruled in regard to a particular matter by custom, to prove that he is so governed, and not by personal law, and further to prove what the particular custom is. There is no presumption created by the clause (S. 26) in favour of custom; on the contrary, it is only when the custom is established that it is to be the rule of decision (13). (*Lord Buckmaster.*) ABDUL HUSSEIN KHAN v. BIBI SONA DESO.

(1917) 45 I. A. 10 = 45 C. 450 (458-60) = 22 C. W. N. 353 = 23 M. L. T. 117 =

16 A. L. J. 17 = 27 C. L. J. 240 = 20 Bom. L. R. 528 = 4 Pat. L. W. 27 = 43 I. C. 306 = 34 M. L. J. 48.

—S. 27, Cl. (1)—Family rule or usage—Inquiry into—Duty as to—Allegation in pleadings of such rule or usage—Absence of—Effect.

Whatever may be the duty of the Judge under Bombay Reg. IV of 1827, where any particular rule or usage is alleged, as to which any reasonable doubt may exist, and the parties have not waived resort to the course prescribed by the Regulation, and their Lordships are far from considering that in such cases the Judges in India may not well be advised of their own accord to act upon the Regulation, they certainly would not be disposed to discourage such a practice. The Regulation, however, imposes no such obligation upon the Judges where there is no allegation of any rule or usage as to which any reasonable doubt can be entertained, or where the parties have waived resort to the course pointed out by the Regulation. (*Lord Justice Turner.*) MODEE KAIKHOOSROW HORMUSJEE v. COOVERBAEE.

(1856) 6 M. I. A. 448 (458-9) = 4 W. R. 94 = 1 Suth. 268 = 1 Sar. 562.

—Ch. II, S. 3—Mogulan dues—Suit for title to, as well as for dues themselves—What amounts to.

A suit having been brought for the amount of one year's Mogulan dues, and amended by claiming, pursuant to Reg. IV of 1827, ch. II, S. 3, ten years' dues, is a suit for the title to the dues as well as for the dues themselves. (*Lord*

BOMBAY REGULATIONS—(Contd.)**Civil Courts (Law to be observed) Reg. IV of 1827, Ch. II, S. 3—(Contd.).**

Brougham.) BOMAN-JEE MUNCHER-JEE v. SYUD HOOS-SAIN ABDOOLLAH. (1837) 1 M. I. A. 494 (503-4) =

5 W. R. 61 (P. C.) = 1 Suth. 77 = 1 Sar. 142.

Civil Court, Surat Reg. I of 1800.

—S. 13—Applicability—Land—Suit on account of.

The Bombay Regulation I, A. D. 1800, S. 13, limiting the right of action to twelve years, includes suits on account of land as well as personal actions. Where, therefore, a suit was instituted for the share of certain lands, some of which were attached to the hereditary office of Desaye, and no satisfactory proof was given that any demand had been made in respect thereof within that period, the right of action was held to be absolutely barred. (*Mr. Baron Parke.*) NUNDRAM DYARAM v. DULA-BHAE KURPARAM. (1837) 1 M. I. A. 414 = 1 Sar. 136.

—Admission of truth of plaintiffs' demand—Compromise—Offer of sum by way of, not involving admission of justice of plaintiff's demand—Effect.

Section 13 of Bombay Reg. I of 1800 prohibited the Court from hearing, trying or determining the merits of any suit whatever, against any person or persons, if the cause of action should have arisen twelve years before any suit should have been commenced on account of it, unless the complainant could show by clear and positive proof that he had demanded the money or matter in question, and that the defendant had admitted the truth of the demand, etc.

In a suit in which the cause of action had admittedly arisen 27 years before any suit was commenced, the plaintiff contended that the suit was not barred because the defendant had admitted the truth of the demand. When the evidence upon which the supposed admission rested was examined, it was found to amount to no more than an offer of a specific sum of money by way of compromise, in no way involving an admission of the justice of the plaintiff's demand further than what may be inferred from the offer of any compromise, an inference which is never permitted, and which in the particular case would be most unfair, when the action was commenced while the defendant was absent for a temporary purpose from his usual place of business, to which he was anxious to return.

Held, that such evidence ought not to be taken as proof of any admission by the defendant of the truth of the plaintiff's demand, so as to take the case out of the prohibitory clause of the 13th article of the Regulation. (*Mr. Thomas Erskine.*) BHAECHUND v. PURTAB CHUND.

(1837) 1 M. I. A. 155 (170-2) = 5 W. R. 31 (P. C.) = 1 Suth. 51 = 1 Sar. 103.

—Good and sufficient cause for not suing—Residence of defendant beyond limits of jurisdiction of Company's Courts if a.

The residence of the defendant beyond the limits of jurisdiction of the Company's Courts is not a good and sufficient excuse for the complainant's delay beyond the twelve years within the meaning of Article 13 of Bombay Reg. I of 1800. (*Mr. Thomas Erskine.*) BHAE CHUND v. PURTAB CHUND. (1837) 1 M. I. A. 155 (172-3) =

5 W. R. 31 P. C. = 1 Suth. 51 = 1 Sar. 103.

Collectors of Land Revenue Reg. XVI of 1827.

—S. 20—Watan lands—Alienation of—Permanent tenancy if an. See WATAN LANDS—ALIENATION OF—PERMANENT TENANCY IF AN.

(1923) 50 I. A. 255 (258) = 47 B. 798 (801).

Dekkhan and Khandesh (Poona, Ahmednagar and Khandesh) Reg. XXIX of 1827.

—Jaghirdars—Claims of—Decision of Collector or Commissioner on—Appeal from—Jurisdiction of Bombay Sudder Dewanny Adawlut to entertain.

BOMBAY REGULATIONS—(Contd.)

Dekkhan and Khandesh (Poona, Ahmednagar and Khandesh) Reg. XXIX of 1827—(Contd.).

The Sudder Dewanny Adawlut of Bombay have no jurisdiction to entertain an appeal from a decision of the Collector or Commissioner appointed to adjust the claims of Jaghirdars, which is final, if delivered before the promulgation of Bombay Reg. XXIX of 1827. *ESHWUNT ROW THORAT DINKUR ROW v. NILLOBA AND JOTEEBA THORAT.* (1838) 2 M. I. A. 107=1 Sar. 158.

Punchayat Reg. VII of 1827.

—Award under—Finality of—Objection to want of—Maintainability of, before P. C. for first time.

All the other objections that have been taken as to the award not being final, their Lordships do not enter into; it may be doubtful how far a Court of appeal could enter into that question at all, whether it ought not to have been originally raised in the Zillah Court, and disposed of there (163). (*Sir John Patteson.*) *NUSSURWANJEE PESTONJEE v. MEER MYNOODEEN KHAN WULLUD MEER SUDROODEEN KHAN BAHADOOR.* (1855) 6 M. I. A. 134.

—Boundary dispute—Decision of punchayat on—Suit to enforce—Defences open in—Agreement of parties to abide by its decision amounting to an effectual reference to arbitration—Agreement not having that effect—Distinction.

Where parties to a boundary dispute enter into an agreement to abide by the opinion and determination of a punchayat, and an opinion is expressed, and a determination made, by those to whom the dispute is so referred, the party affected by the decision is nevertheless entitled to contend that the agreement and determination do not necessarily bind and to bring forward all the circumstances of the case, for the purpose of showing it to be impossible that they should bind, in other words, to resist a demand resting on what the punchayat did on grounds analogous to some of those on which the specific performance of an agreement may be resisted in English Courts of Equity (392-3).

Quære, as to the rule in the case of an effectual reference to arbitration, and an award, property so considered (393). (*Vice-Chancellor Knight Bruce.*) *MOKUDDINS OF KUNKUNWADY v. ENAMDAR BRAHMINS OF SOORPAL.* (1845) 3 M. I. A. 383=7 W. R. 8 (P.C.)=1 Suth. 164=1 Sar. 292.

—Law under—Basis of—9 and 10 Will. III, c. 15 if and to what extent a.

It is very likely that Reg. VII of 1827 may have been enacted by the Legislature in India, with some reference to the Act of Parliament in this country, 9 & 10 Will. III, c. 15 by which submissions to arbitration were authorized to be made rules of Court, and enforced by process of contempt of Court, as if it were a proceeding actually in Court; it is very possible that that was so (154). (*Sir John Patteson.*) *NUSSURWANJEE PESTONJEE v. MEER MYNOODEEN KHAN WULLUD MEER SUDROODEEN KHAN BAHADOOR.* (1855) 6 M. I. A. 134.

—Law under—9 & 10 Will. III, c. 15—Distinction.

The difference between the law in England under 9 & 10 Will. III, c. 15 and the law in India under Regulation VII of 1827, is very marked, because, by 9 & 10 Will. III, c. 15, all that is enacted is, that if the parties choose to submit their differences to arbitration, they may insert in the submission the agreement between them, that the submission may be made a rule of any of His Majesty's Courts of Record, upon an affidavit made by the witnesses to the submission, that there is such a clause; but there is no mention made in the Statute of Will. III with respect to what the submission itself shall contain; it is left entirely to the parties themselves to put into the submission anything they think fit (154-5). (*Sir John Patteson.*) *NUSSURWANJEE*

BOMBAY REGULATIONS—(Contd.)

Punchayat Reg. VII of 1827—(Contd.).

PESTONJEE v. MEER MYNOODEEN KHAN WULLUD MEER SUDROODEEN KHAN BAHADOOR.

(1855) 6 M. I. A. 134.

—Reference under—Nature and extent of matter referred—Specification of, indeed of reference—Necessity—Sufficiency of—Conditions.

It is necessary under Regulation VII of 1827 that the nature and extent of the matter referred should be contained in the deed of reference, not meaning by that, that every single thing should be specified which the parties dispute, but generally so as to be intelligible and clear, so that it may appear when once filed, if any future suit should arise, what it was that had been determined by the arbitrator. Whether the reference to petitions of a certain date might be sufficient or not, or whether the petitions ought to have been annexed or not, it is not necessary for their Lordships to determine (162). (*Sir John Patteson.*) *NUSSURWANJEE PESTONJEE v. MEER MYNOODEEN KHAN WULLUD MEER SUDROODEEN KHAN BAHADOOR.*

(1855) 6 M. I. A. 134.

—S. 3 (1)—Jurisdiction to make award under—Conditions of, specified in section—Waiver of, by consent of parties—Effect—Validity of award.

In a case in which the deed of reference did not insert the time within which the award was to be delivered as required by cl. (1) of S. 3 of Regulation VII of 1827, *held*, that the consent of the parties to waive one of the conditions which was required by the Legislature in the Regulation could not give jurisdiction to the Zillah Court to make the award have the force of a decree of Court (161).

The parties cannot by consent give the Court the power which the statute must give (161). (*Sir John Patteson.*) *NUSSURWANJEE PESTONJEE v. MEER MYNOODEEN KHAN WULLUD MEER SUDROODEEN KHAN BAHADUR.* (1855) 6 M. I. A. 134.

—Matters specified in—Insertion of, in deed of reference—Necessity.

Their Lordships are quite clearly of opinion that they must take it that the Legislature of India meant distinctly to prescribe that any deed of reference under which an award was to be made, to have the force of a decree of the Zillah Court should contain all those matters which are specified in Cl. (1) of S. 3 of Regulation VII of 1827 (161). (*Sir John Patteson.*) *NUSSURWANJEE PESTONJEE v. MEER MYNOODEEN KHAN WULLUD MEER SUDROODEEN KHAN BAHADOOR.* (1855) 6 M. I. A. 134.

—Time for making award—Insertion of, in deed of reference—Provision as to—Directory or mandatory.

References to arbitration had prior to Regulation VII of 1827 been made in India under the name of "Panchayets," which had been attended with a very great and unreasonable delay. It might probably have been the intention of the Legislature in framing this Regulation to prevent such delays from taking place, and that might have been a very good reason why this requirement should have been made, that the time should be specified in the deed of reference within which the award should be made. To regard it, therefore, as merely directory, or of little importance, would seem to be letting in one of those very mischiefs which were expressly intended to be avoided by this Regulation (158). Their Lordships cannot help thinking that the time within which the award was to be made was considered by the Legislature of India to be essential, to be of great importance and to be necessary to be inserted in the deed of reference in order to give to the award the force of a decree of the Zillah Court (160). (*Sir John Patteson.*) *NUSSURWANJEE PESTONJEE v. MEER MYNOODEEN KHAN.*

(1855) 6 M. I. A. 134.

BOMBAY REGULATIONS—(Concl'd.)**Punchayat Reg. VII of 1827, S. 3 (1)—(Contd.)**

—Time for making award—Omission to insert, in deed of reference—Validity of award in case of.

The insertion in the deed of reference of the time within which the award should be made provided for by cl. (1) of S. 3 of Regulation VII of 1827 is mandatory and not directory only, and where the deed of reference omits to specify the time as required by that clause, although the award made on the reference may be a very good award in itself, it cannot have the force which the Regulation would have given to it if it had contained all the requisites which the section specified (161-2). (*Sir John Patteson.*) **NUSSERWANJEE PESTONJEE v. MEER MYMOODEEN KHAN WULLUD MEER SUDROODEEN KHAN BAHADOOR.**

(1855) 6 M. I. A. 134.

Suits in Civil Courts Reg. II of 1800.

—S. 7—Dismissal of suit on ground of no right in plaintiff to institute it—Costs of defendant in case of—Disallowance of—Validity of—Discretion as to.

S. 7 of Bombay Reg. II of 1800 enacts, "that after the parties in a suit have been heard, and witnesses and exhibits examined and considered, the Judge is to give judgment according to justice and right, and is to order costs to be paid to the party in whose favour the decree should be made."

The action out of which the appeal arose was brought by two of the clerks of one P for injury supposed to have been sustained to the reputation and the trade of their master by the conduct of the defendant. But it appeared in the course of the cause, that the master had died before the action had been commenced, and therefore, although there appeared to have been some injury sustained by the plaintiffs themselves, inasmuch as they rejected that as the ground of their suit, but rested it entirely upon the right that their master had to recover damages for injury sustained by him, the Court thought that the suit would not be further proceeded in, and proceeded to adjudge the costs of the suit, and then, considering, upon looking into the proceedings, that the defendants had misconducted themselves, instead of following the terms of the above-mentioned Regulation, they proceeded to direct that each party should pay their own costs.

Held, affirming the Court below, that the Zillah Court had no discretion to exercise but were bound by the terms of the Regulation to award the costs to be paid by the plaintiffs in the suit to the defendants.

The Zillah Court had no discretion to exercise upon the subject, because the ground of the decision of the Zillah Court appears to have been that this was a suit instituted by parties who had no right to institute it, for the person in whose name and on whose behalf they instituted it was dead at the time, and therefore, having no right to institute it, the judgment was upon the merits, and therefore that the whole case being before them according to this provision in the Regulation, they must give the costs according to the result of the suit. (*Mr. T. Erskine.*) **MUSSUMAT KEMBE BAE v. LUCHMUN DASS NARAIN DASS.**

(1837) 1 M. I. A. 470 (479 80) = 5 W.R. 59 (P.C.) = 1 Suth. 75 = 1 Sar. 141.

BOMBAY SUPREME COURT.

—See SUPREME COURT OF BOMBAY.

BOND.

—Consideration for—Decision as to, in suit for interest due thereunder—Effect of, in subsequent suit to recover principal—Court disposing of first suit not competent to try second See C. P. C. OF 1908, S. 11—CASES UNDER—BOND. (1882) 9 I.A. 197 (204) = 9 C. 439 (445-6).

BOND—(Contd.)

—Consideration for—Failure of—Compromise of suit—Bond given as consideration for—Suit prosecuted nevertheless—Both parties responsible therefor—Effect.

The widows of a deceased zemindar sued the respondent, the brother of the deceased, for the recovery of the deceased's estate, questioning the legitimacy and title of the respondent. Before the suit came on for hearing a compromise was entered into by them to the effect that the widows were to have their suit dismissed, and that, as a condition of their so doing, the respondent was to execute a bond for a stated sum in favour of the appellant, with whom the widows had, prior to the suit, entered into an agreement regarding its subject-matter.

When the suit came on for hearing, the respondent, before the *razinama* was filed and acted upon, prayed for an adjournment, which was granted. At the adjourned hearing the suit was dismissed on a plea raised by the Collector, and not the respondent, that the recognition of the respondent by the Government as Zemindar was an act of State and that the court had no jurisdiction to question the validity of the said act. The widows appealed, insisting that the decree in the suit should be one framed in consonance with the *razinama*. The respondent opposed, on the ground that he was no longer bound by the *razinama*. The High Court upheld his contention, went into the case, and reversed the court below. They then gave the widows time to consider whether they would press their suit, and have the case remanded in order that the issue as to the legitimacy of the respondent might be regularly tried. The widows elected to have that issue tried. The case was remanded, and the respondent was found to be legitimate. An appeal by the widows on that point to the P. C. was dismissed.

In a suit brought by the appellant to recover the amount of the bond executed by the respondent, *held*, that the question whether there had not been a failure of consideration for the bond was one of some difficulty (264). (*Sir James W. Colville.*) **CHEDAMBARA CHETTY v. RANGA KRISHNA MUTHU VIRA PUCHAIYA NAICKER.** (1874) 1 I. A. 241 = 22 W.R. 148 = 13 B.L.R. 509 = 3 Sar. 373.

—Consideration for—Onus of proof of—Suit against obligor's heirs—Issue raised only as to due execution of bond.

The appellants were money-lenders. The respondents were, amongst others, the infant son and heir of A, the late Talookdar of Mahmudabad.

The deceased A died largely indebted to the appellants. The latest transaction between them was in May, 1856; when, as they alleged, an account was settled between them and their debtor, and two bonds were executed by him in their favour. The suit was by the appellants for the recovery of the amounts due under the said two bonds. They filed in Court one of the two bonds which was marked Exhibit A. They did not produce the other bond, which they said had been lost, but they filed a note of hand or letter of the same date, Exhibit B, relying upon it as corroborative evidence of the execution of the second bond.

The issues settled in the cause were—*First*, is A the deed of the deceased? *Secondly*, how much was repaid? *Thirdly*, is B under the seal of the deceased; and if so, is it a valid acknowledgment of debt, especially with reference to the alleged other bond?

Held that, upon the issues settled, the appellants were not bound to prove the consideration for the bonds (124). (*Sir James W. Colville.*) **SHAH KOONDUN LALL v. RAJAH AMEER HUSSUN KHAN.** (1866) 11 M.I.A. 120 = 2 Sar. 239 = R. & J.'s No. 6 (Oudh).

—Genuineness of—Registration—Absence of—Presumption from—Short date—Bond payable at.

BOND—(Contd.)

As against the genuineness of the bond it was urged that it was not registered. Two-thirds of the bonds in India, which are payable at short dates, as this was, are not registered (223). (*Lord Kingsdown.*) **CHEYT RAM v. CHOWDHREE NOWBUT RAM.** (1858) 7 M.I.A. 207 = 5 W.R. 3 = 1 Suth. 319 = 1 Sar. 627.

———*Interest—Rate of, fixed in bond—Reduction of, in suit to enforce bond—Power of—Bond not set aside but allowed to stand as security.*

In a suit to enforce a bond executed in pursuance of a settlement of accounts between the obligor and the obligee, the court below allowed the bond to stand, but reduced the rate of interest on the sum which they awarded as due on the date of the settlement of the accounts and the execution of the bond below the rate provided by the bond.

Held that, if the bond were allowed to stand as security for the amount, the contract rate of interest would also remain (127).

The course adopted by the courts below would perhaps be intelligible if they had set aside the security altogether as fraudulent, and had treated the sum awarded as due upon an open account; no rate of interest being fixed by either positive stipulation or the course of dealing between the parties. But the intention of the courts below being to allow the bond to stand as such security, the contract rate of interest would also remain (127). (*Sir James W. Colville.*) **SHAH KOONDUN LALL v. RAJAH AMEER HUSSUN KHAN.** (1866) 11 M.I.A. 120 = 2 Sar. 239 = R. & J.'s No. 6 (Oudh).

———*Interest payable under—Liability for—Exemption from, during period of Mutiny of 1857 and consequent interruption of British rule—Right to.*

The suit was brought by the appellants to enforce two bonds executed by a deceased Nawab on 15—5—1856 in settlement of accounts between him and the appellants. The sums secured by the bonds were made payable by instalments, of which the first fell due about September, 1857. At that time British rule had been interrupted, and all Civil Administration suspended, by the Mutiny; and that state of things continued until after the Nawab's death in 1858. In April, 1859, when order had been restored, and the Court of Wards had assumed the management of the estate, the appellants claimed the sum then due to them for principal and interest. In January, 1862, they instituted the suit out of which the appeal arose for the recovery of the balance due under the bonds.

Held, that there was no principle of law, equity or sound policy, upon which the period when the rebellion took place should be excluded from the time for which interest was computed (127-8). (*Sir James W. Colville.*) **SHAH KOONDUN LALL v. RAJAH AMEER HUSSUN KHAN.** (1866) 11 M. I. A. 120 = 2 Sar. 239 = R. & J.'s No. 6 (Oudh).

———*Liability under—Payment of obligee out of proceeds of sale of rubies in England and by obligors of deficiency, if any—Sale in England not possible owing to fall in market and sale of rubies in Calcutta with consent of obligors—Liability of obligors for deficiency.*

In 1875 Koosoo and Ko Pho, or one of them, purchased, in Burmah, a number of rubies. Not having the means of paying for them, they borrowed a sum of Rs. 62,044 from A, for which they gave a promissory note, both Ko Pho and Koosoo being liable upon that note. A endorsed the note to the plaintiffs in the suit out of which the appeal arose. An arrangement was come to for sending the rubies, or some of them, to England for sale, through Messrs. H. & Co., Jewellers in Calcutta. In consequence, a bond dated 29—6—1875 was entered into, by which Ko Pho, as well as Koosoo, bound himself to pay to the plaintiffs the sum of

BOND—(Contd.)

Rs. 65,368 upon certain conditions; the Rs. 65,368 being the amount of principal and interest due upon the note. The bond provided that the plaintiffs were to be repaid from the proceeds of the sale of the rubies in England, and that, in case the sum so realised by the said sale should not be sufficient, the bond and the obligation were to remain as security for the balance. The rubies were sent to England for sale in pursuance of the arrangement. But the market for rubies fell there, and they could not therefore be sold there. They were, therefore, with the consent of Koosoo and Ko Pho, brought back to Calcutta and sold there.

Held, that Koosoo and Ko Pho were liable to pay to the plaintiffs the amount secured by the bond after deducting the sum which was realised by the sale in Calcutta. (*Sir Barnes Peacock.*) **RAMSWAMY SETTY v. KOOSOO.** (1881) Bald. 396 = 5 I.J. 498.

———*Liability of third party under—Admission of—Admission by him that money due under bond is "duly repayable" if equal to. See ADMISSION—MORTGAGE—LIABILITY OF THIRD PARTY UNDER.*

(1892) 19 I.A. 228 (230) = 20 C. 93 (96-7).

———*Mesne profits to be realised in execution—Bond for payment of amount out of—Profits not realisable in execution or otherwise—Enforceability of bond in case of—Obligor giving up claim to such profits under compromise in case of—Effect.*

A decree for possession in appellants' favour did not award mesne profits. On an application made by them in their suit, the executing Court, however, made an order giving them mesne profits for the period during which they were out of possession after their decree. That order was subsequently reversed. While the prior order awarding mesne profits stood unreversed although nothing had been done in pursuance of it, the appellants executed a bond in favour of S, their pleader, which recited that a decree had already been passed in their favour for the mesne profits, and that the property of the judgment-debtor had been attached in execution of that decree. The bond continued: "We do here by declare that when the mesne profits are realised, we shall pay Rs. 2,000 to the said S, without any objection and without interest, as soon as any amount is realised by us, and that, if, when the mesne profits are realised, we do not pay the aforesaid amount, we shall pay interest thereon at the rate of 2 per cent. per mensem from the date of realization." Subsequent to the execution of the bond, the appellants entered into a compromise with their judgment-debtor renouncing all claim to mesne profits on their decree.

In a suit brought by the son of S to enforce payment of the amount of the bond in favour of his father, *held*, that the realisation by the appellants of the mesne profits under their decree was the event on the occurrence of which the sum under the bond was payable, that the appellants could not, by entering into the compromise, be said to have by their deliberate act prevented the happening of that event, and that the plaintiff could not, therefore, recover the amount sued for (74).

The decree in favour of the appellants did not award mesne profits, and they could not recover any in execution. A fresh suit for such profits was barred at the date of the compromise. There was, therefore, no real concession made by the appellants in the deed of compromise, because the right purporting to be given up had no existence. The obligation for payment of the Rs. 2,000 and interest out of mesne profits never took effect or became enforceable, and the non-occurrence of the condition was not due to the conduct or default of the appellants (74). (*Lord Davey.*) **KALKA SINGH v. PARASRAM.**

(1894) 22 I. A. 68 = 22 C. 434 (443) = R. & J.'s No. 137 = 6 Sar. 545 = 5 M. L. J. 14.

BOND—(Concl'd.)

—*Payment of—Onus of proof of—Shifting of—Condition—Payment to Sepatris of creditor—Proof of—Effect.*

The appeal arose out of a suit brought by the plaintiff-appellant on a bond given by the defendant to secure a sum of Rs. 26,000 and interest. Among other securities which were pledged with the plaintiff by the bond was a kistbundi, which had been executed in favour of the defendant by the Nawab Nazim for a lac and Rs. 11,375. That security being in the hands of the plaintiff, he would have had a right to receive the money if it had been paid by the Nawab Nazim; but the Nawab did not pay his debts, and the Government, on account of that debt of a lac and Rs. 11,375, arranged to pay the sum of Rs. 33,843. A cheque for that amount was drawn upon the collectorate at Berhampore; and the principal question was whether the full amount of that cheque or only Rs. 24,577 were received and appropriated by the plaintiff, and the balance Rs. 9,266, retained by the defendant, or by her agent K in fraud of her.

Held, that the onus no doubt lay in the first instance upon the defendant to prove that she paid the money; but that when she proved that the Rs. 33,843 was handed over to the Sepatris of the plaintiff, then the onus was shifted, and it lay upon the plaintiff to show what, if any, portion of that money was returned by him, or got out of his possession, into the hands of the defendant or of K as her agent (486). (*Sir Barnes Peacock.*) ROY DHUNPUT SINGH BAHADUR v. DOORGA BIBI. (1887) **Bald. 483.**

—*Renewal of prior—Prior cancelled bond—Custody proper of—Obligor's or obligees.*

In a suit upon a bond alleged to have been executed in renewal of prior bonds alleged to have been cancelled, it was urged, against the genuineness of the suit bond, that the cancelled bonds had not been delivered up to the obligor.

Held, overruling the contention, that a plaintiff was required to prove the consideration for his bond, and that the documents relating to it, the cancelled documents, were properly left in the possession of the obligee (222-3). (*Lord Kingsdown.*) CHEYT RAM v. CHOWDHREE NOWBUT RAM. (1858) 7 **M. I. A. 207** = 5 **W. R. 3** = 1 **Suth. 319** = 1 **Sar. 627.**

BOUNDARY.

—*Area—Conflict between—Which prevails. See DEED—CONSTRUCTION—AREA.*

—*Decree fixing—Construction—Hard and fast line or line variable according to action of river.*

The plaintiff-respondent, the talukdar of H, claimed against the defendant-appellant, the talukdar of D, certain lands as accrued or accreted to his estate by the action of the river Gogra. The first Court, the Deputy Commissioner, decided in the plaintiff's favour as to a certain portion of the claim; but as to the rest of the land claimed, he decided against the plaintiff upon the ground that in a previous suit, the Court had established, as between the same parties, that a definite line,—a hard and fast line, as it was called in some of the judgments,—was to be laid down between the estates of the plaintiff and defendant, and that whatever the action of the river might be, that line was still to divide the estates. The Commissioner upon appeal differed from the Deputy Commissioner in his view of the decree of 1870, the decree in the previous suit. He considered that the meaning of that decree was that the boundary between the two estates was the river itself,—the northernmost stream of the river,—and that each estate ran to the water's edge, whatever that might be. He considered that the line was a variable line according to the action of the river, instead of being a hard and fast line fixed by the decree of 1870. And upon that view he gave the plaintiff a decree for the whole area claimed. Upon appeal to the Judicial Commissioner, he affirmed the Commissioner's decree.

BOUNDARY—(Contd.)

In an appeal to the P. C. against the decree of the Judicial Commissioner, *held*, that the matter was completely concluded by the judgments of the two appellate Courts below. (*Sir Arthur Hobhouse.*) THAKUR RAGHBIR SINGH v. RAJA NORINDAR BAHADUR SINGH.

(1881) **Bald. 411** = **R. & J.'s No. 66 (Oudh).**

—*Dispute as to. See BOUNDARY DISPUTE.*

—*Evidence—Hakikat Chowhuddibandi papers—Area and boundaries given in—Conflict between—Effect.*

It is true that the "hakikat chowhuddibandi" papers purported to give exact areas, and that the total area is far less than the area of the land claimed. If in fact the boundaries are proved to include an area far greater than that referred to in the returns, such miscalculation or misrepresentation cannot defeat the title to the estate (368). (*Lord Buckmaster.*) HARADAS ACHARJYA CHOWDHURI v. SECRETARY OF STATE FOR INDIA.

(1917) 43 **I. C. 361** = 22 **M. L. T. 438** = 26 **C. L. J. 590** = (1918) **M. W. N. 28** = 20 **Bom. L. R. 49.**

—*Evidence—Hakikat Chowhuddibandi papers—Nature of—Evidentiary value of—Dispute with Government.*

The word "Chowhuddibandi" means "boundary" and the "hakikat Chowhuddibandi" papers may, therefore, be properly described as the boundary papers. They appear from their form to have been returns which apparently were required for the year 1799. They were made by the owners of the estates in question and sent in to the Government. Whether they were made for other years is not certain. Even the exact purpose for which they were prepared is not clear, but it may be accepted that they were not voluntary. They were made on a Government form in pursuance of a Government request and to afford the Government for their purpose satisfactory information upon the various questions to which they furnish answers; the first of these questions, after the statement of a number of mouzahs, being as to their boundaries.

Most information is to be gathered from the boundary papers. These give descriptions of the different mouzahs with their different boundaries and, as there appears to have been no correction whatever made in the statements, and no document is forthcoming from the Government showing that the returns were questioned, they must, as between the Government and the Zemindars, be accepted as *prima facie* accurate, and the boundaries so given, unless shown to be erroneous, ought to be regarded as the boundaries of the mouzahs forming part of the estates (365). (*Lord Buckmaster.*) HARADAS ACHARJYA CHOWDHURI v. SECRETARY OF STATE FOR INDIA. (1917) 43 **I. C. 361** = 22 **M. L. T. 438** = 26 **C. L. J. 590** = (1918) **M. W. N. 28** = 20 **Bom. L. R. 49.**

BOUNDARY DISPUTE.

—*Adjoining land—Ownership of—Consideration of question of—Value of.*

The ownership of the adjoining lands, though essential in the consideration of a title founded on accretion, is of little, or no value, in an issue as to whether the lands in dispute form part of the mouza of the plaintiff or are part of the mouza of the defendant, in an issue, in other words, as to disputed boundary (405). (*Mr. Pemberton Leigh.*) MUS-SUMAT IMAM BANDI v. HURGOVIND GHOSE.

(1848) 4 **M. I. A. 403** = 7 **W. R. P. C. 67** = 1 **Suth. 208** = 1 **Sar. 371.**

—*Agreement of parties to accept certain boundary—Decision ignoring—Error of law under S. 100, C. P. C. of 1908.*

BOUNDARY DISPUTE—(Contd.)

If, in the case of a boundary dispute, there is a judicial agreement by both parties to accept as conclusive a boundary laid down upon the ameen's map deviating the original line in accordance with the information given by the government engineer, the first appellate Court must be held to have erred in law, within the meaning of S. 584 of C.P.C. of 1882, in ignoring that agreement (46). (*Lord Watson.*) **LUKHI NARAIN JAGADEB v. MAHARAJA JODU NATH DEO.** (1893) 21 I. A. 39 = 21 C. 504 (513-4) = 6 Sar. 408.

———*Ameen's report in—Evidentiary value of—Decree in accordance with—Validity.*

In the case of a boundary dispute as to land admittedly waste or jungle, no evidence of possession was adduced on either side. The plaintiff produced and founded upon the Government survey map of 1839; and a remit was made to an ameen of the Court to ascertain the true boundary. The ameen made his report, accompanied by a map upon which the boundary was laid down, and the evidence which he had taken for his assistance. The defendant then examined the ameen as a witness, with the view of showing the inaccuracy of his report, and adduced no other evidence. The Sub-Judge accepted the report, and gave a decree to the plaintiff on foot thereof.

Held, that it was impossible to affirm that there was no evidence before the Sub-Judge upon which that finding—which was a pure finding of fact—could be rested (43). (*Lord Watson.*) **LUKHI NARAIN JAGADEB v. MAHARAJA JODU NATH DEO.** (1893) 21 I. A. 39 =

21 C. 504 (510) = 6 Sar. 408.

———*Ameen's report in—Suit and appeal—Ameens appointed in—Reports of—Conflict between—Appellate decision on foot of report of Ameen appointed in suit—Legality of.*

In a suit involving a boundary dispute, the Sub-Judge made a remit to an ameen of the Court to ascertain whether the disputed land, or any portion of it, fell within the out lines of the plaintiff's mouzah. The ameen found that the boundary included in the mouzah about 47 acres of the area claimed by the plaintiff, and assigned the remainder to the defendant's mouzah. He submitted a report to that effect, and the Sub-Judge accepted the same and decreed to the plaintiff the 47 acres as shewn in the ameen's map.

On appeal, the District Judge made a remit to the same ameen to lay down, upon the map prepared by him, a new boundary line ascertained by the use of a different compass. The ameen did so with the result that the new line included in the defendant's mouzah, not only the whole of the disputed land with the exception of a small area, but, in addition, about 53 acres which admittedly belonged to the plaintiff's mouzah. The ameen submitted a report to that effect, but, on its receipt, the District Judge acted upon the first report of the ameen, and affirmed the Sub-Judge.

Held, that the District Judge's disregarding the second report and acting upon the first did not constitute a substantial error or defect in procedure, within the meaning of S. 584 (c) of C.P.C. of 1882 (44).

There was no defect in the conduct of the case; the only error relied upon was one which, if it was committed at all, was committed by the Judge, and consisted in his drawing a wrong conclusion from the evidence. The decision of the District Judge, so far as it went, involved no principle of law, and was certainly within his competency (44). (*Lord Watson.*) **LUKHI NARAIN JAGADEB v. MAHARAJA JODU NATH DEO.** (1893) 21 I. A. 39 =

21 C. 504 (511-2) = 6 Sar. 408.

———*Ameen's report in—Weight to be attached to.*

Unless there are very good grounds for dissenting and differing from the reports made by ameens upon local

BOUNDARY DISPUTE—(Contd.)

investigations, the Courts even in India, and *a fortiori*, the Courts in England, in dealing with boundary questions, ought to give great weight to them and be guided by them. (*Sir James Colville.*) **RAM GOPAL ROY v. GORDON STUART & CO.** (1872) 14 M. I. A. 453 (463-4) =

17 W. R. 285 = 2 Suth. 549 = 3 Sar. 73.

———*Award settling—Binding character of, as to title and possession—Arbitrators appointed by Settlement Officer of district on application of parties—Award by.* See **ARBITRATION—AWARD—BOUNDARY DISPUTE.**

(1883) 13 C. L. R. 26.

———*Cross-suits by two rival claimants for exclusive possession of piece of water between their estates—Failure of either to prove exclusive possession—Possession found to be between the two—Decree for possession of moiety to each in case of.*

The appeals arose out of two suits brought by the appellants and respondents respectively, each against the other, for exclusive possession of the piece of water the subject thereof.

The Sub-Judge dismissed the suit of the appellants, and decreed that of the respondents. The High Court came to the conclusion that neither party had proved their case, and that both the suits should be dismissed with costs. The result of the decree of the High Court was that the Government, which had entered into possession as stake-holders and had never made any claim thereto, would remain in possession as proprietors.

On appeal their Lordships concurred in the decision on the matters of fact which the High Court had arrived at, namely, that neither of the parties had proved a title to the exclusive possession of the sota in question. But they were of opinion that, although neither party had proved a title to an exclusive possession, there could be no doubt that possession belonged to the appellants and the respondents. They were of opinion that, though the evidence was insufficient to establish an exclusive possession by either of the parties, it was equally cogent to show that there was possession between the two.

Held, reversing the High Court, that each of the parties should be declared entitled to an equal moiety of the sota opposite to and adjoining their respective Zemindaries, and be decreed to be put into possession thereof accordingly. (*Lord Morris.*) **KHAGENDRA NARAIN CHOWDHRY v. MATANGINI DEBI.** (1890) 17 I. A. 62 =

17 C. 814 = 5 Sar. 528.

———*Decision in case of—Substantial justice—Scientific accuracy—Object proper.*

Their Lordships assent to the observation made by the Judge that "scientific accuracy is hardly to be expected in such cases" (cases of boundary dispute), "substantial justice being all that is necessary for practical purposes" (43). (*Lord Watson.*) **LUKHI NARAIN JAGADEB v. MAHARAJA JODU NATH DEO.** (1893) 21 I. A. 39 =

21 C. 504 (510-1) = 6 Sar. 408.

———*Decision of, even if evidence unsatisfactory—Duty of Court.* See **BOUNDARY DISPUTE—EVIDENCE UNSATISFACTORY.** (1893) 21 I. A. 39 (43) =

21 C. 504 (511).

———*Decree in case of—Map—Annexing to decree of—Practice of—Desirability of.*

Their Lordships desire to express their approbation of the course taken by the High Court in this case, *viz.*, that of working on a map of the precise area which has been decreed to the plaintiff. It is a practice which it is desirable for the Courts in India to follow in all cases of boundary, so far as it is possible to do so, since disputes often arise here as to what the Indian Courts meant to decree (173).

BOUNDARY DISPUTE—(Contd.)

(*Sir James W. Colville.*) **RAJA LELANAND SINGH v. MAHARAJAH LUCHMESSUR SINGH.**

(1880) 10 C. L. R. 169 = **Bald. 386.**

—Evidence—Chittas—Admissibility of—Zemindar and tenant—Zemindar and rival proprietor—Disputes between—Cases of—Distinction. See **EVIDENCE—CHITTAS.**

(1868) 12 M. I. A. 136 (142-3).

—Evidence—Grantee from A and Government—Dispute between—Grant from A ancient—Statement of boundaries in—Admissibility against Government.

The question was one of boundary. The defendants-appellants claimed title under Government, which held khas a large portion of forest land situate in the district and apparently never included in the Decennial Settlement. Out of that land, that estate which was admittedly in the possession of and belonged to the appellants had been carved. On the other hand, the Chatterjees, whose title was vested in the plaintiffs-respondents, derived title under a Mocurrery grant from the Rajah of Burdwan, and the land so granted to them was part of the settled estate of the Rajah of Burdwan. The decision depended upon the ascertainment of the real boundaries between the settled mehals of the Rajah of Burdwan, and the forest lands which remained after the Perpetual Settlement in the hands of the Government. The respondents relied upon the statement of the boundaries in the original Sunnud, which was a very ancient document, granted by the Rajah of Burdwan in favour of the Chatterjees.

Held, that the Sunnud being a mere statement by the Rajah of Burdwan of the boundaries of what he professed to grant would not of itself prove the title of the respondents against the appellants (462).

It is possible to conceive cases in which, if there had been a conflict between the Rajah of Burdwan and the Government as to the boundaries of his zemindary, this assertion of a right to grant all the land comprised within the boundaries specified would be no evidence against the Government that this zemindary extended so far; it is at most a proof of an early assertion on the part of the Rajah of Burdwan that the land which he purported to grant in Mocurrery to the Chatterjees did extend so far (462). (*Sir James Colville.*) **RAM GOPAL ROY v. GORDON STUART & CO.**

(1872) 14 M. I. A. 453 = 17 W. R. 285 = 2 Suth. 549 = 3 Sar. 73.

—Evidence—Map prepared with reference to different disputes between parties to suit and third parties.

The dispute in this case related to a certain quantity of land, the plaintiff and defendant, two adjoining landholders, claiming the same adversely to each other. Maps that had been prepared on previous occasions, not with reference to the dispute in question, but with reference to some other disputes between the parties to the present suit and some strangers were put in evidence. *Held*, the maps were irrelevant and inadmissible in evidence. **JOHN KERR v. NUZZUR MAHOMED.** (1864) 2 W. R. 28 (P. C.) = 1 Suth. 546.

—Evidence unsatisfactory—Decision even in case of—Duty of Court.

It is of frequent occurrence, especially in cases where the disputed line of division runs between waste lands which have not been the subject of definite possession, that no satisfactory evidence is obtainable. That circumstance cannot relieve the Court of the duty of settling a line, upon the evidence which is laid before it (43). (*Lord Watson.*) **LUKHI NARAIN JAGADEB v. MAHARAJA JODU NATH DEO.** (1893) 21 I. A. 39 = 21 C. 504 (511) = 6 Sar. 408.

—Onus on plaintiff in—Ejectment suits—Rule in cases of—In applicability of. See **BOUNDARY DISPUTE—POSITION OF PARTIES IN.**

(1893) 21 I. A. 39 (43-4) = 21 C. 504 (511).

BOUNDARY DISPUTE—(Contd.)

—Onus on plaintiff in—Failure to discharge, as to part of lands claimed—Effect.

In a question of disputed boundaries the *onus probandi* lies upon the plaintiff to prove by independent evidence his right to recover. But, in the circumstances, *held*, that the mere failure on the plaintiff's part to support the burthen of proof cast upon him, as to part of the lands claimed, was not conclusive as it would be in ejectment, and the case remitted to India for further inquiries (111-2). (*Lord Justice Turner.*) **RAJAH LELANUND SINGH v. MAHARAJAH MOHESHUR SINGH.** (1864) 10 M. I. A. 81 = 3 W. R. 19 (P. C.) = 2 Sar. 74.

—Position of parties in—Onus on plaintiff—Rule in ejectment suits as to—In applicability of.

The ordinary rule regarding the onus incumbent on the plaintiff in an ejectment suit has really no application to cases in which the dispute is as to the true boundary between the estates of the plaintiff and of the defendant. The parties to such a suit are in the position of counter-claimants; and it is the duty of the defendant, as much as of the plaintiff, to aid the Court in ascertaining the true boundary. Were any other rule recognised, the result might be that some boundaries would be incapable of judicial settlement (43-4). (*Lord Watson.*) **LUKHI NARAIN JAGADEB v. MAHARAJA JODU NATH DEO.** (1893) 21 I. A. 39 =

21 C. 504 (511) = 6 Sar. 408.

—Possession exclusive of piece of water—Cross-suits between rival claimants for—Failure of either to prove exclusive possession—Possession found to be between the two—Decree for possession of moiety to each in case of. See **BOUNDARY DISPUTE—CROSS-SUITS, ETC.**

(1890) 17 I. A. 62 = 17 C. 814.

—P. C. appeal in—Appellate decision—Affirmance of.

In a case of dispute as to boundary, their Lordships, on the evidence, affirmed the decree of the High Court. (*Sir Richard Couch.*) **MAHARANI SARNAMOAYI v. MAHARAJAH NRIPENDRA NARAIN BHOOP BAHADOOR.**

(1891) **Bald. 504.**

—P. C. appeal in—Appellate decision—Weight of—Circumstances destroying.

Upon a question of disputed boundary, very great weight would, at first sight, appear to be due to the judgment of the Court below (405).

In the case before their Lordships, the Judge of the Provincial Court was in favour of the plaintiffs-appellants. On appeal to the Sudder Court, the Judges were divided in opinion, and though three against one concurred in the decision, one of the three decided upon a point which was repudiated by the other two, and those two mistook the nature of the question which they had to try.

Held, that those circumstances went far to destroy the authority of the judgment of the Sudder Court reversing the decision below (405). (*Mr. Pemberton Leigh.*) **MUSSUMAT IMAM BANDI v. HURGOVIND GHOSE.**

(1848) 4 M. I. A. 403 = 7 W. R. 67 (P. C.) = 1 Suth. 208 = 1 Sar. 371.

—P. C. appeal in—Appellate decision—Reversal of, and restoration of that of trial Judge.

The appeal arose out of a suit brought by the appellants against the respondents for the recovery of certain lands, of which the latter were in possession. The appellants claimed them as part of a mouza belonging to them, while the respondents alleged that they were part of a mouza which belonged to them.

The Judge of the Provincial Court decided in favour of the appellants, but his decree was reversed on appeal by the Sudder Court.

Held, on the evidence and under all the circumstances of the case, that the decree of the Sudder Court ought to be

BOUNDARY DISPUTE—(Contd.)

reversed, and that the appellants ought to be put in possession of the lands in dispute. (*Mr. Pemberton Leigh.*) **MUSSUMAT IMAM BANDI v. HURGOVIND GHOSE.** (1848) 4 M. I.A. 403 = 7 W.R. 67 (P.C.) = 1 Suth. 208 = 1 Sar. 371.

—In a case in which the question was as to the identification and boundaries of *churs*, the judgment of the trial Court was founded on a long and careful local investigation, while that of the High Court, reversing it, was supported by no reasons that their Lordships could pronounce to be satisfactory. Their Lordships, accordingly, reversed the High Court and restored the trial Judge (617, 619). (*Sir James W. Colville.*) **RANEE SURUT SOONDREE DEBIA v. BABOO PROSONNO COOMAR TAGORE.** (1870) 13 M. I. A. 607 = 15 W. R. 20 = 6 B. L. R. 677 = 2 Suth. 393 = 2 Sar. 632.

—*P. C. appeal in—Indian Courts—Concurrent findings of—Interference with—Grounds.*

In an appeal in which the question in dispute was what property formed the boundary line between the appellants' and respondents' estates, their Lordships observed as follows:—

"If it could be shown as in this case that there was a clear miscarriage of justice, that is to say, that there was no evidence whatever which would have warranted the conclusion at which the Court below has arrived, or that in the conduct of the trial, in the mode in which the evidence was adduced, in the course that was pursued as to holding the balance of justice between the parties in the course of the trial, there was a clear departure from the ordinary principles which regulate judicial proceedings, then their Lordships, notwithstanding the decision of the two Courts below, would have entertained and considered the appeal. But their Lordships are clearly of opinion that when the question is one simply of fact, and when above all things, that question of fact is a question of fact as to boundaries, where the local knowledge of local Judges and the observation of the local witnesses are all important, they would be departing from what has been the practice of this tribunal if they were to act in opposition to the well-considered judgment of the two Courts from whom the appeal comes. It is admitted, and could not be otherwise than admitted, that there is evidence which, if believed, would have justified those judgments. Their Lordships are of opinion that the Courts below were the best tribunals for deciding the question whether the evidence was credible or not, and they would be entirely unwilling to disturb their judgments. **MAHARAJ KUMAR BABOO GANESWAR SING v. DURGA DUTT.**

(1871) 7 B. L. R. 651 = 15 W. R. P. C. 37 = 6 Mad. Jur. 143 = 2 Sar. 676.

—The conclusions of the courts below on this point being concurrent findings on an issue of fact the well-established rule of this Board in such cases is: Their Lordships do not consider that the question they have to determine is what conclusion they would have arrived at if the matter had for the first time come before them, but whether it has been established that the judgments of the Courts below were clearly wrong.

The question in this case was whether the lands in question did or did not form part of the mahal purchased by the plaintiff at a revenue sale. (*Lord Atkinson.*) **MAHARAJA SURJA ACHARJYA BAHADUR v. SARAT CHANDRA ROY CHOWDHURI.** (1914) 18 C.W.N. 1281 = 16 M.L.T. 290 = 1 L.W. 807 = (1914) M. W. N. 757 = 16 Bom.L.R. 925 = 20 C. L. J. 563 = 25 I. C. 309 = 27 M. L. J. 365 (370).

—*P. C. appeal in—Indian Courts—Decision of—Interference with—Conditions.*

Their Lordships are sensible of the force of the observation that boundary disputes are presumably best determined by local judges (224-5). (*Lord Justice Turner.*) **MAHA-**

BOUNDARY DISPUTE—(Contd.)

RAJAH KOOWUR BABOO NITRASUR SINGH v. BABOO NUND LOLL SINGH. (1860) 8 M. I. A. 199 = 1 W. R. 51 = 1 Suth. 420 = 1 Sar. 744.

—Upon a boundary question the Privy Council would be extremely reluctant to reverse the judgment of an Indian Court, unless they were clearly satisfied that it was wrong. (*Sir James Colville.*) **RAJAH LEELANUND SINGH v. RAJAH MOHENDERNARAIN.** (1869) 13 M.I.A. 57 (68) = 13 W. R. 7 = 2 Suth. 286 = 2 Sar. 482.

—In a question relating to boundaries of land, the Judicial Committee, on a review of the evidence, reversed the concurrent decrees of the Court of first instance and the Sudder Court, but without costs. (*Sir James W. Colville.*) **RAM CHUNDER DUTT v. CHUNDER COOMAR MUNDUL.** (1869) 13 M. I. A. 181 = 2 Sar. 507.

—Their Lordships would themselves be very slow to interfere with the judgment of an Indian Court upon a question of this nature, namely, a question of identification and boundaries of *churs* (617). (*Sir James W. Colville.*) **RANEE SURUT SOONDREE DEBIA v. BABOO PROSONNO COOMAR TAGORE.** (1870) 13 M. I. A. 607 = 15 W. R. 20 = 6 B. L. R. 677 = 2 Suth. 393 = 2 Sar. 632.

—Of all the questions which are brought here (Privy Council) from India, there is no question of fact which is so improper to be brought for final decision by this tribunal as a question of boundary, since the decision of that question, particularly where the boundary line is to be run through a forest or a tract of waste land, must depend so much upon local investigation and local inquiry, and on that sort of knowledge which only officers in India, who are conversant with such disputes, can acquire. Accordingly, their Lordships will never interfere with the finding of an Indian Court upon a question of boundary unless they are clearly satisfied that there has been some plain miscarriage in the conduct or decision of the case upon which they can put their hands and make the grounds for an order reversing or varying the decree. (*Sir James W. Colville.*) **RAM GOPAL ROY v. GORDON STUART & CO.** (1872) 14 M.I.A. 453 (460) = 17 W. R. 285 = 2 Suth. 549 = 3 Sar. 73

—Their Lordships would be very loath to disturb the decisions of the courts in India on a question of boundary dispute, because it is obviously one that is far better dealt with and decided there. (*Sir James W. Colville.*) **RAJAH LEELANUND SINGH BAHADUR v. MAHARAJA LUCHMESWAR SINGH BAHADUR.** (1880) Bald. 382 (386).

—Their Lordships would be loath to disturb the decisions of the courts in India on a question of boundary, because it is obviously one that is far better dealt with and decided there (173). (*Sir James W. Colville.*) **RAJAH LELANUND SINGH v. MAHARAJA LUCHMESSUR SINGH.** (1880) 10 C. L. R. 169 = Bald. 386.

—*P. C. appeal in—Onus on appellant in.*

In order to set aside the decision of the Court below in boundary cases, the appellants should come prepared to show clearly where it is wrong, and what other course is right. In such cases nothing is easier than to propound riddles which cannot be answered by merely looking at the maps, or reading the statement which appears in the record. If it were enough to show to this tribunal difficulties which the respondent's counsel cannot explain, and then to contend that his case is not proved, he would labour under an unfair amount of burden. In such cases the local courts have advantages over the remote ones. To induce this Board to disaffirm the decision of the High Court in plaintiffs' favour, the defendants ought to do something more than to show that the plaintiffs' title is not free from doubts; they should at least give some acceptable explanation of the circumstances which

BOUNDARY DISPUTE—(Contd.)

have led the court below to its conclusion (146-7). (*Lord Hobhouse.*) **RAJCOOMAR ROY v. GOBIND CHUNDER ROY.**

(1892) 19 I. A. 140 = 19 C. 660 (670-1) = 6 Sar. 140.

—To induce the Board, in a case of boundary dispute, to reverse the judgment appealed from, the appellant must do something more than show that the plaintiff's title is not free from doubts; the appellant must at least give some acceptable explanation of the circumstances which have led the court below to its conclusion. (*Lord Lindley.*) **DINOMONI CHOWDHRANI v. BROJO MOHINI CHOWDHRANI.**

(1901) 29 I. A. 24 (34) = 29 C. 187 (199) =

6 C. W. N. 386 = 4 Bom. L. R. 167 = 8 Sar. 224 =

12 M. L. J. 83.

—P. C. appeal in—Onus on appellant in. See **BOUNDARY DISPUTE—P. C. APPEAL IN—INDIAN COURTS—DECISION OF.**

—P. C. appeal in—Riddles—Propounding of—Permissibility.

In such cases nothing is easier than to propound riddles which cannot be answered by merely looking at the maps, or reading the statement which appears in the record. It is not enough to show to this tribunal difficulties which the respondent's counsel cannot explain. (*Lord Hobhouse.*) **RAJCOOMAR ROY v. GOBIND CHUNDER ROY.**

(1892) 19 I. A. 140 (146-7) = 19 C. 660 (670-1) =

6 Sar. 140.

—To induce the Board, in a case of boundary dispute, to reverse the judgment appealed from, the appellant must do something more than show that the plaintiff's title is not free from doubts; the appellant must at least give some acceptable explanation of the circumstances which have led the court below to its conclusion. (*Lord Lindley.*) **DINOMONI CHOWDHRANI v. BROJO MOHINI CHOWDHRANI.**

(1901) 29 I. A. 24 (34) = 29 C. 187 (199) =

6 C. W. N. 386 = 4 Bom. L. R. 167 = 8 Sar. 224 =

12 M. L. J. 83.

—Their Lordships' Board has had occasion before now to deprecate the practice of "propounding riddles of this kind" and to point out how rarely they succeed. It may be doubted if such efforts are worth the labour they involve. (*Lord Sumner.*) **KUMAR BASANTA ROY v. SECRETARY OF STATE FOR INDIA.**

(1917) 44 I. A. 104 (110) =

44 C. 858 (867-8) = 22 M. L. J. 310 = 21 C. W. N. 642 =

15 A. L. J. 398 = 25 C. L. J. 487 = 1 Pat. L. W. 593 =

19 Bom. L. R. 483 = 6 L. W. 117 = 40 I. C. 337 =

32 M. L. J. 505.

—Observations of Lord Sumner in 44 I. A. 104 at 110 applied. (*Lord Shaw.*) **SECRETARY OF STATE FOR INDIA v. JATINDRA NATH CHOWDHURY.**

(1924) 51 I. A. 241 (255-6) = 51 C. 802 (818-9) =

29 C. W. N. 1 = 80 I. C. 1023 = (1924) M. W. N. 588 =

35 M. L. T. 146 = A. I. R. 1924 P. C. 175 =

47 M. L. J. 48.

—Punchayat—Decision of, on such dispute—Suit to enforce—Defences open in—Agreement of parties to abide by its decision amounting to effectual reference to arbitration—Agreement not having that effect—Distinction. See **BOMBAY REGULATIONS—PUNCHAYAT REG. VII OF 1827—BOUNDARY DISPUTE.** (1845) 3 M. I. A. 383 (392-3).

—Riddles—Propounding of—Permissibility. See **BOUNDARY DISPUTE—P. C. APPEAL IN—RIDDLES.**

—Trial Judge's decision in—Interference on appeal with—Conditions.

The considerations which make their Lordships reluctant to set their judgment against that of an Indian Court upon such a question as this, namely, a question of the identification and boundaries of *churs*, ought to influence in some degree the appellate Court in India, and to prevent its interference with the result of a local inquiry, except upon

BOUNDARY DISPUTE—(Concl'd.)

clearly defined and sufficient grounds (617). (*Sir James W. Colville.*) **RANEE SURUT SOONDREE DEBIA v. BABOO PROSONNO COOMAR TAGORE.** (1870) 13 M. I. A. 607 = 15 W. R. 20 = 6 B. L. R. 677 = 2 Suth. 393 = 2 Sar. 632.

—In boundary cases the local Courts have advantages over the remote ones. To a certain extent the remark is true as between the trial Judge and the High Court hearing the appeal from him (146).

Where the High Court felt the local difficulties, and met them by ordering a local survey of their own, and reversed the trial Judge on the strength of the results of that survey, held, that they were justified in reversing the trial Judge (146-7). (*Lord Hobhouse.*) **RAJCOOMAR ROY v. GOBIND CHUNDER ROY.**

(1892) 19 I. A. 140 =

19 C. 660 (670-1) = 6 Sar. 140.

BRAHMO SAMAJ.

—Membership of—Effect of, on community in which member was born. See **SIKH-BRAHMO SAMAJ.**

(1903) 30 I. A. 249 (256-7) = 31 C. 11 (33).

BRITISH BELUCHISTAN REGULATION IX OF 1896.

—S. 10—Appeal—Point decided by Court below but left open in—If *res judicata*. See **C. P. C. OF 1908, S. 11—CASES UNDER—APPEAL—POINT DECIDED, ETC.**

(1917) 44 I. A. 213 = 45 C. 442.

BRITISH PROTECTORATE.

—See **PROTECTORATE—BRITISH PROTECTORATE.**

BRITISH SUBJECTS.

—See **WORDS AND PHRASES—MEANING OF—BRITISH SUBJECTS.**

BRITISH TERRITORY.

—Cession to Native State of. See **CESSION OF TERRITORY—BRITISH TERRITORY.**

—Civil and criminal jurisdiction over—Transfer to Native State of—Power of Crown or of Government of India—Legislative act—Necessity—Effect of transfer on (1) territorial rights of Crown over transferred territory and (2) rights as British subjects of persons resident therein. See **JURISDICTION—BRITISH TERRITORY—CIVIL AND CRIMINAL JURISDICTION OVER.**

(1876) 3 I. A. 102 (150-1) = 1 B. 367 (459).

—Jurisdiction over—Transfer of, to Native State under British supervision and control—Power of Governor-General in Council as regards—Legislative act—Necessity. See **LEGISLATION—GOVERNOR-GENERAL IN COUNCIL—BRITISH TERRITORY.** (1876) 3 I. A. 102 (152) =

1 B. 367 (460-1).

BROKER.

—Loan—Undertaking to procure—Conditional or unconditional.

D, partner in a firm, which acted as managers of a Mills Company, applied to the appellants for a loan of a lakh and a half of rupees, explaining that he was about to raise a loan of eleven lakhs on first mortgage of the mills through the respondent. The appellants then took from the respondent a document and advanced the money required. The document, which was addressed to the appellants, was in these terms: "In consideration of your having at my request acceded to the proposal of the agents of the Mills Company, to advance to the mills a sum of rupees one lakh and fifty thousand, I hereby bind myself to you to procure a loan within 2 weeks of rupees eleven lakhs on the first mortgage of the mills property, and to pay you thereout the said sum of rupees one lakh and fifty thousand agreed to be advanced by you to the mills."

The respondent subsequently repudiated liability on the ground that he had been and was in a position to procure

BROKER—(Contd.)

the loan and carry through the transaction, but that *D* had refused to mortgage.

In a suit by the appellants for damages for breach of the agreement, which was admittedly one of guarantee, the respondent contended that all he had undertaken to do was to procure the lending of eleven lakhs if a first mortgage of the mill was given, and to pay thereout rupees 1½ lakhs to the plaintiff.

Held, overruling the contention, that the undertaking was a substantial undertaking that a loan should be procured, and that out of that loan the sum of one lakh and 50 thousand should be repaid. (*Lord Macnaghten.*) VISSANJI SONS & CO. *v.* SHAPURJI BURJORJI BHAROOCHA.

(1912) 39 I. A. 152 = 36 B. 387 =

9 A. L. J. 811 = 16 C. W. N. 769 = 16 C. L. J. 53 =

16 I. C. 98 = 23 M. L. J. 77.

—Under-broker—Employment of, depending upon broker's own appointment—Termination of, before period by termination of broker's employment—Damages for—Measure of—Termination of broker's employment with a view to defeat under-broker's rights—Distinction in case of.

In 1911 a company appointed the respondent's firm to be their brokers for the sale and purchase of sugar for a period of 5 years from the date of the agreement, the agreement providing, *inter alia*, for the appointment of under-brokers and for the termination of the agreement by 3 months' notice on either side. Very soon after, the respondent's firm entered into an agreement with the appellants constituting them under-brokers. Under that agreement, the appointment of the appellants was for the period of the agreement between the company and the respondent's firm and was an appointment to act as brokers in respect of the sugar bought and sold by the respondent's firm under their bargain with the company. In August 1912, the respondent, the surviving partner of the firm, wrongfully determined the agreement with the appellants. On December 2, 1912, the respondent, *bona fide* and not as a means of limiting the damages, made a new agreement with the company the terms of which were inconsistent with, and thus put an end to, the original agreement between his firm and the company. In a suit brought in January, 1913, by the appellants for the recovery of damages from the respondent, *held*, that the contract of December 2, 1912, ended the original appointment of the respondent's firm with the company, and that with its termination the appellant's contract likewise came to an end; that inasmuch as the contract of the respondent with the appellants never expressly created nor impliedly involved any obligation not to agree with the company to a new contract of brokerage, if and when it was thought fit, the respondent did not commit a breach of his duties under his contract with the appellants; and that the appellants were therefore entitled by way of damages only to the amount which they would have earned as under-brokers down to December 2, 1912.

Quære, as to what the position would be if the original agreement were ended simply as a means of defeating the appellant's rights.

Whether or no the contract of December 2, 1912, followed a termination by 3 months' notice of the earlier contract pursuant to the provisions which it contained was immaterial. (*Lord Buckmaster.*) LACHMANDAS KHANDELWAL *v.* RAGHUMULL. (1919) 46 I. A. 314 = 47 C. 290 =

24 C. W. N. 577 = 11 L. W. 551 = 58 I. C. 851.

—Under-broker—Employment of, depending upon broker's own appointment—Termination of broker's employment by consent before period fixed and appointment of him under new and different contract—Effect of, on under-broker's employment—Termination of broker's employment for defeating under-broker's rights—Effect in case of.

BROKER—(Concl'd.)

By an agreement dated 31—5—1911 David Sassoon & Co., Ltd., appointed the respondent and his partner to be their brokers for the sale and purchase of sugar for a period of 5 years from the date of the agreement, or for such further period as should be mutually agreed, unless the agreement should be sooner determined under provisions therein contained. The agreement provided for the appointment by the respondent's firm of such under-brokers as might be required for the purpose of the sugar business, the under-brokers to be under the control of the company, but liable to be dismissed by the respondent's firm. It also provided that the agreement might be ended by 3 calendar months' notice on either side.

On the 8th June, 1911, the respondent's firm entered into an agreement with the appellants constituting them under-brokers. The agreement recited the original contract, and stated that the appointment it effected was for "the sale and purchase of sugar in respect of all contracts to be entered into by them (*i.e.*, the respondent) on behalf of the said David Sassoon & Co., Ltd., under the aforesaid agreement (*i.e.*, the agreement of the 31st May, 1911) and during the subsistence of the said agreement, or for such further period as the said brokers and the said company may further extend."

On the 2nd December, 1912, the original contract between David Sassoon & Co. and the respondent was terminated, and a new contract was entered into between them differing in many material respects from the contract of the 31st May, 1911, and appointing the respondent broker in the same business for a new period of 5 years on different terms.

The question arose whether this contract of the 2nd December, 1912, had the effect of terminating the appointment of the appellants as under-brokers.

Held, that, even apart from the words in the agreement of 8th June, 1911, which made the period of the contract identical with that of the covering authority, the mere fact that the appointment of the appellants was an appointment to act as brokers in respect of the sugar bought and sold by the respondent's firm under their bargain with Sassoon & Co., showed that when they ceased to buy and sell sugar in accordance with that authority, the appointment of the appellants as brokers would necessarily come to an end (297).

Quære, as to what the position would be if the original agreement were ended simply as a means of defeating the appellants' rights (297). (*Lord Buckmaster.*) LACHMANDAS KHANDELWAL *v.* RAGHUMULL. (1919) 47 C. 290 =

46 I. A. 314 = 24 C. W. N. 577 = 58 I. C. 851 = 11 L. W. 551.

BUILDING.

—For all cases relating to buildings on land, *see* LAND—BUILDING.

BURMA.

—Courts of—Law applicable in, in absence of statutory law—Justice, equity and good conscience.

The Burmese Courts are directed, in the absence of any statutory law applicable to the case, to follow the guidance of justice, equity, and good conscience (245). (*Lord Davey.*) KADER MOIDEEN *v.* NEPEAN. (1898) 25 I. A. 241 = 26 C. 1 (6) = 2 C. W. N. 665 = 7 Sar. 394.

—District Courts of—Case from—Pleadings in and conduct of—Strict scrutiny of—Propriety.

In a case from a District Court in Burma pleadings, and, indeed, the whole conduct of the case, can scarcely be scrutinised with the strictness with which a case would be scrutinised in this country. (*Viscount Dunedin.*) MAUNG KYI OH *v.* MA THET PON. (1926) 4 R. 513 = 94 I. C. 916 = (1926) M. W. N. 489 = 3 O. W. N. 735 = A. I. R. 1926 P. C. 29.

BURMA—(Concl'd.)

—Hindus migrating to, inter-marrying with Burmans, settling there, and forming a community—Law governing. See HINDU—BURMA—HINDUS MIGRATING TO, ETC.

(1921) 48 I. A. 553 (564).

—Kalais of—Law governing—Hindu Law—Succession Act of 1865. See BURMA LAWS ACT OF 1898, S. 13—HINDUS.

(1921) 48 I. A. 553 (564).

BURMA COURTS ACT XVII OF 1875.

—S. 4—Marriage—Question regarding—Maintenance claim by wife against husband if a.

The respondent sued the appellant, alleging that she was married in Rangoon to the appellant according to Burmese rights and customs, and claiming Rs. 10,000 for her expenses of necessities and living for five years, after deducting Rs. 1,400, the amount realized by the sale of a house given to her by the appellant. The respondent was found to be the wife of the appellant by a validly constituted marriage, she being what was generally called a lesser wife.

Held, that the question whether, in view of the facts and circumstances of the case, the respondent was entitled to any maintenance was one regarding marriage within the meaning of S. 4 of the Burma Courts Act, and fell to be decided according to the Buddhist law (119). (*Sir Richard Couch.*)

MOUNG HMOON HTAW v. MAH HPWAH.

(1884) 11 I. A. 109 = 10 C. 777 (784) = 4 Sar. 505.

BURMA LAWS ACT XIII OF 1898.

—S. 13—Hindus—Kalais of Burma if—Law governing them.

The Kalais of Burma are the descendants of Hindus who had married Burmese women.

The Kalais as a community are not Hindus within the meaning of the expression as used in the Burma Laws Act of 1898.

The Kalais acquired a non-Hindu status of their own. (*Viscount Haldane.*) MA YAIT v. MAUNG CHIT MAUNG.

(1921) 48 I. A. 553 (564) = 1 Bur. L. J. 15 =

30 M. L. T. 126 = 4 U. P. L. R. (P. C.) 45 =

(1922) P. C. 197 = 66 I. C. 609 = 42 M. L. J. 193.

BURMA TOWN AND VILLAGE LANDS ACT IV OF 1898.

—S. 41 (b)—Ultra vires.

Section 41 (b) of Burma Act IV of 1898 is *ultra vires*. (*Lord Chancellor.*) SECRETARY OF STATE FOR INDIA v. MOMENT.

(1913) 40 I. A. 48 = 40 C. 391 =

17 C. W. N. 169 = 11 A. L. J. 49 = 13 M. L. T. 53 =

(1913) M. W. N. 45 = 15 Bom. L. R. 27 =

17 C. L. J. 194 = 18 I. C. 22 = 7 L. B. R. 10 =

6 Bur. L. T. 1 = 24 M. L. J. 459.

BURMA REGISTRATION REGN. (II OF 1897—UPPER BURMA).

—Rules 4 and 7—Registration of mortgage—Validity—Presentation for registration—Official endorsement showing presentation was by mortgagee—Signature purporting to be by agent unauthorised—Effect—Presumption of official endorsement.

Rule 4 of the rules under Upper Burma Registration Regn. II of 1897 requires a document to be presented for registration by some person executing or claiming under the same . . . or by the agent of such person . . . duly authorised by power-of-attorney.

A mortgage bond purported to be signed by both the mortgagors, and its execution was admitted by them. It was contended that the registration of the bond was invalid because it was presented for registration by an unauthorised agent. The contention rested on the supposition that the writing at the foot of the document purporting to be the Tamil signature of R showed that it was he who presented

BURMA REGISTRATION REGN. (II OF 1897—UPPER BURMA—(Concl'd.)

the document and that he was only an agent. But that theory was directly opposed to the official statement signed by the registering officer that the document was presented for registration by the mortgagee.

Held, over-ruling the contention, that the mortgage was duly registered.

There is no provision in the Regulation or the rules that requires the signature of the person presenting the document for registration. But under Rule 7 registration shall be effected by the registering officer writing on it an endorsement in the terms of that appearing at the foot of the document. The correctness of that official endorsement is to be presumed, and the Tamil signature, for which there was no legal sanction, cannot operate to contradict it. The presentation, therefore, was by a person claiming under the document. (*Sir Lawrence Jenkins.*) BAIJNATH SINGH v. JAMAL BROS. & CO.

(1923) 51 I. A. 18 (21-2) =

51 C. 354 = 2 R. 99 = 22 A. L. J. 42 =

A. I. R. (1924) P. C. 48 = (1924) M. W. N. 196 =

19 L. W. 345 = 28 C. W. N. 1029 = 79 I. C. 940 =

34 M. L. T. 50.

—Rule 5—Defect in procedure—Admission of execution—One of executants not appearing before Registrar—Omission by Registrar to make a note of fact of—Effect on validity of registration—Document properly presented.

Rule 5 of the rules made under Upper Burma Registration Reg. II of 1897 requires, where any party to a document is unable or refuses to appear, a note of the circumstances to be made. *Held*, that the omission to make the note was not one for which the person presenting the document could be held responsible; and that it was at most a defect in procedure which did not vitiate a registration made on a proper presentation. (*Sir Lawrence Jenkins.*) BAIJNATH SINGH v. JAMAL BROS. & CO.

(1923) 51 I. A. 18 (22) = 51 C. 354 =

2 R. 99 = 22 A. L. J. 42 = A. I. R. (1924) P. C. 48 =

(1924) M. W. N. 196 = 19 L. W. 345 =

28 C. W. N. 1029 = 34 M. L. T. 50 = 79 I. C. 940.

BURMESE BUDDHIST LAW.

ADOPTION.

* AUTHORITIES.

AWARD.

BOY—PUBERTY.

BROTHER DECEASED—BENAMIDAR FOR SURVIVOR.

DAUGHTER.

DIVORCE.

DOMINANT FEATURE OF.

ELDEST SON—ELDEST DAUGHTER.

FATHER AND CHILDREN BY DECEASED WIFE.

HUSBAND AND WIFE.

INHERITANCE.

MARRIAGE.

ORASA.

RELATIONSHIP.

WIFE.

WILL.

WOMAN DECEASED—JEWELLERY WORN BY—OWNERSHIP OF.

Adoption.

—Adopted son. See UNDER THIS SUB-HEADING—KITTIMA SON.

—Ceremony formal unnecessary.

According to the law of Burma, no formal ceremony is necessary to constitute adoption. (*Lord Dunedin.*) MA YWET v. MA ME

(1909) 36 I. A. 192 =

36 C. 978 (984) = 6 M. L. T. 302 = 10 C. L. J. 353 =

14 C. W. N. 111 = 11 Bom. L. R. 1193 = 5 L. B. R. 118 =

3 I. C. 797 = 19 M. L. J. 577.

BURMESE BUDDHIST LAW—(Contd.)

Adoption—(Contd.)

—(Sir Lancelot Sanderson.) MAUNG BA PE v. MAUNG SHWA BA. (1928) 6 R. 520 = 28 L. W. 129 = 48 C. L. J. 177 = 110 I. C. 306 = 33 C. W. N. 70 = A. I. R. 1928 P. C. 197 = 55 M. L. J. 95 (99).

—See BURMESE BUDDHIST LAW—ADOPTION—CONDUCT—INFERENCE OF ADOPTION FROM.

(1909) 36 I. A. 192 = 36 C. 978 (984) and (1928) 6 R. 520 = 55 M. L. J. 95.
—Ceremony formal unnecessary — Publicity and notoriety necessary.

According to the Burmese Buddhist Law, there is no ceremony of adoption, and it is not necessary for one who claims adoption, to point to any particular statement or act made by his adoptive parents upon a particular date. But, on the other hand, the adoption must be a matter of publicity and notoriety. It is most important that adoption with a view to inheritance, which, in this community, takes the place of testamentary disposition, should be made known to all those likely to be concerned; and their Lordships are anxious in no way to weaken what has been stated to this effect in former decisions. (Sir Walter Phillimore.) MAUNG THWE v. MAUNG TUN PE.

(1917) 44 I. A. 251 = 45 C. 1 (7-8) = 22 M. L. T. 411 = 22 C. W. N. 97 = 27 C. L. J. 68 = (1918) M. W. N. 9 = 20 Bom. L. R. 69 = 42 I. C. 863 = 11 Bur. L. T. 28.

—There is no special ceremony in Burmese adoption, but the adoption must be a matter of publicity and notoriety. (Lord Parmoor.) MA THAN THAN v. MA PWA THIT.

(1923) 1 R. 451 = A. I. R. 1923 P. C. 156 = 33 M. L. T. 361 (P. C.) = 2 Bur. L. J. 260 = (1923) M. W. N. 711 = 29 C. W. N. 610 = 77 I. C. 63 = 46 M. L. J. 334 (337).

—Conduct—Inference of adoption from—Publicity of relationship in case of—Necessity for—Degree of—Adoption alleged to have taken place on distinct and specified occasion—Case of—Distinction.

Under the Burmese law, though adoption is a fact, that fact can either be proved as having taken place on a distinct and specified occasion, or may be inferred from a course of conduct which is inconsistent with any other supposition. But in either case publicity must be given to the relationship, and it is evident that the amount of proof of publicity required will be greater in cases of the latter category, when no distinct occasion can be appealed to. (Lord Dunedin.) MA YWET v. MA ME.

(1909) 36 I. A. 192 = 36 C. 978 (984) = 6 M. L. T. 302 = 10 C. L. J. 353 = 14 C. W. N. 111 = 11 Bom. L. R. 1193 = 5 L. B. R. 118 = 3 I. C. 797 = 19 M. L. J. 577.

—Conduct—Inference of adoption from—Publicity or notoriety of relationship in case of—Proof satisfactory of—Necessity.

According to the law of Burma, the fact of adoption may be inferred from a course of conduct inconsistent with any other supposition; but in that case the publicity or notoriety of the relationship must be satisfactorily proved. (Sir Lancelot Sanderson.) MAUNG BA PE v. MAUNG SHWA BA. (1928) 6 R. 520 = 28 L. W. 129 = 48 C. L. J. 177 = 110 I. C. 306 = 33 C. W. N. 70 = A. I. R. 1928 P. C. 197 = 55 M. L. J. 95 (99).

—Kittima adoption—Validity—Essentials.

Amongst Burmans neither ceremony nor written document is required to constitute or initiate a keittima adoption. There must be, on the one hand, the consent of the natural parents, and, on the other, the taking of the child by the adoptive parent with the intention and on the footing that the child shall inherit (75-6). (Lord Robertson.) MA ME GALE v. MA SA YI. (1904) 32 I. A. 72 = 32 C. 219 (225) = 4 B. L. R. 172 = 8 Sar. 743.

BURMESE BUDDHIST LAW—(Contd.)

Adoption—(Contd.)

—Kittima child—Who is a.

Under the Burmese Buddhist Law, a child adopted according to the fullest form of adoption and retaining his status as an adopted child till the death of his adoptive parents, is entitled to inherit their estate as if he were a natural and lawful child, either in the absence of other children or in competition with them. Such a child is called a *kittima* or *kittima* child. The word is sometimes written *keitima* and seems to be a corruption of the Sanskrit *keitrīma*. (Sir Walter Phillimore.) MAUNG THWE v. MAUNG TUN PE. (1917) 44 I. A. 251 = 45 C. 1 (7) = 22 M. L. T. 411 = 22 C. W. N. 97 = 27 C. L. J. 68 = (1918) M. W. N. 9 = 20 Bom. L. R. 69 = 11 Bur. L. T. 28 = 42 I. C. 863.

—Kittima daughter—Proof of—Quantum.

The question was whether the appellant was keittima daughter of the deceased Ma Ye, a Burmese lady.

Held, reversing the Court below and restoring the trial Judge, that the adoption of the appellant by the deceased had been satisfactorily established. (Lord Robertson.) MA ME GALE v. MA SA YI. (1904) 32 I. A. 72 = 32 C. 219 = 4 B. L. R. 172 = 8 Sar. 743.

—The question was whether the appellant was the keittima adopted daughter of K and M.

It appeared that K and M took the appellant, when she was a child, aged about one year, away from her parents, and that she lived in the house of K for the next 13 or 14 years. She was taken to K's house with the consent of her natural parents to be adopted by K and M. From the time that the appellant was taken to the house of K she was brought up publicly as his daughter, and lived openly and continuously under his protection. In the register of the School which the appellant attended K was entered as her parent, and paid the school fees. After the appellant left school she continued to sleep in K's house until she was about 14 years of age, after which she slept in the house of her natural mother. The reason for the change was that there was no female companion in K's house. The appellant did not, however, cease to visit K's house frequently, and it was not suggested that, if she had become his adopted daughter, there was any action which denoted repudiation of her adoption. Further, there was positive evidence as to the adoption of the appellant, that a *kinmoodat* ceremony was performed, and that the *phoongyis* were invited and fed.

Held, on the evidence, reversing the appellate Court and restoring the trial Judge, that the appellant had established that she was the keittima adopted daughter of K. (Lord Parmoor.) MA THAN THAN v. MA PWA THIT.

(1923) 1 R. 451 = A. I. R. 1923 P. C. 156 = 33 M. L. T. 361 (P. C.) = 2 Bur. L. J. 260 = (1923) M. W. N. 711 = 29 C. W. N. 610 = 77 I. C. 63 = 46 M. L. J. 334.

—Kittima daughter—Relationship of—Repudiation by adoptive father of—Permissibility.

Quere, whether after a person had become the keittima adopted daughter of another, it is, under the Burmese law, possible for the latter to repudiate the adoption of the former. (Lord Parmoor.) MA THAN THAN v. MA PWA THIT.

(1923) 1 R. 451 = A. I. R. 1923 P. C. 156 = 33 M. L. T. 361 (P. C.) = 2 Bur. L. J. 260 = (1923) M. W. N. 711 = 29 C. W. N. 610 = 77 I. C. 63 = 46 M. L. J. 334 (337).

—Kittima son—Inheritance to adoptive parents—Right of—Forfeiture of—Grounds—Residence with parents-at-law with consent of adoptive parents if one.

For a young man on his marriage to go and live with his parents-at-law is strictly in accordance with the Burmese custom; and where a keittima son does so with the consent

BURMESE BUDDHIST LAW—(Contd.)**Adoption—(Contd.)**

of his adoptive father, his conduct in doing so is not such as will disentitle him from inheriting to his adoptive parents (99-100). (*Sir Lancelot Sanderson.*) MAUNG BA PE v. MAUNG SHWA BA. (1928) 6 R. 520 =

28 L. W. 129 = 48 C. L. J. 177 = 110 I. C. 306 =

33 C. W. N. 70 = A. I. R. 1928 P. C. 197 = 55 M. L. J. 95.

—*Kittima son — Inheritance to adoptive parents — Right of — Forfeiture of — Grounds — Separation from adoptive parents — Forfeiture on ground of — Rule as to — Basis and scope of.*

Under the Burmese Bhuddhist Law, a *kittima* child may forfeit his right of inheritance by separating from his adoptive parents, this being considered an act of ingratitude. The authorities, however, draw a distinction between the cases where there are other children with whom the *kittima* child seeks to compete and share, and cases where he has no such competition, and in the latter instance allow him to inherit in whole or in part notwithstanding his separation.

This points to the true principle upon which the rule of forfeiture rests. It is a matter of intention. If the *kittima* child goes to live separately from his adoptive parents, it may be that he has shaken off the tie, that he has provided for himself, has discontinued the further performance of duty towards his adoptive parents, and has given up with his duty his claims upon their estate; and it is more easy to presume this when the parents have other children who can perform the duties and receive the estate.

The fact that the child goes to live apart is some evidence of an intention to break the bond. The distance may be so great as to render it impracticable for the child to continue to discharge duties to his adoptive parents, and in that case it probably works a forfeiture.

But if the distance be not so great, if the separation of residence be with the consent of the adoptive parents, and if the child is ready and willing to discharge filial duties after this separation, the bond is not broken. (*Sir Walter Phillimore.*) MAUNG THWE v. MAUNG TUN PE

(1917) 44 I. A. 251 = 45 C. 1 (8-9) = 22 M. L. T. 411 =

22 C. W. N. 97 = 27 C. L. J. 68 = (1918) M. W. N. 9 =

20 Bom. L. R. 69 = 11 Bur. L. T. 28 = 42 I. C. 863.

—*Kittima son — Inheritance to adoptive parents — Right of — Forfeiture of — Unfilial or inimical conduct entailing — Proof of.*

In Burmese law, an adopted son loses his right to inherit to his adoptive parents on account of conduct unfilial or inimical towards them, as for instance, where he keeps away intentionally from them, or intentionally neglects to look after them during illness, or by failure duly to perform their funeral ceremonies, or is guilty of any other acts which, if proved, according to Buddhist law, would disentitle a child to inherit.

Held, on the evidence, that it was not established that the plaintiff, and adopted son, had been guilty of any unfilial or inimical conduct which would deprive him of his right of inheritance (*Sir Lancelot Sanderson.*) MAUNG BA PE v. MAUNG SHWE BA. (1928) 28 L. W. 129 =

48 C. L. J. 177 = 110 I. C. 306 = 6 R. 520 =

33 C. W. N. 70 = A. I. R. 1928 P. C. 197 = 55 M. L. J. 95.

—*Kittima son — Proof of — Quantum.*

Held, on the evidence affirming the court below, that the plaintiff was adopted by M and her husband as a *keittima* son with a right to inherit (99). (*Sir Lancelot Sanderson.*) MAUNG BA PE v. MAUNG SHWA BA.

(1928) 6 R. 520 = 28 L. W. 129 = 48 C. L. J. 177 =

110 I. C. 306 = 33 C. W. N. 70 = A. I. R. 1928 P. C. 197 =

55 M. L. J. 95.

BURMESE BUDDHIST LAW—(Contd.)**Adoption—(Contd.)**

—Publicity or notoriety of relationship of—Necessity. See BURMESE BUDDHIST LAW—ADOPTION—CEREMONIES FORMAL UNNECESSARY—PUBLICITY AND NOTORIETY NECESSARY.

—Publicity or notoriety of relationship of—Proof of—Quantum—Child—Adult—Adoptions alleged of—Distinction.

In many cases the inference of the relationship of adoption existing, and the publicity of the relationship itself, may naturally be taken from the facts of the life of the parties apart from the verbal statements of those concerned. Thus when a child who has natural parents leaves those parents and its own home, and is brought up in the house of another who treats it as a father would a child, the inference is not difficult to draw, and the facts from which that inference is drawn are public facts necessarily known to all the person's friends and acquaintances. But in the case of an adult, where the inferences to be drawn from "bringing up" are necessarily absent, and where the consequence of adoption is disinherison of those entitled to succeed by law, it is especially necessary to insist on adequate proof of publicity or notoriety of the relationship. (*Lord Dunedin.*) MA YWET v. MA ME. (1909) 36 I. A. 192 (195, 196) =

36 C. 978 (984-5) = 6 M. L. T. 302 = 10 C. L. J. 353 =

14 C. W. N. 111 = 11 Bom. L. R. 1193 = 5 L. B. R. 118 =

3 I. C. 797 = 19 M. L. J. 577.

—Publicity or notoriety of relationship of—Proof of—Quantum—Past statements and conduct—Inferences from—Case of.

Where it would have been easy for the parties, by means of an actual, though not ceremonial adoption in presence of witnesses, to have precluded the raising of subsequent questions, and that has not been done, and where the fact of adoption is left to be inferred from past statements and conduct, it is a salutary rule that adequate proof of publicity or notoriety of the relationship should be insisted on (196). (*Lord Dunedin.*) MA YWET v. MA ME.

(1909) 36 I. A. 192 = 36 C. 978 (985) = 6 M. L. T. 302 =

10 C. L. J. 353 = 14 C. W. N. 111 = 11 Bom. L. R. 1193 =

5 L. B. R. 118 = 3 I. C. 797 = 19 M. L. J. 577.

—Second adoption while first alive—Validity—Rights of second adopted son.

Their Lordships have been informed by counsel for the plaintiff that he does not contend that there would be any legal objection to a Burman Buddhist widow adopting a second heir, or that the position of a son so adopted would be in any way inferior to that of the first adopted son. (*Sir Walter Phillimore.*) MAUNG THWE v. MAUNG TUN PE.

(1917) 44 I. A. 251 = 45 C. 1 (16) = 22 M. L. T. 411 =

22 C. W. N. 97 = 27 C. L. J. 68 = (1918) M. W. N. 9 =

20 Bom. L. R. 69 = 42 I. C. 863 = 11 Bur. L. T. 28.

Authorities.

—*Dhammathats.*

The Burmese Buddhist Law is contained in a series of books entitled *Dhammathats* which have been composed from time to time by the expounders of that Law ever since the thirteenth century, if not from before. A *Dhammathat* is a "collection of rules which are in accordance with custom and usage" of the Burmese people. (*Mr. Ameer Ali.*) KIRKWOOD alias MA THEIN v. MAUNG SIN.

(1924) 51 I. A. 334 (338) = 2 R. 693 =

A. I. R. 1924 P. C. 238 = 3 Bur. L. J. 304 =

29 C. W. N. 653 = 84 I. C. 867 = 48 M. L. J. 1 (4).

—*Manugye—Authority of.*

The authority of the *Manugye* has been recognised by this Board. (*Mr. Ameer Ali.*) KIRKWOOD alias MA THEIN v. MAUNG SIN. (1924) 51 I. A. 334 = 2 R. 693 =

A. I. R. 1924 P. C. 238 = 3 Bur. L. J. 304 =

29 C. W. N. 653 = 84 I. C. 867 = 48 M. L. J. 1 (10).

BURMESE BUDDHIST LAW—(Contd.)**Authorities—(Contd.)**

—*Manugye or Dammathat of the Laws of Menoo—Authority of.*

The Burmese law in this (divorce) and similar questions is to be determined by the Manugye or Dammathat of the Laws of Menoo, with such assistance as may be derived when necessary from the other Dammathats. (*Sir John Wallis.*)

MA SAW KIN *v.* MAUNG TAN AUNG GYAW.
(1927) 55 I. A. 38 = 6 R. 79 = I. L. T. 40 R. 14 =
32 C.W.N. 429 = 108 I.C. 345 = 47 C.L.J. 577 =
27 L.W. 830 = A.I.R. (1928) P.C. 8 = 54 M.L.J. 468.

—*Rules in—Nature and authority of.*

The Burmese Buddhist Law is stated to be contained in a series of books entitled Dhammathats, which have been composed from time to time by the expounders of that law ever since the 13th century, if not before. A distinguished Burmese jurist of the name of U Gaung has, at the expense of the British Government, compiled a Digest of these books, and say it is a collection of rules which are in accordance with the custom and usage of the Burmese people. It may possibly be that in Burma these rules have in the course of ages crystallised, as it were, into rules of positive law. (*Lord Atkinson.*) KIRKWOOD *alias* MA THEIN *v.* MAUNG SIN.
(1925) 52 I.A. 265 =
6 L.R. P.C. 160 = 89 I.C. 773 = A.I.R. 1925 P.C. 216.

—*Rules in—Sources of—Digest of Burmese Buddhist Law.*

The Digest of Burmese Buddhist Law is the available source of reference to the rules of the Dhammathats. (*Lord Dunedin.*) MAUNG DWE *a.* KHOO HAUNG SHEIN.
(1924) 52 I.A. 73 = 3 R. 29 = 3 Bur. L.J. 340 =
29 C.W.N. 824 = A.I.R. 1925 P.C. 29 =
1925 M.W.N. 23 = 84 I.C. 899 = 47 M.L.J. 853 (855).

—*Major Sparks's Code.*

Major Sparks's Code is used in the British Courts as an authority on Burmese law (119). (*Sir Richard Couch.*) MOUNG HMOON HTAW *v.* MAH HPWAH.
(1884) 11 I. A. 109 = 10 C. 777 (783 4) = 4 Sar. 505.

Award.

—*Setting aside of, as regards some of parties—Effect of, as against others.*

Quære, whether, under the Burmese Buddhist Law, an award which is set aside as regards some of the parties, must *ipso facto* be necessarily set aside in its entirety, and whether the test applicable under the English law in such cases, *viz.*, whether the different parts of the award are so severable that it is possible to carry out the intentions of the remaining parties thereto, while allowing one party to claim entirely independently of the award, is the test applicable under the Burmese Buddhist law. (*Lord Atkinson.*) KIRKWOOD *alias* MA THEIN *v.* MAUNG SIN.
(1925) 52 I. A. 265 (278) = 6 L.R.P.C. 160 =
89 I. C. 773 = A.I.R. 1925 P. C. 216.

Boy—Puberty.

—*Attainment of—Ceremony on occasion of—Shinbyu.*

This ceremony (of Shinbyu), which ends in a boy entering for a time a Buddhist monastery, is one which a Buddhist boy goes through upon attaining puberty. (*Sir Walter Phillimore.*) MAUNG THWE *v.* MAUNG TUN PE.
(1917) 44 I. A. 251 = 45 C. 1 (11) = 22 C.W.N. 97 =
27 C.L.J. 68 = (1918) M.W.N. 9 = 20 Bom L. R. 69 =
11 Bur. L.T. 28 = 42 I.C. 863 = 22 M.L.T. 411.

Brother deceased—Benamidar for survivor.

—*Claim by latter to property in deceased's name on foot of—Proof of—Onus—Quantum.*

Held, on the evidence, affirming the High Court which had reversed the Court below, that the appellant had not established that his deceased brother, in whose name had

BURMESE BUDDHIST LAW—(Contd.)**Brother deceased—Benamidar for survivor—(Contd.)**

stood a number of conveyances of paddy lands and also a number of mortgages of considerable value, was a mere benamidar for him the appellant.

Though in all benami transactions the very object of the parties is secrecy, still the person who alleges that property conveyed to another belongs to him must prove his allegation and prove it beyond reasonable doubt. (*Lord Chancellor.*) MAUNG PO KIN *v.* MAUNG PO SHEIN.
(1926) 4 R. 518 = 24 A. L. J. 758 = 31 C. W. N. 252 =
3 O. W. N. 845 = 96 I. C. 142 = A. I. R. 1926 P. C. 77.

Daughter.

—*Mother's inheritance—Share of minor daughter in—Transfer by father by registered partition deed in lieu of—Benami nature of—Evidence—Admission by father prior to suit that he held possession on behalf of daughter and would restore it to her—Value of.*

In a case in which the question was whether a transfer by a registered partition deed made by a father to his minor daughter by his deceased first wife in lieu of her share of her mother's inheritance was a benami transaction or not, *held*, that an admission made by the father prior to his daughter's suit for possession against him and on the occasion of a demand for possession made by the plaintiff and her uncle that he held possession on her behalf and would restore it to her was an important piece of evidence in considering whether the partition was a benami transaction or not. (*Lord Atkin.*) MA NGWE NAING *v.* MAUNG THA MAUNG.
(1928) 49 C. L. J. 167 = A.I.R. 1929 P.C. 55 =
7 R. 4 = 31 Bom. L.R. 311 = 1929 M.W.N. 235 =
33 C.W.N. 531 = 29 L.W. 669 = 114 I. C. 595 =
56 M. L. J. 244 (253, 254-5).

—*Mother's inheritance—Share of minor daughter in—Transfer by father by registered partition deed in lieu of—Benami nature of—Evidence—Possession and management of property continuing with father—Value of—Limitation plea based upon—Maintainability.*

In a case in which a father had, under a registered deed of partition, transferred property to his minor daughter by his deceased first wife in lieu of her share of her mother's inheritance, but he subsequently raised the plea that the transfer was fictitious and was intended to defraud his creditors, *held*, that the retaining of the possession and management of the transferred property by the father was, in the circumstances of the daughter being an infant and the guardian of the transferred property being the paternal grand mother, entirely consistent with the possession and management being conducted in accordance with the legal title that is for, and on account of the daughter, and that no title would be acquired by the father under the Law of Limitation. (*Lord Atkin.*) MA NGWE NAING *v.* MAUNG THA MAUNG.
(1928) 49 C. L. J. 167 = 7 R. 4 =
31 Bom. L.R. 311 = 1929 M.W.N. 235 =
33 C.W.N. 531 = 29 L.W. 669 = 114 I.C. 595 =
A. I. R. 1929 P. C. 55 = 56 M. L. J. 244 (254).

—*Mother's inheritance—Share of minor daughter in—Transfer by father by registered partition deed in lieu of—Benami nature of—Plea by father of—Onus of proof of—Quantum of proof.*

The plaintiff was the daughter, and the only issue, of the defendant by his first wife. She became entitled, on the death of her mother, and on the remarriage of the defendant, to the joint marital property of her father and deceased mother. Shortly after the remarriage the defendant took steps to carry out a legal partition and to vest the appropriate share in the plaintiff. He executed a registered partition deed which recited that the father divided and gave outright possession by way of inheritance of one-fourth of the whole estate to plaintiff for the mother's share

BURMESE BUDDHIST LAW—(Contd.)**Daughter—(Contd.)**

and that the paternal grandmother of the plaintiff undertook to take charge of the plaintiff's share until the plaintiff's majority. In due course the grandmother applied for a grant of letters of administration to the plaintiff's deceased mother, alleging that the father had made over the guardianship and one-fourth share due to his deceased wife in trust for her daughter. Letters of Administration of the estate of plaintiff's mother in general form were granted to the grandmother. The grandmother, acting on behalf of the plaintiff, with the approval and assistance of the defendant, took proceedings to have an attachment of the property in execution of a decree against the defendant set aside and succeeded. The plaintiff lived with her maternal grandmother; the property transferred continued in possession of the defendant, who received its rents and profits but contributed to the plaintiff's support.

In a suit by the plaintiff for recovery of possession of the property in question from the defendant, *held*, that the onus lay heavily on the defendant to show that the transaction evidenced by the registered partition deed was fictitious and was intended to defraud his creditors and that he failed to discharge that onus. (*Lord Atkin.*) *MA NGWE NAING v. MAUNG THA MAUNG.* (1928) 49 C. L. J. 167 =

7 R. 4 = 31 Bom. L. R. 311 = 1929 M. W. N. 235 =

33 C. W. N. 531 = 29 L. W. 669 = 114 I. C. 595 =

A. I. R. 1929 P. C. 55 = 56 M. L. J. 244

—Mother's inheritance—Share of minor daughter in—Transfer by father by registered partition deed in lieu of—Benami nature of—Test proper of—Share which daughter was in law entitled to—Share which at time of transfer she was in fact thought to be entitled to.

Where the question was whether a transfer by a registered partition deed made by a father to his minor daughter by his deceased first wife in lieu of her share of her mother's inheritance was a benami transaction or not, *held*, that, for the purpose of ascertaining the good faith of the parties to the deed, the expressed intention of giving one-fourth share to the daughter should alone be looked at, and not the share to which the daughter would legally be entitled. (*Lord Atkin.*) *MA NGWE NAING v. MAUNG THA MAUNG.*

(1928) 49 C. L. J. 167 = A. I. R. 1929 P. C. 55 =

7 R. 4 = 31 Bom. L. R. 311 = 1929 M. W. N. 235 =

33 C. W. N. 531 = 29 L. W. 669 = 114 I. C. 595 =

56 M. L. J. 244 (254).

Divorce.

—Consent—Divorce by—Wife's fault—Divorce by reason of—Distinction.

A Buddhist husband sued his wife for divorce, the ground alleged being that she had, by sundry fraudulent devices, stolen certain jewels which were his property. The wife filed her defence denying the allegations as to her misconduct and asking that the suit be dismissed with costs. Witnesses were summoned, but on the day fixed for hearing the wife abandoned her defence and, although continuing to deny her guilt, consented to a divorce. Judgment was thereupon given for a decree "as prayed for."

Held, that the divorce granted under the above-mentioned circumstances was not by consent, but was granted by reason of the wife's fault (144).

Although the wife at the last moment abandoned her defence and consented to the decree, she certainly ought not to be put in the position of an innocent wife who has contracted for a divorce on an equal footing with her husband. If she had invited her husband to enter into such an agreement before he began his action he would have been at liberty to refuse and to have insisted upon a decree establishing her guilt, in order to determine the basis upon which the subsequent partition between them should take place,

BURMESE BUDDHIST LAW—(Contd.)**Divorce—(Contd.)**

and he was certainly placed in no worse position by the fact that he was obliged to bring the action in order to secure relief. The proceedings at law disclose, not an agreement between husband and wife, but a claim by the husband on a specific ground to which the wife in effect submitted (144). (*Lord Robson.*) *MAUNG PE v. MA LON MA GALE.*

11 I. C. 497 = (1911) 38 I. A. 140 = 38 C. 629 (636-7) =

8 A. L. J. 739 = 13 Bom. L. R. 464 = 15 C. W. N. 766 =

14 C. L. J. 15 = (1911) M. W. N. 397 = 6 L. B. R. 18 =

3 Bur. L. T. 153 = 10 M. L. T. 479 = 21 M. L. J. 749.

—Desertion by husband—Divorce on ground of—Effect—Forfeiture of property.

Under the Burmese Buddhist Law, desertion by the husband for 3 years, with failure to provide maintenance, undoubtedly entitles the wife to a divorce, but not necessarily to a divorce with possession (*i.e.*, forfeiture) of all the husband's interest in the property. In other words, the husband does not, by reason of his desertion of his wife, forfeit to her the whole of his interest in the property, joint or separate.

The proposition enunciated by the Courts in Burma that "where a divorce is adjudged through the fault of one party, the innocent party obtains all the property, including the joint property as well as the separate property of the guilty spouse", is too widely stated and is not supported by any texts in the Dhammathats or in the Burmese Buddhist Law Books. (*Sir Lancelot Sanderson.*) *MAUNG PO NYUN v. MA SAW TIN.* (1927) 54 I. A. 403 = 5 R. 841 =

39 M. L. T. 492 = 46 C. L. J. 406 = 6 Bur. L. J. 231 =

A. I. R. 1927 P. C. 234 = 53 M. L. J. 425.

—Desertion by husband—Living apart by mutual consent—Desertion by wife—Evidence.

The plaintiff, a Burmese Buddhist, was married to one S, also a Burmese Buddhist, in 1887, and lived with her more or less amicably until 1916. By that time marital relations between the parties had ceased for some years, and the plaintiff had taken a junior wife, for whom he provided a separate residence, while continuing to reside with the senior wife. Prior to 1916, there were quarrels between the husband and wife. S and her sister, who had inherited considerable property from their father, in which their husbands were entitled to share, lived with their husbands in a particular house until, in consequence of an evil omen, they all moved to another. Not long afterwards S and her sister went to live in another house, leaving the plaintiff in the last-mentioned house, but they continued to send him his food until 1918, when it was stopped. He then began to live openly with the junior wife. As S had inherited considerable property from her father, and was then in an advanced stage of tuberculosis, of which disease she died in 1922, it was obviously the plaintiff's interest to resist a divorce which might affect his rights of inheritance in his wife's estate. In those circumstances he acquiesced in his exclusion from his wife's home, to the extent of not suing for restitution of conjugal rights, or himself suing for divorce, but the evidence showed that he always repudiated the notion that there had been any divorce and that he continued to make unsuccessful efforts to communicate with his wife until she died.

Held, that the effect of the evidence was that there was only a living apart by mutual consent, or, if there was desertion at all, it was desertion by S, the wife, which was not the case set up. (*Sir John Wallis.*) *MA SAW KIN v. MAUNG TAN AUNG GYAW.* (1927) 55 I. A. 38 =

6 R. 79 = J. L. T. 40 R. 14 = 32 C. W. N. 429 =

108 I. C. 345 = 47 C. L. J. 577 = 27 L. W. 830 =

A. I. R. 1928 P. C. 8 = 54 M. L. J. 468.

BURMESE BUDDHIST LAW—(Contd.)**Divorce—(Contd.)**

—Desertion by husband or wife—Divorce by reason of—Condition—Maintenance of wife for specified period—Husbands' failure to provide for—Necessity—*Manugye V, S. 17—Construction.*

There has been much difference of opinion in Burma on the question whether, when the husband or wife has left the home, the marriage is put an end to by the fact of the husband's omitting to send the wife anything for 3 years or one year, as the case may be, or whether there must be some further act of volition showing an intention to determine the marriage relation, such as re-marriage or a suit for divorce. Their Lordships express no opinion on that question, because it only arises under the terms of S. 17 of *Manugye V* where there has been desertion on the one side or the other and failure on the part of the husband to provide the wife with any maintenance for the specified period. Unless both conditions are satisfied, the text gives the wife no right to re-marry, and the marriage tie must be considered as subsisting. (*Sir John Wallis*) *MA SAW KIN v. MAUNG TAN AUNG GYAW.* (1927) 55 I. A. 38 =

6 R. 79 = I L. T. 40 R. 14 = 32 C. W. N. 429 =
108 I. C. 345 = 47 C. L. J. 577 = 27 L. W. 830 =
A. I. R. 1928 P. C. 8 = 54 M. L. J. 468.

—Grounds of—Wife—Theft of husband's property by, if one.

Quære, whether the fact that the wife has, by sundry fraudulent devices, stolen certain jewels of the husband is an adequate ground for a divorce according to Burmese Buddhist Law (143). (*Lord Robson.*) *MAUNG PE v. MA LON MA GALE.* (1911) 38 I. A. 140 = 38 C. 629 (635 6) =

13 Bom. L. R. 464 = 15 C. W. N. 766 = 8 A. L. J. 739 =
14 C. L. J. 15 = (1911) M. W. N. 397 =
4 Bur. L. T. 153 = 6 L. B. R. 18 = 10 M. L. T. 479 =
11 I. C. 497 = 21 M. L. J. 749.

—Grounds of, alleged in Courts below—Failure to prove—P. C. appeal—Fresh ground of divorce in—Setting up of—Permissibility.

In a suit by a Burmese Buddhist husband claiming a share in the property inherited by his deceased wife from her father, the sisters of the deceased pleaded that the plaintiff having deserted the deceased for over three years and contracted a second marriage, the parties had thereby become divorced, and that the plaintiff could not therefore claim as heir of his deceased wife. The issue framed in the case was whether there had been as alleged in the written statements of the defendants on or about the date alleged, and whether such desertion operated as a divorce. That was the ground on which the parties went to trial in the Courts below. The High Court found, and their Lordships agreed, that there had been no desertion by the husband.

Held, that the defendants having failed to prove the grounds of divorce on which they had gone to trial, could not, in the appeal to the P. C. be allowed to set up a fresh case. (*Sir John Wallis.*) *MA SAW KIN v. MAUNG TAN AUNG GYAW.* (1927) 55 I. A. 38 =

6 R. 79 = I L. T. 40 R. 14 = 32 C. W. N. 429 =
108 I. C. 345 = 47 C. L. J. 577 = 27 L. W. 830 =
A. I. R. 1928 P. C. 8 = 54 M. L. J. 468.

—Husband's suit for, based on wife's misconduct—Decree granting—Partition—Husband's subsequent suit against wife for—Maintainability—C. P. C., O. 2, R. 2—Effect.

A Buddhist husband first sued his wife for divorce, the alleged ground of divorce being that the wife had, by sundry fraudulent devices, stolen certain jewels which were the property of the husband. A decree for divorce was granted in the suit. A subsequent suit brought by the husband for the recovery of his property, which he alleged his

BURMESE BUDDHIST LAW—(Contd.)**Divorce—(Contd.)**

divorced wife still fraudulently kept in her possession, and for a partition of their joint property was held by the Chief Court to be barred under Ss. 42 and 43 of C. P. C. of 1882. The ground of the decision of the Chief Court was that in Burmese Buddhist Law the marital fault constituted the cause of action for both the divorce and the separate possession of either the whole or part of the property and that the plaintiff ought to have asked for a partition in the action for divorce.

Held, by their Lordships that the subsequent suit was not barred under Ss. 42 and 43, C. P. C. (145).

The cause of action for the divorce was the misconduct of the wife, but the cause of action for the partition was the divorce of the wife founded on that misconduct. The partition may no doubt be treated as relief consequential upon the divorce, and therefore dealt with in the same suit, but the evidence is different, and the ground of divorce must be first and separately proved as a distinct cause of action before any question of partition can properly arise. There is, therefore, not necessarily any hardship on the defendant in severing the two matters. Indeed it may, and generally would, be the more convenient course finally to settle the question of the divorce and the misconduct before entering upon an inquiry as to partition which would be altogether unnecessary if the decree were refused, or would be put on a different basis if the misconduct were disproved (145). (*Lord Robson.*) *MAUNG PE v. MA LON MA GALE.*

(1911) 38 I. A. 140 = 38 C. 629 (637-8) =
13 Bom. L. R. 464 = 15 C. W. N. 766 =
4 Bur. L. T. 153 = 8 A. L. J. 739 = 14 C. L. J. 15 =
6 L. B. R. 18 = 10 M. L. T. 479 = 11 I. C. 497 =
(1911) M. W. N. 397 = 21 M. L. J. 749.

—Partition after—Shares of husband and wife at—Divorce by consent—Divorce on ground of matrimonial offence—Distinction.

Under Burmese Buddhist Law, the shares to which a husband and his wife would be respectively entitled under a partition made after a divorce would vary according to whether the divorce had been granted on the ground of a matrimonial offence or had been arranged by consent (144). (*Lord Robson.*) *MAUNG PE v. MA LON MA GALE.*

(1911) 38 I. A. 140 = 38 C. 629 (636-7) =
13 Bom. L. R. 464 = 15 C. W. N. 766 = 8 A. L. J. 739 =
14 C. L. J. 15 = (1911) M. W. N. 397 =
4 Bur. L. T. 153 = 6 L. B. R. 18 = 10 M. L. T. 479 =
11 I. C. 497 = 21 M. L. J. 749.

—Partition of husband's property on—Wife's right to—Marriage brought about by husband by misrepresentation as to divorce of first wife—Desertion of second wife by husband unjustifiable and of an aggravated nature.

Defendant, a Burmese, who had a Burmese wife living, falsely represented that he had divorced her, and induced the plaintiff also a Burmese, to be given in marriage to him on the faith of that representation. The defendant lived with the plaintiff for a few months, but subsequently deserted her, and for more than 3 years he did not resume conjugal relations with the plaintiff and gave her no maintenance. Thereupon the plaintiff instituted a suit claiming a divorce from the defendant and also, by a partition of his properties, a one-third share of properties which he had inherited from his adoptive mother after the marriage, and a one-sixth share of estimated profits derived therefrom during three years, alleging that she was so entitled under the Burmese Buddhist Law. Both the Courts below granted the plaintiff the reliefs claimed by her. On the appeal to the P. C., the plaintiff's right to a divorce was not contested. But the decree in so far as it awarded the properties claimed was impugned.

BURMESE BUDDHIST LAW—(Contd.)**Divorce—(Contd.)**

Held, that, in the circumstances of the case, the decree appealed from, which awarded to the plaintiff the shares in the properties in suit specified therein, was neither unreasonable nor contrary to justice, equity, and good conscience.

In deciding the question whether the decree below is right it is material to take into consideration the general rules of the Burmese Buddhist Law as regards the interest which the wife obtains in her husband's property at the time of the marriage; and in the property acquired by him after the marriage, and the fact that the Dhammathats treat the division of property as part of the law of divorce. It is also material and important to consider the facts of this case; as, for instance, that the marriage of the plaintiff was brought about by misrepresentation, that the plaintiff was an entirely innocent party, that the facts relating to the desertion were of an aggravated nature and quite unjustifiable, and that desertion, where there is a duty to comfort and support, is regarded by the Burmese as a serious offence (412). (*Sir Lancelot Sanderson.*) **MAUNG PO NYUN v. MA SAW TIN.** (1927) 54 I. A. 403 = 39 M. L. T. 492 = 46 C. L. J. 406 = 6 Bur. L. J. 236 = A. I. R. 1927 P. C. 234 = 53 M. L. J. 425.

Dominant feature of.

—Sex equalisation—Eldest son—Eldest daughter—Equal position of.

The Burmese adopted the Buddhist religion which was imported from India, and with the religion they also seem to have received the Indo-Aryan conception of the superior rights of men. The Hindu notion of sex superiority found its way among some of the text-writers, as will be seen from the use in the Dhammathats of various legal terms borrowed from the Sanskrit. Gradually, as the compilers of the Dhammathats absorbed the national customs and usages, the sex equalization, which is the dominant feature of the Burmese law, prevailed, and the later Dhammathats show that the eldest-born son and the eldest-born daughter stand on the same footing. (*Mr. Amcer Ali.*) **KIRKWOOD alias MA THEIN v. MAUNG SIN.**

(1924) 51 I. A. 334 (353) = 2 R. 693 = A. I. R. 1924 P. C. 238 = 3 Bur. L. J. 304 = 29 C. W. N. 653 = 84 I. C. 867 = 48 M. L. J. 1.

•Eldest son—Eldest daughter.

—Equal position of. *See* BURMESE BUDDHIST LAW—DOMINANT FEATURE OF.

(1924) 51 I. A. 334 (353) = 2 R. 693.

Father and children by deceased wife.

—Deed between, on eve of second marriage, in respect of business carried on by father and deceased wife—Partition of inheritance or mere agreement of partnership—Construction of deed.

N, a Burmese, subject to the Burmese-Buddhist law, was a trader by profession, and carried on in conjunction with his deceased wife, M, a rice business. N had by M five sons and two daughters, who were all *sui juris* when she died in 1904. No division took place on her death, and the father and the children continued, as in her lifetime, working in common. In May, 1905, a fortnight before N's re-marriage with the respondent, a deed was executed, which was in form a partnership deed, and which recited that N and his sons and daughters executed it in order to carry on business. The deed provided, *inter alia*, that N was to transfer all the properties which had been in his name to the name of the partnership to consist of himself and his children and that all his properties, moveables, immoveables, cash, jewels-mills, machines, and stock-in-trade were to belong to the partnership. The deed then gave the shares.

BURMESE BUDDHIST LAW—(Contd.)**Father and children by deceased wife—(Contd.)**

Held, upon the true construction of the deed and having regard to the circumstances, that the deed was a record of a division of rights and interest rather than a deed of partnership.

The strange similarity of language between the terms of the provision contained in the second paragraph of the deed in question and the rules laid down in the dhammathats for division of family property on the demise of one of the parents is striking. The paragraph in question provides that "all the house sites . . . will belong to the partnership." In any ordinary partnership the inclusion of these articles would be regarded as unusual; but bearing in mind the rules of the dhammathats it would be natural, and in the ordinary course, in a deed of partition. Again, the paragraph relating to jewellery appears to be unusual in a deed of partnership designed for carrying on business. These particular provisions furnish the key to the solution of the question whether the document is a deed of partnership or a deed of partition. And the mode in which the sons and daughters of N dealt with their shares is material; it helps to strengthen the conclusion that the deed was more a record of a division of rights and interest rather than a deed of partnership. (*Mr. Amcer Ali.*) **MA THAUNG v. MA THAN.** 19 L. W. 477 = (1923) 51 I. A. 1 (7-8) = 51 C. 374 = (1924) M. W. N. 662 = 3 Bur. L. J. 333 = 29 C. W. N. 559 = A. I. R. 1924 P. C. 88 = 80 I. C. 1031 = 46 M. L. J. 618.

Husband and wife.

—Divorce. *See* BURMESE BUDDHIST LAW—DIVORCE.

—Divorce—Partition of husband's property on—Wife's right to—Marriage brought about by husband by misrepresentation as to divorce of first wife—Desertion of second wife by husband unjustifiable and of an aggravated nature. *See* BURMESE BUDDHIST LAW—DIVORCE—PARTITION OF, ETC. (1927) 54 I. A. 403.

—Partition—Husband's suit against wife for—Maintainability of—Divorce—Prior suit by him for, based on wife's misconduct—Decree granting—Effect. *See* BURMESE BUDDHIST LAW—DIVORCE—HUSBAND'S SUIT FOR, ETC. (1911) 33 I. A. 140 (145) = 38 C. 629 (637-8).

—Partition after divorce—Shares at—Divorce by consent—Divorce on ground of matrimonial offence—Disinfection. *See* BURMESE BUDDHIST LAW—DIVORCE—PARTITION AFTER. (1911) 38 I. A. 140 (144) = 38 C. 629 (636-7).

—Property of—Separate and joint properties—Category of.

Under the Burmese Law, for the purposes of marriage, divorce, and inheritance, the property of the married persons is considered separate or joint (118).

The following is defined as separate property of the husband and wife:—

1. What belonged to either before marriage.
 2. What has been given especially to either since marriage.
 3. What has come into the possession of either by inheritance from his or her own family since marriage.
 4. Clothes, jewels and ornaments.
- The profits or interest arising since marriage from the employment or investment of the separate property of either husband or wife, as also the property acquired during the coverture by their mutual skill and industry, are their joint

BURMESE BUDDHIST LAW—(Contd.)**Husband and wife—(Contd.)**

property (119). (*Sir Richard Couch.*) MAUNG HMOON.
HTAW v. MAH HPWAH. (1884) 11 I.A. 109 =
10 C. 777 (783 4) = 4 Sar. 505.

—*Virgin couple—If and when may be considered as.*

Their Lordships left open the question when a husband and a wife may be considered as "virgin couple." (*Sir Lancelot Sanderson.*) MAUNG PO NYUN v. MA SAW TIN.
(1927) 54 I. A. 403 = 5 R. 841 = 39 M.L.T. 492 =
46 C.L.J. 406 = 6 Bur. L. J. 231 =
A.I.R. 1927 P.C. 234 = 53 M.L.J. 425.

Inheritance.

—Adopted son—Inheritance to adoptive parents. See BURMESE BUDDHIST LAW—KITTIMA SON—INHERITANCE TO ADOPTIVE PARENTS.

—*Authorities on law of—Manu Kyay.*

The Manu Kyay is still the highest authority on questions of the Burmese Buddhist Law of Inheritance. (*Lord Shaw.*) MA NHIM BWIN v. U SCHWE GONE.

(1914) 41 I. A. 121 = 41 C. 887 = 23 I.C. 433 =
18 C.W.N. 1121 = 7 Bur. L. T. 105 =
(1914) M. W. N. 449 = 1 L. W. 914 =
16 Bom. L. R. 377 = 16 M.L.T. 142 =
20 C. L. J. 264 = 8 L.B.R. 1 = 27 M.L.J. 41.

—*Children of deceased wife—Inheritance to father's property—Right of—Partition during father's lifetime and before his re-marriage allotting them shares in his property—Effect.*

The children of a Burmese, subject to the Burmese Buddhist Law, will not be entitled to share in the inheritance of their father after a partition made in his lifetime and before his re-marriage allotting them specific shares in the property he possessed. (*Mr. Ameer Ali.*) MA THAUNG v. MA THAN.

(1923) 51 I. A. 1 (9-10) =
51 C. 374 = 19 L.W. 477 = (1924) M.W.N. 662 =
80 I. C. 1031 = 3 Bur. L. J. 333 = 29 C.W.N. 559 =
A.I.R. (1924) P. C. 88 = 46 M.L.J. 618.

—*Daughter surviving—Husband of—Right of.*

Under the Burmese Law the surviving husband of a person who *ex hypothesi* is the then surviving daughter is treated as one of the heirs of the father. (*Viscount Dunedin.*) MAUNG KYI OH v. MA THET PON.

(1926) 4 R. 513 = (1926) M.W.N. 489 =
3 O.W.N. 735 = 94 I.C. 916 = A.I.R. 1926 P.C. 29.

—*Descendants—Collaterals—Preference between.*

By Buddhist Law the property never ascends as long as it can descend. Hence descendants necessarily oust collaterals. (*Lord Dunedin.*) MAUNG DWE v. KHOO HAUNG SHEIN.
(1924) 52 I.A. 73 = 3 R. 29 = 3 Bur. L.J. 340 =
29 C.W.N. 824 = A.I.R. (1925) P.C. 29 =
(1925) M.W.N. 23 = 84 I.C. 899 =
47 M.L.J. 853 (856).

—*Eldest surviving son—Right of—Nature of—Dhammathat Manugye—Rule 5—Construction—Limitation for enforcing right of such son—Limitation Act of 1908, Art. 123.*

The right conferred upon the eldest surviving son by rule 5 of the Dhammathat Manugye is the right to a definite one-fourth part of the estate of his father, a right which he is at liberty to assert within any period that is not outside the period fixed by Sch. I, Art. 123 of the Limitation Act, 1908. The right which he gets under that rule is not merely the right to elect within a certain limited period of time whether he would take the property or no with the consequence that, in the absence of election within a reasonable time, he

BURMESE BUDDHIST LAW—(Contd.)**Inheritance—(Contd.)**

cannot assert the right thereafter. (*Lord Buckmaster, L.C.*) MAUNG TUN THA v. MA THIT.

(1916) 44 I.A. 42 = 44 C. 379 = 21 M.L.T. 97 =
21 C. W. N. 527 = 19 Bom L. R. 294 =
15 A. L. J. 96 = 26 C. L. J. 169 = 38 I.C. 809 =
32 M.L.J. 71.

—*Kittima son. See BURMESE BUDDHIST LAW—KITTIMA SON—INHERITANCE TO, ETC.*

—*Orasa son—Eldest-born son or eldest of sons amongst a number of children of both sexes.*

A Burmese husband and wife had four children, the eldest of whom was a daughter, and the second and third sons, and the fourth a daughter. The mother died first and thereupon the eldest child, *i.e.*, the first daughter, assumed all her responsibilities for which she was quite competent. The question arose whether the elder of the two sons acquired the status of *orasa* and became entitled to the privileged position allotted to the eldest or first-born son. The question, in other words, was whether that special right was given to the *eldest-born son*, or whether the words "eldest son" applied equally to a son who, in a family consisting of a number of children of both sexes, stood in relation to them as the eldest son.

Held, that a younger child, although the eldest son, did not acquire the status of *orasa* and did not become entitled to the privileged position allotted to the eldest or first-born son. (*Mr. Ameer Ali.*) KIRKWOOD *alias* MA THEIN v. MAUNG SEIN.

(1924) 51 I.A. 334 = 2 R. 693 =
A. I. R. 1924 P.C. 238 = 3 Bur. L.J. 304 =
29 C.W.N. 653 = 84 I. C. 867 = 48 M.L.J. 1 (9, 19).

—*Right of—Residence with deceased—Burial of deceased—If condition precedent.*

Under the Buddhist law, conduct, though it can operate as a disqualification of the right to inherit, is in no sense a necessary qualification to obtain the right.

Held, therefore, that neither residence with the deceased nor the burying of the deceased was a condition precedent to the allowance of a step-child's right to succeed to the deceased. (*Lord Dunedin.*) MAUNG DWE v. KHOO HAUNG SHEIN.

(1924) 52 I.A. 73 = 3 R. 29 =
84 I.C. 899 = 3 Bur. L.J. 340 = 29 C.W.N. 824 =
A.I.R. 1925 P.C. 29 = (1925) M.W.N. 23 =
47 M.L.J. 853 (856).

—*Rule of Ascertainment of, from Burmese Dhammathats—Mod of.*

The Burmese dhammathats are numerous and the criterion for arriving at a definite conclusion with regard to a particular rule is indicated in the judgment of the Board in L. R. 41 I.A. 121. (*Mr. Ameer Ali.*) MA THAUNG v. MA THAN.

(1923) 51 I.A. 1 (10) = 51 C. 374 =
19 L.W. 477 = (1924) M.W.N. 662 =
3 Bur. L. J. 333 = 29 C.W.N. 559 =
A.I.R. 1924 P.C. 88 = 80 I.C. 1031 =
46 M. L. J. 618.

—*Step-children and step-grand children—Brother and sister—Preference between.*

The step-son and step-grandchildren of a Chinese Buddhist are entitled to inherit her property in preference to the deceased's own brother and sister. (*Lord Dunedin.*) MAUNG DWE v. KHOO HAUNG SHEIN.

(1924) 52 I. A. 73 = 3 R. 29 = 3 Bur. L. J. 340 =
29 C.W.N. 824 = A. I. R. 1925 P. C. 29 =
(1925) M.W.N. 23 = 84 I C 899 = 47 M.L.J. 853.

—*Step-son and step-grandchildren—Preference between—Quaere as to the preferential right to succeed in a contest between the step-son and the step-grandchildren of a*

BURMESE BUDDHIST LAW—(Contd.)**Inheritance—(Contd.)**

Chinese Buddhist. (*Lord Dunedin.*) MAUNG DWE v. KHOO HAUNG SHEIN. (1924) 52 I.A. 73 =

3 R. 29 = 3 Bur. L.J. 340 = 29 C.W.N. 824 =

A.I.R. 1925 P.C. 29 = 1925 M.W.N. 23 =

84 I.C. 899 = 47 M.L.J. 853 (857).

—Widow and son—Rights of.

Their Lordships were told that under the Buddhist law by which the parties are governed, the whole of the property of the deceased devolved upon his widow, his son taking no share in it during his mother's lifetime. (*Sir George Lowndes.*) MA MYA v. MA ME KYIN.

(1929) 7 R. 388 = 117 I.C. 29.

—Woman—Property of—Right to—Sister—Father—Preference.

Where a woman governed by the Burmese Buddhist Law of Inheritance died leaving behind her a sister who had been living with her and their father who had been living apart from them, *held*, that the sister was entitled to inherit the estate of the deceased in preference to the father. *Quære*, as to the preferential right of succession in cases where the father was living together with his deceased daughter. (*Lord Shaw.*) MAH NHIM BWIN v. U SCHWE GONE.

(1914) 41 I.A. 121 = 41 C. 887 =

23 I.C. 433 = 18 C.W.N. 1121 = 7 Bur. L. T. 105 =

(1914) M.W.N. 449 = 1 L.W. 914 = 16 M.L.T. 142 =

16 Bom. L. R. 377 = 20 C. L. J. 264 =

8 L. B. R. 1 = 27 M.L.J. 41.

Marriage.**—Ceremony unnecessary—Mutual consent enough.**

The law relating to marriage in Burma is extremely lax. No ceremony of any kind is essential. Mutual consent is all that is required. (*Lord Macnaghten.*) MI ME v. MI SHWE MA. (1911) 39 I.A. 57 (59-60) = 39 C. 492 (503) =

9 A. L. J. 276 = 15 C. L. J. 276 = 14 Bom. L. R. 204 =

16 C. W. N. 529 = 14 I. C. 475 = 22 M. L. J. 360.

—Consent to—Conduct—Inference from—Reputation—Proof by—Evidence required in case of.

In the absence of direct proof, consent to marriage may be inferred from the conduct of the parties or established by reputation. But when proof of marriage depends wholly or mainly on reputation the circumstances of the case must be scrutinised with some caution because the same word which is used to describe a woman lawfully married is applied by the Burmese to a woman living with a man on less honorable terms. (*Lord Macnaghten.*) MI ME v. MI SHWE MA.

(1911) 39 I.A. 57 (59-60) =

39 C. 492 (503) = 9 A. L. J. 276 = 15 C. L. J. 276 =

14 Bom. L. R. 204 = 16 C. W. N. 529 = 14 I. C. 475 =

22 M. L. J. 360.

—Evidence—Burmese woman—Marriage with Mahomedan.

Held, affirming the Court below, that the appellant had not established that his mother, undoubtedly a Buddhist when she met A, her alleged husband, and a Mahomedan, was lawfully wedded to A (68). (*Lord Macnaghten.*) ABDOOL RAZACK v. AGA MAHOMED JAFFER BINDANEEM.

(1894) 21 I.A. 56 = 21 C. 666 (677-8) = 6 Sar. 389 =

4 M.L.J. 131.

—Evidence—Entertainment with "picked tea"—Living of alleged wife in her mother's house—"Eating out of the same pot"—Evidence of—Effect.

In a suit in which the plaintiff-respondent claimed to have been lawfully married to one A, deceased, and as his widow to be entitled to share equally in his estate with her elder sister (the defendant-appellant), who had been married to him for many years before his connection with the younger

BURMESE BUDDHIST LAW—(Contd.)**Marriage—(Contd.)**

sister, *held*, on the evidence, that the plaintiff had established her status as the lawful wife of A under the Buddhist law as administered in Upper Burma and was entitled to inherit as such lawful wife.

One point (urged against the plaintiff's case) was that there was no entertainment given on her alleged marriage. When there is a marriage between persons who have not been married before, it seems to be usual to give an entertainment at which "picked tea" is the principal feature, or at least the chief delicacy. But then it seems that in the case of persons who have been married before it is not usual to have these entertainments (61).

Then something was made of the fact that the plaintiff continued to live with her mother in her own house. But there is authority for saying that such an arrangement is a mere matter of convenience, and probably necessary for the sake of peace and quietness, when each wife has a family of her own (61).

"Eating out of the same pot" seems rather to be an outward and visible sign of social equality than a proof of matrimony (61). (*Lord Macnaghten.*) MI ME v. MI SHWE MA.

(1911) 39 I.A. 57 = 39 C. 492 (505) =

9 A. L. J. 276 = 14 I. C. 475 = 15 C. L. J. 276 =

14 Bom. L. R. 204 = 16 C. W. N. 529 = 22 M. L. J. 360.

—Formalities necessary—Parental sanction—Sufficiency of.

As religious formalities do not appear essential to lawful wedlock among natives of Burma, subject to the Burmese Buddhist law, a union contracted with parental sanction is evidently regarded to constitute a valid marriage. (*Mr. Ameer Ali.*) KIRKWOOD alias MA THEIN v. MAUNG SIN.

(1924) 51 I.A. 334 (338) = 2 R. 693 =

A. I. R. 1924 P. C. 238 = 3 Bur. L. J. 304 =

29 C. W. N. 653 = 84 I. C. 867 = 48 M. L. J. 1.

—Husband's property at time of—Wife's right in.

Under the Burmese law whatever a man possesses at the time of contracting a re-marriage on the death of his wife will become on the marriage the common property of his wife and himself. (*Mr. Ameer Ali.*) MA THAUNG v. MA THAN.

(1923) 51 I.A. 1 (7-8) = 51 C. 374 =

19 L. W. 477 = (1924) M.W.N. 662 = 3 Bur. L. J. 333 =

29 C. W. N. 559 = A. I. R. 1924 P. C. 88 =

80 I. C. 1031 = 46 M. L. J. 618.

—Law of—Authorities on—Jardine's "Notes on Buddhist Law"—Authority of.

Sir John Jardine's "Notes on Buddhist Law" is the principal authority on the law relating to marriage in Burma (60). (*Lord Macnaghten.*) MI ME v. MI SHWE MA.

(1911) 39 I.A. 57 = 39 C. 492 (504) = 14 I. C. 475 =

9 A. L. J. 276 = 15 C. L. J. 276 = 14 Bom. L. R. 204 =

16 C. W. N. 529 = 22 M. L. J. 360.

—Lax notions on subject of—Law relating to, extremely lax.

The law relating to marriage in Burma is extremely lax. The lax notions prevalent among the lower classes on the subject seem to be generally deplored and condemned by their betters. (*Lord Macnaghten.*) MI ME v. MI SHWE MA.

(1911) 39 I.A. 57 (59-60) = 39 C. 492 (503) =

9 A. L. J. 276 = 15 C. L. J. 276 = 14 Bom. L. R. 204 =

16 C. W. N. 529 = 14 I. C. 475 = 22 M. L. J. 360.

—Polygamy—Legality of—Wife's sister—Marriage with—Validity—First wife alive—Effect.

In Burma polygamy is undoubtedly lawful, and it is not unlawful to marry the sister of a living wife, though such a marriage is not considered quite respectable, while marriage with a deceased wife's sister is looked upon as proper and

BURMESE BUDDHIST LAW—(Contd.)**Marriage—(Contd.)**

even laudable (59). (*Lord Macnaghten.*) *MI ME v. MI SHWE MA.* (1911) 39 I. A. 57 = 39 C. 492 (503) =

9 A. L. J. 276 = 14 I. C. 475 = 15 C. L. J. 276 = 14 Bom. L. R. 204 = 16 C. W. N. 529 = 22 M. L. J. 360.

—Presumption from cohabitation with habit and repute—Evidence raising—Quantum—Facts against raising of presumption.

A domiciled Burman, G. had his house and wife at Moulmein in Burma. His business took him to Siam, and there he lived for years with various other women, and with the appellant. The appellant contended that, while the other women were concubines, she was a wife, taken as a second wife, the first wife being all the time in Burma. The appellant in her own evidence and in the evidence of other witnesses examined for her, endeavoured to set up a marriage ceremony as having inaugurated the connection; but that part of her case was subsequently abandoned, and she rested her case on habit and repute. There was no tangible evidence of recognition of the appellant, in her quality of the wife of G, by people external to the house and independent of it. What evidence she had was that of the people who either spoke to the abandoned marriage ceremony or distinguished her position in the house as one of more consequence, and her stay in it as of longer duration, than those of the other women. In truth, when all was said, there was little more pointing to marriage than the use of the word "wife" by some of the witnesses; and the most cursory, as well as the most careful, examination of the evidence showed that it was applied to persons whose status was not matrimonial.

Held, that, on the facts of and evidence in the case, the presumption of marriage from cohabitation with habit and repute did not arise. (*Lord Robertson.*) *MA WUN DI v. MA KIN.* (1907) 35 I. A. 41 (45-6) = 35 C. 232 (240-1) = 3 M. L. T. 93 = 7 C. L. J. 112 = 12 C. W. N. 220 = 10 Bom. L. R. 41 = 5 A. L. J. 63 = 14 Bur. L. R. 3 = 4 L. B. R. 175 = 18 M. L. J. 3.

—Severance of—Provisions relating to, and to similar matters—Strict construction of—Necessity.

Provisions of this kind (provisions of S. 17 of Manugve V) dealing with such a serious matter as the severance of the marriage tie must be strictly construed and fully complied with. (*Sir John Wallis.*) *MA SAW KIN v. MAUNG TAN AUNG GYAW.* (1927) 55 I. A. 38 =

6 R. 79 = I. L. T. 40 R. 14 = 32 C. W. N. 429 = 108 I. C. 345 = 47 C. L. J. 577 = 27 L. W. 830 = A. I. R. 1928 P. C. 8 = 54 M. L. J. 468.

—"Virgin couple"—Parties if and when a. See **BURMESE BUDDHIST LAW—HUSBAND AND WIFE—VIRGIN COUPLE.** (1927) 54 I. A. 403 = 5 R. 841.

—Wife's sister—Marriage with—Validity—First wife alive—First wife dead—Distinction. See **BURMESE BUDDHIST LAW—MARRIAGE—POLYGAMY.**

(1911) 39 I. A. 57 (59) = 39 C. 492 (503).

Orasa.

—Meaning of.

The son born of a union contracted with parental sanction is known as "orasa". The term "orasa" is admittedly borrowed from the Sanskrit "aurasa" used in works on Hindu law and has been corrupted into "auratha" or "orasa". Whether the word is spelt "auratha" or "orasa" it undoubtedly denotes a son born of a union contracted with parental sanction; in other words, a legitimate son. In course of time, it acquired a special meaning; it came to signify a son who, by virtue of his position in the family and his competency to assume the duties of the father, was vested with a defined right in the parental estate. Similarly, in the course of time, the word was extended to include a

BURMESE BUDDHIST LAW—(Contd.)**Orasa—(Contd.)**

daughter standing in the same position and vested with the same right (338-9). (*Mr. Ameer Ali.*) *KIRKWOOD alias MA THEIN v. MAUNG SIN.* (1924) 51 I. A. 334 =

2 R. 693 = A. I. R. 1924 P. C. 238 = 3 Bur. L. J. 304 = 29 C. W. N. 653 = 84 I. C. 867 = 48 M. L. J. 1

—Status of—Son's or daughter's right to—Conditions.

The designation "orasa" in the Dhammathats is not limited to a son, but connotes the eldest or first-born child who is competent to undertake the responsibilities of the deceased parent. The status does not depend on the decease of the father, where the child is a son; or of the mother, where she is a daughter. It comes into existence on the fulfilment of three conditions, namely:—(1) that he or she is the first-born child; (2) that he or she attains majority; and (3) that he helps either in the acquisition of the family property, and the discharge of the father's responsibilities; or, if a daughter, helps the mother in the case of the property and the control and management of the household, which lie particularly within the mother's duties (347). (*Mr. Ameer Ali.*) *KIRKWOOD alias MA THEIN v. MAUNG SIN.*

(1924) 51 I. A. 334 = 2 R. 693 = A. I. R. 1924 P. C. 238 = 3 Bur. L. J. 304 = 29 C. W. N. 653 = 84 I. C. 867 = 48 M. L. J. 1.

Relationship.

—Terms of—Proverbially inexact.

The Burmese are proverbially inexact in their terms of relationship. (*Sir Walter Phillimore.*) *MAUNG THWE v. MAUNG TUN PE.* (1917) 44 I. A. 251 = 45 C. 1 (13) = 22 C. W. N. 97 = 27 C. L. J. 68 = (1918) M. W. N. 9 = 20 Bom. L. R. 69 = 11 Bur. L. T. 28 = 42 I. C. 863 = 22 M. L. T. 411.

Wife.

—Maintenance—Suit against husband for—Divorce by conduct—Plea by husband of—P.C. appeal—Maintainability for first time in.

In a suit by a Burmese wife for the recovery of maintenance from her husband the court below gave the plaintiff a decree for maintenance as prayed for. The husband did not, in the court below, plead in bar of the suit a divorce according to Buddhist law by the conduct of the parties, and no issue was raised as regards that plea.

Held, that the plea could not be allowed to be raised in appeal to the P.C. for the first time (120). (*Sir Richard Couch.*) *MOUNG HMOON HTAW v. MAH HPWAH.*

(1884) 11 I. A. 109 = 10 C. 777 (785) = 4 Sar. 505.

—Maintenance of—Husband's liability for—Wife having separate means of her own—Wife maintaining herself for a period—Effect.

It is the duty of the husband to provide subsistence for his wife, and to furnish her with suitable clothes and ornaments. If he fails to do so he is liable to pay debts contracted by her for necessities. But this law would not be applicable where she has sufficient means of her own (119).

Seem, where the wife has maintained herself she cannot sue her husband for maintenance for the period during which she has done so (119). (*Sir Richard Couch.*) *MOUNG HMOON HTAW v. MAH HPWAH.* (1884) 11 I. A. 109 = 10 C. 777 (784-5) = 4 Sar. 505.

—Position of, in social and legal system.

In the Burmese social and legal system the wife is, to all intents and purposes, a partner. (*Mr. Ameer Ali.*) *MA THAUNG v. MA THAN.* (1923) 51 I. A. 1 (4) =

51 C. 374 = 19 L. W. 477 = (1924) M. W. N. 662 = 3 Bur. L. J. 333 = 29 C. W. N. 559 = A. I. R. 1924 P. C. 88 = 80 I. C. 1031 = 46 M. L. J. 618.

BURMESE BUDDHIST LAW—(Concl'd.)**Wife—(Cont'd.)**

—Word used to describe—Applicability to one who is not lawfully married.

The same word which is used to describe a woman lawfully married is applied by the Burmese to a woman living with a man on less honourable terms. (*Lord Macnaghten.*)

MI ME v. MI SHWE MA. (1911) 39 I. A. 57 (59-60) = 39 C. 492 (503) = 9 A.L.J. 276 = 15 C.L.J. 276 = 14 Bom. L.R. 204 = 16 C. W. N. 529 = 14 I.C. 475 = 22 M. L. J. 360.

Will.

—Disposition by—Strict view as to—Encroachment upon.

Upon the strict Buddhist view intestacy is compulsory; but this has so far been impugned upon that a Chinese Buddhist is allowed to test. (*Lord Dunedin.*) MAUNG DWE v. KHOO HAUNG SHEIN. (1924) 52 I.A. 73 =

3 R. 29 = 3 Bur. L.J. 340 = 29 C.W.N. 824 = A.I.R. 1925 P.C. 29 = (1925) M.W.N. 23 = 84 I.C. 899 = 47 M.L.J. 853 (857).

Woman deceased—Jewellery worn by—Ownership of.

—Evidence—Dead body of woman—Jewellery placed on—Presumption from.

In a suit by a Burman husband for the recovery, from his deceased wife's maternal aunt, of jewels alleged to have belonged to the deceased, the plaintiff's case was that they had been presented to his wife at the time of her wedding by her grandmother. The result of the evidence in the case was thus summarised by the High Court, which held that the jewels were the property of the deceased wife:—"The mere fact that the plaintiff's wife wore the jewellery at her wedding would not go far towards proving that the jewels were hers, because Burmans habitually borrow jewellery for great occasions. But her continued possession of the jewellery and her taking it away with her when she went to live at the various places to which her husband, as the Government servant, was transferred, would raise a strong presumption that it was hers, particularly as her grandmother, to whom it is said to have belonged, was rather miserly, and would not be likely to let her own valuables go out of her possession for any thing like so long a time."

Held, that, whatever might have been the origin of the articles, whether they were originally purchased by the grandmother and were given by her by way of dowry to the plaintiff's wife at or about the time of the wedding, the evidence in the case fully justified the conclusion of the High Court.

Held, further, that the fact that, on the death of the plaintiff's wife, considerable jewellery was placed on her dead body, in the circumstances of the case, gave rise to the inference that it was her own, as it was hardly likely that borrowed jewellery would be placed on the dead person. (*Mr. Ameer Ali.*) MA ON v. MAUNG TIN.

(1927) 27 L.W. 175 = 39 M.L.T. 544 = 102 I.C. 670 = A.I.R. 1927 P. C. 105 = 53 M.L.J. 629.

CALCUTTA IMPROVEMENT ACT V OF 1911.

—Improvement scheme—Sanction of—Announcement by notification of—Necessity—Effect—Suit by owner of land acquired—Right of—Effect on.

Whenever the local Government sanctions an improvement scheme, there is a duty to announce the fact by notification, and the publication of a notification is conclusive evidence that the scheme has been duly framed and sanctioned. This provision does not affect the right of the owner of the land acquired to institute a suit to have it declared that the Board in framing the scheme acted *ultra vires*, or that the scheme as sanctioned does not authorise the Board to acquire by compulsion the land in question. (*Lord Parmoor.*) CALCUTTA IMPROVEMENT TRUSTEES v. CHANDRA KANTA GHOSH. (1919) 47 I.A. 45 (49) =

CALCUTTA IMPROVEMENT ACT V OF 1911—(Cont'd.)

47 C. 500 (506) = 11 L.W. 566 = 18 A.L.J. 521 = 22 Bom. L.R. 586 = 24 C.W.N. 881 = 32 C. L. J. 65 = 56 I.C. 32 = 38 M.L.J. 517.

—S. 41—Land acquired for execution of scheme—Meaning. See under this Act S. 42.

(1919) 47 I. A. 45 (54) = 47 C. 500 (511-2).

—S. 42—Land affected by execution of scheme—Meaning—Land inserted in scheme because it would be enhanced in value by its execution—Acquisition of—Board's powers of—S. 41—Land required for execution of scheme—Meaning.

Land would, using language in its ordinary natural sense, be said to be affected by the execution of a scheme whenever its value was thereby enhanced or diminished (53).

There is no reason, either in the general purpose of the Calcutta Improvement Act, 1911, or the special context, that the word "affected" in S. 42 of the Act, should not be construed in its ordinary sense, and so construed, S. 42 authorises the acquisition of land which is inserted in the scheme because, in the opinion of the Board, it would be enhanced in value by its execution (55).

It was suggested that the Act did not authorise the Board to acquire land unless it was either physically affected by the execution of the scheme, or injuriously affected, whether by severance or in some other manner. Land which would be physically affected by the scheme comes under the provision of S. 41, and to limit the land which a Board may acquire under S. 42 to the land which they must acquire under S. 41 would be in effect to make illusory the powers granted in S. 42. The meaning of the phrase "injuriously affected" was well known in compensation law and practice when the Calcutta Improvement Act was passed. To introduce the limitations connoted by the word "injuriously" would be in effect to alter the language of the section, and, had the Legislature desired to introduce this limitation, there would have been no drafting difficulty of any kind (54). There is no limitation to cases of severance either in S. 42 of Act, or S. 78, and there is no ground for implying any limitations as affecting the authority of the Board for the acquisition of land under S. 42 (54-5). (*Lord Parmoor.*) CALCUTTA IMPROVEMENT TRUSTEES v. CHANDRA KANTA GHOSH.

(1919) 47 I.A. 45 = 47 C. 500 (511-3) = 11 L.W. 566 = 18 A.L.J. 521 = 22 Bom. L.R. 586 = 24 C.W.N. 881 = 32 C.L.J. 65 = 56 I.C. 32 = 38 M.L.J. 511.

—Ss. 42 and 81—Land acquired under S. 42 and not required for actual execution of Street Scheme—Board's power of holding or disposing of.

If the Improvement Board is authorised to acquire land affected in value by the execution of the scheme in order to provide funds in case of the public burden, the acquisition of the land is directly within the purposes of the Act (Calcutta Improvement Act, 1911), and the powers of compulsory acquisition are clearly applicable thereto. S. 81 of the Act confers on the Board wide powers for the holding or disposal of any land vested in them or acquired by them under the Act, amply sufficient for dealing with any land acquired under S. 42 and not required for the actual execution of the street scheme (56). (*Lord Parmoor.*) CALCUTTA IMPROVEMENT TRUSTEES v. CHANDRA KANTA GHOSH.

(1919) 47 I. A. 45 = 47 C. 500 (514) = 11 L. W. 566 = 18 A. L. J. 521 = 22 Bom. L. R. 586 = 24 C. W. N. 881 = 32 C. L. J. 65 = 56 I. C. 32 = 38 M. L. J. 511.

—S. 42 (a)—Land acquired compulsorily—Compensation to owner—Basis of—Land which is not required for execution of scheme but which trustees think will thereby be increased in value.

**CALCUTTA IMPROVEMENT ACT V OF 1911,
S. 42 (a)—(Concl'd.)**

Where, for the purpose of recoupment, the Board of Trustees acquire compulsorily under S. 42 (a) of the Calcutta Improvement Act, 1911, land which is not required for the execution of the scheme but which the trustees are of opinion will thereby be increased in value, the owner of the land would be entitled to the value of his land assessed on the same principle as the value of land actually required for the execution of the widened street, and the effect would be not to deprive him of the value of his property, but only that he would not obtain the additional value due to the proximity of his land to the improvement scheme (55-6). (*Lord Parmoor.*) **CALCUTTA IMPROVEMENT TRUSTEES v. CHANDRA KANTA GHOSH.** (1919) 47 I. A. 45 =

47 C. 500 (513-4) = 11 L. W. 566 =
18 A. L. J. 521 = 22 Bom. L. R. 586 =
24 C. W. N. 881 = 32 C. L. J. 65 = 56 I. C. 32 =
38 M. L. J. 511.

—**S. 78—Object and effect—Calcutta Improvement Scheme—Inclusion of land merely to exact exemption fee from owner—Validity—Ultra vires of Board.**

The object of S. 78 of the Calcutta Improvement Act, 1911, is to give an opportunity to owners of land to request the abandonment of its compulsory acquisition, and it only comes into operation where land has been properly included in a scheme, as required for purposes of the Act. To have included land within the area of the scheme, not because it was wanted for the purposes of the Act, but in order to exact an exemption fee from the owner, would have been a misuse of the powers conferred upon the Board, and in doing so the Board would have acted *ultra vires*, although it might have been anticipated that, by means of such fees, funds would be obtained to ease the burden of the expenditure to be incurred in the execution of the scheme (50-1). (*Lord Parmoor.*) **CALCUTTA IMPROVEMENT TRUSTEES v. CHANDRA KANTA GHOSH.** (1919) 47 I. A. 45 =

47 C. 500 (507-8) = 11 L. W. 566 =
18 A. L. J. 521 = 22 Bom. L. R. 586 =
24 C. W. N. 881 = 32 C. L. J. 65 = 56 I. C. 32 =
38 M. L. J. 511.

CALCUTTA MUNICIPAL ACT III OF 1899.

—**Ss. 14, 357 and 556—Public purpose—Dharmasala if a—Form of belief or practice of those primarily benefited by improvements made—Not material.**

Their Lordships fundamentally disagree with the proposition that the dharmasala is excluded from the term "public purpose" because the persons mainly interested would have been the worshippers and dignitaries of the temple Kali. What the municipality had to consider was not the religious beliefs and purposes of those assembling in such numbers, but what was the situation of the city in respect to this assemblage and to the citizens at large in view of the general questions of public convenience, proper sanitation, and the prevention of danger and disease. Any enlightened municipality would carefully attend to these questions and endeavour to avoid the evils referred to. This is not to be ruled out by a consideration as to the particular form of belief or practice of those who would primarily benefit by the improvements made. (*Lord Shaw.*) **AMULYA CHANDRA BANERJEA v. CALCUTTA CORPORATION.**

(1922) 49 I. A. 255 (259) = 49 C. 838 (842) =
31 M. L. T. 155 = 16 L. W. 673 = 27 C. W. N. 125 =
37 C. L. J. 67 = 21 A. L. J. 27 = A. I. R. 1922 P. C. 333 =
69 I. C. 114 = 43 M. L. J. 634.

—**Ss. 14 and 556—Acquisition of land by Municipality—Street Improvement Scheme—Acquisition of surplus land—Erection of dharmasala—Powers of Municipality.**

The suit out of which the appeal before the P. C. arose was brought by the appellants for a declaration that the

**CALCUTTA MUNICIPAL ACT III OF 1899, Ss. 14
and 556—(Cont'd.)**

Municipality of Calcutta "is not competent, according to law, to acquire" certain property, and for a permanent order of injunction against their doing so.

The suit land lay in the very congested and insanitary area surrounding the temple of the goddess Kali of Kalighat. In connection with a street improvement scheme in that congested area, the Municipal Corporation acquired the suit land, which was surplus land, for the purpose of erecting, at the expense of a private benefactor, a dharmasala for the use of the numerous worshippers resorting to the said temple within the area of the improvement scheme at certain seasons of the year.

Held, that, under the powers conferred by Ss. 14 and 556 of the Calcutta Municipal Act, the Municipal Council had power to acquire the suit land.

S. 556 of the statute plainly confers upon the Corporation power to acquire land and buildings which are, in their opinion, necessary for carrying out any of the purposes of the Act. This refers back to (*inter alia*) various cases in S. 14 of the Act. It may be true that the acquisition of the suit block of land for a dharmasala would not fall under sub-s. (ii) of S. 14 as being for a building under the control of the Corporation, or even under the general denomination of hospitals or alms houses in sub-s. (v); but their Lordships are clearly of opinion that the construction and maintenance of a dharmasala cannot be said to be ruled out of sub-s. (xi), which covers "any other matter which is likely to promote the public health, safety or convenience, or the carrying out of this Act." (*Lord Shaw.*) **AMULYA CHANDRA BANERJEA v. CALCUTTA CORPORATION.**

(1922) 49 I. A. 255 (261) = 49 C. 838 (843-4) =
31 M. L. T. 155 = 16 L. W. 673 = 27 C. W. N. 125 =
37 C. L. J. 67 = 21 A. L. J. 27 =
A. I. R. 1922 P. C. 333 = 69 I. C. 114 = 43 M. L. J. 634.

—**Ss. 14 (xi) and 556—Discretion of Municipality under—Interference with, by Court—Principles.**

The Municipal Corporation of Calcutta has the power of acquisition of land which may in their opinion be needed for carrying out any of the purposes of the Calcutta Municipal Act of 1899. The Act by Ss. 14 and 556 has expressly placed the discretion, not with this Board or with a Court of Law, but with the municipality itself. When, therefore, a question is raised as to the power of the Corporation to acquire land and buildings which are, in their opinion, necessary for carrying out any of the purposes of the Act, their Lordships would be the last to question the opinion of, or the exercise of discretion by, the municipality of Calcutta, even if they differed from it. (*Lord Shaw.*) **AMULYA CHANDRA BANERJEA v. CALCUTTA CORPORATION.**

(1922) 49 I. A. 255 (261) = 49 C. 838 (844) =
31 M. L. T. 155 = 16 L. W. 673 = 27 C. W. N. 125 =
37 C. L. J. 67 = 21 A. L. J. 27 = A. I. R. 1922 P. C. 333 =
69 I. C. 114 = 43 M. L. J. 634.

—**S. 341—Structures ordered to be demolished—Declaration that they had been erected before 1-6-1863, and that owner is entitled to compensation in respect thereof—Suit for—Maintainability—Right to declaration—Grant of same—Discretion of Court.**

Respondents, the Calcutta Corporation, obtained orders for the demolition of certain fixtures attached to the appellant's building on the ground that they were encroachments within the meaning of the Calcutta Municipal Act of 1899. The respondents further denied that the said structures had been erected before June 1, 1863, and that the appellant was entitled to any compensation in respect thereof. Thereupon the appellant instituted a suit for a declaration that the said structures had been erected before June 1, 1863, and that

CALCUTTA MUNICIPAL ACT III OF 1899, S. 341 —(Concl'd.)

he was entitled to compensation for the loss he would suffer by their compulsory removal.

Held, that the appellant was entitled to ask for a declaration in respect of that right under S. 42 of the Specific Relief Act, and that, though the court would not be bound to give the declaration sought, the discretion of the trial court would have been rightly exercised in granting such a declaration or in making an equivalent order (247-8). (*Lord Buckmaster, L.C.*) **JOSEPH v. CALCUTTA CORPORATION.** (1916) 43 I. A. 243 = 44 C. 87 (95-6) =

20 M. L. T. 383 = (1916) 2 M. W. N. 544 = 21 C. W. N. 194 = 24 C. L. J. 498 = 18 Bom. L.R. 878 = 5 L. W. 199 = 36 I. C. 912 = 32 M. L. J. 631.

—**S. 341 (3)—Demolition of structures—Condition precedent to—Assessment of compensation not a.**

Held that, on the true construction of S. 341, sub-s. (3) of the Calcutta Municipal Act of 1899, the assessment of compensation was not a condition precedent to the demolition of the structures (246).

The words of the section only provide for compensation to the person "who suffers damage" by the removal. Until the removal is effected no damage is in fact suffered at all (246). (*Lord Buckmaster, L.C.*) **JOSEPH v. CALCUTTA CORPORATION.** (1916) 43 I. A. 243 = 44 C. 87 (94) = 24 C. L. J. 498 = (1916) 2 M. W. N. 544 = 36 I. C. 912 = 18 Bom. L. R. 878 = 20 M. L. T. 383 = 21 C. W. N. 194 = 5 L. W. 199 = 32 M. L. J. 631.

—**Ss. 617 to 619—Compensation—Fixing of, in case of dispute—Jurisdiction as regards—Small Cause Court—Sub-Court.**

The respondents, the Corporation of Calcutta, obtained an order for demolition of certain fixtures attached to the appellant's house on the ground that they were encroachments on a public street within the meaning of the Calcutta Municipal Act of 1899. Alleging that the fixtures in dispute had been fixed before June 1, 1863, the appellants sued the Corporation in the Sub-Court for a declaration that they were entitled to compensation for the loss that would be caused to the appellants by the compulsory removal of the structures.

Held that, on the right construction of S. 617 of the Calcutta Municipal Act, only the Court of Small Causes had jurisdiction to fix compensation in case of dispute, and that the suit was not therefore cognizable by the Sub-Court (247). (*Lord Buckmaster, L.C.*) **JOSEPH v. CALCUTTA CORPORATION.** (1916) 43 I. A. 243 =

44 C. 87 (94-5) = 20 M. L. T. 383 = (1916) 2 M. W. N. 544 = 21 C. W. N. 194 = 24 C. L. J. 498 = 18 Bom. L. R. 878 = 5 L. W. 199 = 36 I. C. 912 = 32 M. L. J. 631.

—**Ss. 618 and 619—Word "Person"—Municipal authority if included in.**

Quære, whether the word "person" in Ss. 618 and 619 of the Calcutta Municipal Act of 1899 includes "municipal authority" (247). (*Lord Buckmaster, L.C.*) **JOSEPH v. CALCUTTA CORPORATION.** (1916) 43 I. A. 243 =

44 C. 87 = 20 M. L. T. 383 = (1916) 2 M. W. N. 544 = 21 C. W. N. 194 = 24 C. L. J. 498 = 18 Bom. L. R. 878 = 5 L. W. 199 = 36 I. C. 912 = 32 M. L. J. 631.

CALCUTTA RENT ACT III of 1920.

—**Landlord and tenant in—Ex-landlord and ex-tenant included in, in proper context.** (*Lord Atkin.*) **KARNANI INDUSTRIAL BANK, LTD. v. SATYA NIRANJAN SHAW.** (1928) 55 I. A. 344 = 32 C. W. N. 1093 = 111 I. C. 300 = 28 L. W. 862 = A. I. R. 1928 P. C. 227 = 55 M. L. J. 464 (469).

CALCUTTA RENT ACT III OF 1920—(Cont'd.)

—**Operation of—Calcutta Rent Amendment Act of 1924, S. 2, Proviso—Effect—Rent of premises exceeding Rs. 250 a month—Revisional jurisdiction of President after March, 1924—Application presented in 1922.**

By the Calcutta Rent Act III of 1920, which came into force on 5-5-1920, either a landlord or a tenant may apply to the Controller, an officer appointed under the Act, to fix the standard rent of premises. S. 18 of the Act gave an appeal from his decision to the President of the Improvement Tribunal, whose decision was declared to be final. Sub-s. (4) to S. 1 of the Act provided that the Act was to be in force for a period of 3 years from its date. By an amending Act of 1923 that provision was amended by the substitution of the fixed date of the end of March, 1924, for the expiration of three years from the commencement. A further amendment was made by an amending Act of 1924 by which the date 1927 was substituted for 1924, but there was added the following proviso:—"Provided that after the 31st day of March, 1924, this Act shall cease to apply to any premises the rent of which exceeded Rs. 250 a month, or Rs. 3,000 a year, on the 1st day of November, 1918."

The appellant, who was tenant of premises of which the rent exceeded Rs. 250 a month, applied in November, 1922, to the President, to revise an order of the Controller certifying the standard rent. That appeal was only finally disposed of on 3-8-1924. The President dismissed the appeal, holding that he had no jurisdiction to determine the matter. His view, which was eventually upheld by the High Court, was that the effect of the proviso in the amending Act of 1924 was to make the Act of 1920 a temporary Act ending at March, 1924, as regards premises the rent of which exceeded Rs. 250 a month, but an existing Act until 1927 as to other premises.

Held, that that view was erroneous and that the President was bound to hear and dispose of the appellant's appeal.

The Act of 1920 still lives until 1927. The effect of the proviso is just as if the words therein had been inserted in the original Act, and the Act must be so read at the present time. If that had been done, there would have been no doubt as to the true interpretation. The Act is good for premises of all values up to March, 1924, but only good for those of lower value after that. The application of the Act is when the parties begin to move under it. This was done in the present case before March, 1924. The rest is merely the working out of the application (155-6). (*Viscount Dunedin.*) **KESHORAM PODDAR v. NUNDO LAL MULLICK.** (1927) 54 I. A. 152 = 54 C. 508 =

26 L. W. 435 = 46 C. L. J. 341 = 25 A. L. J. 956 = 31 C. W. N. 646 = (1927) M. W. N. 340 = 101 I. C. 38 = 38 M. L. T. (P. C.) 95 = 29 Bom. L. R. 868 = A. I. R. 1927 P. C. 97 = 52 M. L. J. 655.

—**Ss. 14 and 15—Landlord and tenant—Ex-landlord and ex-tenant if and when included in. See under this Act LANDLORD AND TENANT.**

(1928) 55 I. A. 344 = 55 M. 464.

—**Ss. 15 and 18—Controller—Jurisdiction of—Erroneous exercise of—Remedy in case of—Appeal under S. 18.**

Under S. 15 of the Act, the Controller has jurisdiction to determine when the premises were first let, as he has jurisdiction to determine whether there is any difficulty which makes it in his opinion just to fix the standard rent under cl. 3(a). If he does in fact consider both questions but comes to a wrong conclusion, the remedy is not by way of attack on his jurisdiction, but by appeal to the President of the Improvement Tribunal under S. 18 of the Act. (*Lord Atkin.*) **KARNANI INDUSTRIAL BANK, LTD. v. SATYA NIRANJAN SHAW.** (1928) 55 I. A. 344 =

CALCUTTA RENT ACT III OF 1920, Ss. 15 and 18

—(Concl'd.)

32 C. W. N. 1093 = 111 I. C. 300 = 28 L. W. 862 =
A. I. R. 1928 P. C. 227 = 55 M. L. J. 464.

—S. 18—President—Revisional jurisdiction of, as regards rent of premises exceeding Rs. 250 a month after March, 1924—Calcutta Rent Amendment Act I of 1924, S. 2, Proviso—Application for revision filed in 1922. See under this Act OPERATION OF.

(1927) 54 I. A. 152 = 54 C. 508.

—Standard rent—Date of commencement of—Contractual rent paid for a portion of period of tenancy—Effect—Landlord's right to amount paid.

Where the contractual rent has been paid for a portion of the period of the tenancy and the rent so paid has become irrecoverable by the lapse of six months from the date of the last payment, the landlord is entitled to hold the sum so paid for the contractual rent, and rent on the basis of the standard rent will only run from after the date up to which the contractual rent has been so paid. In such a case the tenant is not entitled to be debited with the standard rent from the date of the tenancy. (*Lord Atkin.*) KARNANI INDUSTRIAL BANK, LTD. v. SATYA NIRANJAN SHAW.

(1928) 55 I. A. 344 = 32 C. W. N. 1093 = 111 I. C. 300 =
28 L. W. 862 = A. I. R. 1928 P. C. 227 =
55 M. L. J. 464 (470-1).

—Standard rent—Fixing of, with retrospective operation—Controller's power of. (*Lord Atkin.*) KARNANI INDUSTRIAL BANK, LTD. v. SATYA NIRANJAN SHAW.

(1928) 55 I. A. 344 = 32 C. W. N. 1093 =
28 L. W. 862 = 111 I. C. 300 = A. I. R. 1928 P. C. 227 =
55 M. L. J. 464 (470).

CALCUTTA SUPREME COURT.

—See SUPREME COURT OF CALCUTTA.

CANAL.

—Government land—Canal constructed by private persons on—Rights acquired by—Proprietary right in land and right to have canal irrigated by water from Government river—Conditions—Expectations raised by Government to that effect. See CROWN—LAND OF—CANAL CONSTRUCTED BY PRIVATE PERSONS ON.

(1901) 28 I. A. 211 = 28 C. 693 (705-6).

CANTONMENT.

—Poona cantonment—Land within area of—Tenure on which, held—Cantonment tenure—Ownership in fee—Possession—Presumption of ownership from—Applicability—Resumption by Government—Compensation payable on—Basis of.

In an action brought by the Secretary of State for India in Council to eject the appellants before the Privy Council from certain premises within the limits of the Poona Cantonment, the point for decision was whether, as contended for by the Secretary of State, the land belonged to the Government of Bombay and was only held by the appellants on military or cantonment tenure, which entitled the Government to resume it at their pleasure, subject to compensation for buildings which the tenants might have erected thereon, or, as urged by the appellants, the land was their private property and, though they were subject to military jurisdiction and to the Government right of appropriation, they were entitled to compensation on a basis of private ownership, and not as mere licensees.

Held, on a consideration of the Bombay regulations applicable to cantonments from the year 1819, that the appellants were mere licensees of the suit land and that buildings built by them thereon were subject to expropriation at a price to be fixed by the military authorities who held the cantonment area in full proprietary right.

CANTONMENT—(Contd.)

In this state of things it is impossible to say that mere possession or occupation of the bungalow on this site affords any presumption whatever that the possessor or his predecessors in title were owners in fee. The presumption is all the other way (216). (*Lord Robson.*) GHASWALA v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

(1911) 38 I. A. 204 = 36 B. 1 = 15 C. W. N. 909 =
10 M. L. T. 97 = (1911) 2 M. W. N. 23 = 14 C. L. J. 268 =
13 Bom. L. R. 788 = 8 A. L. J. 1219 =
12 I. C. 117 = 21 M. L. J. 1100.

CANTONMENTS ACT XXII OF 1864.

—S. 11—Lunatic dangerous—Arrest and confinement of alleged—Commanding officer of cantonment causing—Damages for wrongful arrest and confinement—Liability for—*Bona fide* but mistaken act. See DAMAGES—ARREST WRONGFUL—WRONGFUL CONFINEMENT.

(1882) 9 I. A. 152 = 9 C. 341.

CARRIERS—COMMON CARRIERS.

—See also RAILWAY.

—Law governing—Contract Act—Effect.

The Contract Act of 1872 was not intended to alter the law applicable to common carriers. No doubt the Act treats of bailments in a separate chapter. But there is nothing to show that the Legislature intended to deal exhaustively with any particular chapter or sub-division of the law relating to contracts. On the other hand, it is to be borne in mind that at the time of the passing of the Act of 1872, there was in force a statute relating to common carriers, which, in connection with the common law of England, formed a Code at once simple, intelligible, and complete. Had it been intended to codify the law of common carriers by the Act of 1872, the more usual course would have been to have repealed the Carriers Act of 1865 and to re-enact its provisions with such alterations or modifications as the case might seem to require. It is scarcely conceivable that it could have been intended to sweep away the common law by a side wind, and by way of codifying the law to leave the law to be gathered from two Acts which proceed on different principles, and approach the subject from different points of view (129).

At the date of the Contract Act of 1872, the law relating to common carriers was partly written, partly unwritten, law. The written law is untouched by the Act of 1872. The unwritten law was hardly within the scope of an Act intended to define and amend the law relating to contracts (129). The Act was not intended to deal with the law relating to common carriers, and notwithstanding the generality of some expressions in the chapter on bailments, common carriers are not within the Act (131). (*Lord Macnaghten.*) IRRAWADY FLOTILLA CO. v. BUGWANDASS.

(1891) 18 I. A. 121 = 18 C. 620 (628-9) =
6 Sar. 40.

—Law governing—English Common Law—Carriers Act—Basis of.

It is not material to inquire how it was that the common law of England came to govern the duties and liabilities of common carriers throughout India. The fact itself is beyond dispute. It is recognised by the Indian Legislature in the Carriers Act, 1865, an Act framed on the lines of the English Carriers Act of 1830 (125). (*Lord Macnaghten.*) IRRAWADY FLOTILLA CO. v. BUGWANDASS.

(1891) 18 I. A. 121 = 18 C. 620 (625) = 6 Sar. 40.

—Liability of—Origin of—Contract not—Breach of duty—Action for—Basis of.

The obligation imposed by law on common carriers has nothing to do with contract in its origin. It is a duty cast upon common carriers by reason of their exercising a public employment for reward. A breach of this duty is a breach of the law, and for this breach an action lies founded on the

CARRIERS—COMMON CARRIERS—(Contd.)

common law which action wants not the aid of a contract to support it (129). (*Lord Macnaghten.*) **IRRAWADY FLOTILLA CO. v. BUGWANDASS.**

(1891) 18 I. A. 121 = 18 C. 620 (629) = 6 Sar. 40.

—*Liability of, as insurers.*

The liability of a common carrier as an insurer is an incident of the contract between the common carrier and the owner of the property to be carried (131). (*Lord Macnaghten.*) **IRRAWADY FLOTILLA CO. v. BUGWANDASS.**

(1891) 18 I. A. 121 = 18 C. 620 (630) = 6 Sar. 40.

CARRIERS ACT III OF 1865.

—Basis of—English Carriers Act of 1830. *See* **CARRIERS—COMMON CARRIERS—LAW GOVERNING—ENGLISH COMMON LAW.**

(1891) 18 I. A. 121 (125) = 18 C. 620 (625).

—**S. 2—Common carrier—Liability for goods carried—Exemption from—Conditions.**

What is required in the case of a person who answers the definition under the Indian Carriers Act—namely, of transporting for hire goods from place to place for all persons indiscriminately, is that the nature of the contract entered into must either have the limitation of the liability under that Act made expressly and in writing or the facts must be such that for the contract in question the contractor was departing from his usual business and engaging in a different type of business from that of common carrier. (*Lord Shaw.*) **INDIA GENERAL NAVIGATION AND RV. CO. v. DEKHAN TEA CO.**

(1923) 51 I. A. 28 (35-6) = 51 C. 304 =

28 C. W. N. 302 = A. I. R. 1924 P. C. 40 =

(1924) M. W. N. 158 = 19 L. W. 277 = 22 A. L. J. 173 =

34 M. L. T. 53 = 26 Bom. L. R. 571 =

80 I. C. 1038 = 10 O. & A. L. R. 591.

—*Words “for all persons indiscriminately” —Meaning.*

The words “for all persons indiscriminately” in S. 2 of the Indian Carriers Act III of 1865 simply mean that persons so engaged in and catering for business satisfy the demands or applications of customers as they come and are not at liberty to refuse business. This arises from the public employment in which they are engaged. Apart from danger arising, say, from the nature of the goods received, the carrier is by his office bound to transport the goods as clearly as if there had been a special contract which purported so to bind him, and he is answerable to the owner for safe and sound delivery. (*Lord Shaw.*) **INDIA GENERAL NAVIGATION AND RV. CO. v. DEKHAN TEA CO.**

(1923) 51 I. A. 28 (34) = 51 C. 304 =

28 C. W. N. 302 = A. I. R. 1924 P. C. 40 =

(1924) M. W. N. 158 = 19 L. W. 277 = 22 A. L. J. 173 =

34 M. L. T. 53 = 26 Bom. L. R. 571 =

80 I. C. 1038 = 10 O. & A. L. R. 591.

—**Ss. 6, 8 and 9—Loss of goods by fire—Damages for—Negligence—Absence of—Onus on company to prove—Evidence.**

The appellant company were common carriers by inland navigation, and the suit against them was to recover the value of goods received on board their flat K to be delivered to the plaintiffs at Calcutta. The flat arrived there; but whilst moored to the place where the goods had to be delivered, the flat and its cargo were destroyed by fire, the origin of which did not appear. The appellant company contended that they had brought themselves within the protection of the Carriers Act.

Held, that the appellant company had not at all exonerated themselves from the onus cast on them of showing that the fire originated from causes over which they had no control, and could not have been expected to have had any control, and that the evidence really went to show that the

CARRIERS ACT III OF 1865, Ss. 6, 8 and 9—(Contd.)

fire must have originated from within the flat, and therefore from a place for which they were liable for its being in a proper position, and free from any inflammatory article that would have set the goods on fire when it could not have got on fire of itself. (*Lord Morris.*) **RIVER STEAM NAVIGATION CO. v. CHOUTMULL.** (1898) 26 I. A. 1 (5) =

26 C. 398 (403) = 3 C. W. N. 145.

—**S. 9—Railway Company—Consignment of goods to—Shipping Company carrying goods by ships or flats along a portion of the line under arrangement with Railway Company—Liability of, for loss of goods, as a common carrier.**

Respondents consigned their goods (tea) to the Assam-Bengal Railway Company for the purpose of transport from Assam to Chittagong for shipment to England. Consignments were in ordinary course taken and carried entirely over the Railway Company's own line without recourse to any other system of transport. Owing, however, to a breakdown of a section of their line, the Railway Company made arrangements with the appellant shipping Company for taking the goods by ships or flats from one specified place to another where the goods could again be put on rail and so reach Chittagong. There was nothing to show that that portion of the river carriage was a temporary and exclusive monopoly for one single customer on special terms.

Held, that the appellants were common carriers of goods which they carried under the contract with the Railway Company, and were liable to the respondents for the loss of the goods under S. 9 of the Carriers Act without proof of negligence.

It cannot be said that, because the appellant Company was doing this particular set of journeys for the Railway Company by a special flotilla which was devoted for the time to this purpose only and which was making a through run to the place where the goods could again be put on rail, it was departing from its usual business and engaging in a different type of business, *viz.*, the business of a sub-contractor for the Railway in such special sense as to take it *quoad* these journeys out of the avocation of a common carrier.

Quære, whether the result under the English law would have been in any wise different from that arrived at (33-4). (*Lord Shaw.*) **INDIA GENERAL NAVIGATION AND RAILWAY COMPANY v. DEKHAN TEA COMPANY.**

(1923) 51 I. A. 28 = 51 C. 304 =

28 C. W. N. 302 = A. I. R. 1924 P. C. 40 =

(1924) M. W. N. 158 = 19 L. W. 277 = 22 A. L. J. 173 =

34 M. L. T. 53 = 26 Bom. L. R. 571 =

80 I. C. 1038 = 10 O. & A. L. R. 591.

CASES.

—*See* DECISIONS.

CASES—NEW CASES.

—Decision in—Rule applicable. *See* JURISPRUDENCE—NEW CASES. (1872) Sup. I. A. 47 (68-9).

CASTE DISABILITIES REMOVAL ACT XXI OF 1850.

—Caste—Degradation from—Effect—Hindu law rule as to—Effect of Act upon. *See* HINDU LAW—CASTE—DEGRADATION FROM. (1880) 7 I. A. 115 (156) =

5 C. 776 (792).

—Hindu—Change of religion—Inheritance or suit—Right of—Effect on.

The explanation of the exclusion of the plaintiff from any further provision by this will is supplied by the fact that he had become a Christian in the year 1851. No proceedings of exclusion or degradation had, however, followed or been attempted. The Act XXI of 1850 is conclusive to show that this change of religion does not affect the plaintiff's right of

CASTE DISABILITIES REMOVAL ACT XXI OF 1850—(Contd.)

inheritance or suit (56). (*Mr. Justice Willes.*) JUTTEN-DROMOHUN TAGORE *v.* GANENDROMOHUN TAGORE.

(1872) Sup. I. A. 47 = 9 B. L. R. 377 = 18 W. R. 359 = 3 Sar. 82 = 2 Suth. 692.

CASTE PANCHAYAT.

——Power of. See LIBEL—CASTE PANCHAYAT.

CATTLE TRESPASS ACT I OF 1871.

——Private cattle pounds—Maintenance of. See ACT OF STATE—ACT AMOUNTING TO AN OR NOT—NON-FEUDATORY ZEMINDARS IN CENTRAL PROVINCES.

(1912) 39 I. A. 31 = 39 C. 615.

CAUSE OF ACTION.

——Identity—Test—Allegations in *plaint*.

Where the allegations and equity in the first suit are different from the allegations and equity in the second suit, the decision in the first suit is no bar to the proceeding in the second. *Contra*, where the claim is the same, although the allegations are different (154). (*Sir Barnes Peacock.*) TEKAIT DOORGA PERSAD SINGH *v.* TEKAITNI DOORGA KUNWARI. (1878) 5 I. A. 149 = 4 C. 190 (195 6) =

3 C. L. R. 31 = 3 Sar. 827 = 3 Suth. 540.

——Identity—Test—Relief prayed for—Defence set up—Nature of.

The cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the *plaint* as the cause of action, or, in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour (157-8). (*Lord Watson.*) MUSSUM-MAT CHAND KOER *v.* PARTAB SINGH.

(1888) 15 I. A. 156 = 16 C. 98 (102) = 5 Sar. 243.

——Identity—Test—Relief prayed for different—Effect. See C. P. C. OF 1908, O. 9, R. 9—CAUSE OF ACTION—IDENTITY. (1887) 15 I. A. 66 (76) = 15 C. 422 (431).

Meaning of.

——The expression "cause of action" in S. 2 of C. P. C. of 1859 cannot be taken in its literal and most restricted sense. The term is to be construed with reference rather to the substance than to the form of action (156-7). (*Sir Barnes Peacock.*) TEKAIT DOORGA PERSAD SINGH *v.* TEKAITNI DOORGA KUNWARI. (1878) 5 I. A. 149 = 4 C. 190 (198-9) = 3 C. L. R. 31 = 3 Sar. 827 = 3 Suth. 540.

——The term "cause of action" in S. 2 of Act VIII of 1859 is to be construed rather with reference to the substance than to the form of action (36). (*Sir Robert P. Collier.*) RUN BAHADUR SINGH *v.* LACHOO KOER.

(1884) 12 I. A. 23 = 11 C. 301 (308) = 4 Sar. 602

Plaint if discloses a.

——Question as to—Points to be considered in case of. See PRACTICE—PLEADINGS—DEMURRER.

Substance rather than form of action to be regarded.

——The term "cause of action" in S. 2 of C.P.C. of 1859 is to be construed with reference rather to the substance than to the form of action (218). (*Sir Robert P. Collier.*) SOORJOMONEE DAYEE *v.* SUDDANUND MOHAPATTER. (1873) Sup. I. A. 212 = 12 B. L. R. 304 = 20 W. R. 377 = 3 Sar. 285 = 2 Suth. 899.

——The expression "cause of action" in S. 2 of C.P.C. of 1859 cannot be taken in its literal and most restricted sense. It must be construed with reference rather to the substance than to the form of action (285). (*Sir Mentague E. Smith.*) KRISHNA BEHARI ROY *v.* BROJESWARI CHOWDRANEE.

(1875) 2 I. A. 283 = 1 C. 144 (146) = 25 W. R. 1 = 3 Sar. 559 = 3 Suth. 213.

CENTRAL PROVINCES GOVERNMENT WARDS ACT XVII OF 1885.

——Joint family property—Assumption of management of—Power of.

Act XVII of 1885 was obviously intended to apply to the superintendence by the Court of Wards of the family property of joint Hindu families as well as to the superintendence of separate property of Hindus and others situate within the territories for the time being administered by the Chief Commissioner of the Central Provinces (128-9). (*Sir John Edge.*) GULAB SINGH *v.* SETH GOKULDAS.

(1913) 40 I. A. 117 = 40 C. 784 (801) = 17 C. L. J. 619 =

15 Bom. L. R. 613 = 17 C. W. N. 918 =

(1913) M. W. N. 542 = 14 M. L. T. 55 = 19 I. C. 521 =

9 N. L. R. 117 = 25 M. L. J. 179.

——Joint family property—Members' undivided interest in—Assumption of management of—Power of.

Under Act XVII of 1885 it is not possible for the Court of Wards to assume the superintendence of the unpartitioned interests of some only of the members of a joint Hindu family governed by the Mitakshara law (128-9). (*Sir John Edge.*) GULAB SINGH *v.* SETH GOKULDAS.

(1913) 40 I. A. 117 = 40 C. 784 (798) = 17 C. L. J. 619 =

15 Bom. L. R. 613 = 17 C. W. N. 918 =

(1913) M. W. N. 542 = 14 M. L. T. 55 = 19 I. C. 521 =

9 N. L. R. 117 = 25 M. L. J. 179.

——S. 7 (c) (4)—Assumption of management—Manager's application for—Scope of—Entire joint family property or only manager's interest in it.

Maharaj Singh and Dulichand, who were brothers, were the senior and managing members of an undivided Hindu family consisting of themselves, their children, and their grandchildren. Being involved in debts and unable to pay, they applied to the Deputy Commissioner of Hoshangabad stating that they were unable to arrange for the liquidation of the debt or to manage the estate and if villages should be lost on account of the indebtedness "our children will have no estate left to them" and prayed that "if under S. 7 of Act XVII of 1885 you be pleased to assume the management of our Malguzari villages and to arrange for the discharge of our debt in any way possible, our estate will be saved and our children will thereby be able to maintain themselves."

Held, that in making the application Maharaj Singh and Dulichand were acting in their capacity as managing members of the joint family and not merely as two members of the family applying only in their own individual interests and were acting within their powers and authority as the managing members of the family. (*Sir John Edge.*) GULAB SINGH *v.* SETH GOKULDAS.

(1913) 40 I. A. 117 (128-9) = 40 C. 784 (797-8) =

17 C. L. J. 619 = 15 Bom. L. R. 613 = 17 C. W. N. 918 =

(1913) M. W. N. 542 = 14 M. L. T. 55 = 19 I. C. 521 =

9 N. L. R. 117 = 25 M. L. J. 179.

——Joint family property—Assumption of management of, on manager's application.

Under S. 7 (c), cl. (4) of the Act, it is competent for the Chief Commissioner to sanction the assumption by the Court of Wards of the superintendence of joint family property on the application of the managing members of the family (128-9). (*Sir John Edge.*) GULAB SINGH *v.* SETH GOKULDAS. (1913) 40 I. A. 117 = 40 C. 784 (802) =

17 C. L. J. 619 = 15 Bom. L. R. 613 = 17 C. W. N. 918 =

(1913) M. W. N. 542 = 14 M. L. T. 55 = 19 I. C. 521 =

9 N. L. R. 117 = 25 M. L. J. 179.

——S. 18—Mortgage—Sanction of—Actual mortgage or its precise terms—Sanction of—Not necessary.

It is not necessary under S. 18 of Act XVII of 1885 that the actual mortgage to be made by the Court of Wards should be submitted to the Chief Commissioner for sanction or that the Court of Wards should have sanction for the

CENTRAL PROVINCES GOVERNMENT WARDS ACT XVII OF 1885, S. 18—(Contd.)

precise terms of the mortgage provided sanction has been obtained for effecting a mortgage. (*Sir John Edge.*) **GULAB SINGH v. SETH GOKULDAS.**

(1913) 40 I. A. 117 (129) = 40 C. 784 (802-3) = 17 C. L. J. 619 = 15 Bom. L. R. 613 = 17 C. W. N. 918 = (1913) M. W. N. 542 = 14 M. L. T. 55 = 19 I. C. 521 = 9 N. L. R. 117 = 25 M. L. J. 179.

CENTRAL PROVINCES LAND REVENUE ACT XVIII OF 1881.

—S. 87—*Bar of claim under—Conditions—Hindu Law—Joint family—Joint property—Widow of deceased coparcener—Award allotting portion of property to, for her lifetime in lieu of maintenance—Effect—No partition by award—Devolution of portion on widow's death—Law applicable to.*

A claim to be barred by S. 87 of the Central Provinces Land Revenue Act (XVIII of 1881) must have been considered—that is, made or tabled as the subject of consideration and expressly decided. While the section gives to awards granted before its date the effect of judicial decrees it ascribes to them no adventitious force which would not belong to a decree pronounced in *pari materia*. To be barred by such an award a claim must have been decided by the officer making the award to be invalid or inferior to the claim of the person in whose favour it is made.

P and S formed a joint Hindu family and held a zemindari of certain villages as joint family property. After the death of S, P proposed in 1863, and the Collector ordered, *inter alia*, that 8-anna shares of the zemindari should be awarded to N, the widow of S, "for her lifetime". In pursuance of this order the name of N was recorded in the settlement record as owner for her lifetime of the 8-anna shares. On the death of N, plaintiff, the nearest heir of S, brought a suit for the recovery of the 8-anna shares held by her, alleging that the award by which N's name was put on the record had, under S. 87 of the Central Provinces Land Revenue Act, the effect of making the said shares separate estate, to which her husband's heir must succeed. The defendant, the representative in interest of P, contended, on the other hand, that the shares continued to be undivided estate, and the succession to it was governed by the ordinary Hindu law applying to undivided estates.

Held, that the award granted the 8-anna shares to N in lieu of her maintenance, and the Collector had no occasion to consider anything as to the reversion of those shares after the death of N.

The claim of P or of any one else to the reversion did not enter the question whether N should have the estate for her lifetime. The claim which is brought under consideration by the defendant was therefore not "expressly decided" "after consideration", and is not barred by S. 87. (*Lord Robertson.*) **KEWA PRASAD SUKAL v. DEO DUTT RAM SUKAL.** (1899) 27 I. A. 39 = 27 C. 515 = 4 C. W. N. 582 = 2 Bom. L. R. 558 = 7 Sar. 653.

CENTRAL PROVINCES LAND REVENUE ACT II OF 1917.

—S. 109—*Protected Thekadar—Village and house therein included in the theka—Exclusive possession of, as against other members of his joint family—Right to.*

A protected Thekadar, who has been excluded from a village and a house therein included in the theka by other members of his joint family, is, in the absence of any arrangement for the joint or divided management of the village or part thereof among the members as provided in S. 109 (1) (a) of the Act, entitled to absolute possession of the village as well as the house on the strength of his protected status certificate. (*Sir John Wallis.*) **BHAGWAN SINGH v. DARBAR SINGH.** (1828) 27 L. W. 763 = 108 I. C. 365 = A. I. R. 1928 P. C. 96 = 54 M. L. J. 576.

CENTRAL PROVINCES TENANCY ACT IX OF 1883.

—S. 42—*Mortgage including Sir land—Decree for sale in, leaving open question whether Sir land included therein—Validity—Mortgagor's right to dispute—Estoppel—Decree by consent.*

A mortgage deed executed in 1891 in respect of certain mouzahs stated that the mouzahs "together with all actual and reputed rights, easements and appurtenances to the same and all cultivated and uncultivated land, groves, abadi, Sir rents and profits such as *jalkar*, *bankar* and by whatever name the same may be styled or known have been and are hereby hypothecated by way of mortgage to the mortgagees."

In 1904 the mortgagee sued to enforce the mortgage, and in April, 1906, a decree for sale was passed, which specified as the property that was to be offered for sale property including the cultivating rights in the Sir. The mortgagors appealed on the ground that the lower court erred in holding that the mortgagees would be entitled under the terms of the mortgage to sell the cultivating rights in Sir. That question by agreement between the parties was, however, left open in the appeal, and it was also agreed between the parties that in the list of the mortgaged property on the back of the lower court's decree the words "with all actual and reputed rights as detailed in the mortgage" were to be substituted for the words "with cultivating rights in Sir." The final decree in the suit accordingly ordered the property to be sold "with all actual and reputed rights as detailed in the mortgage".

In a suit brought by the mortgagee who had himself purchased the property in execution of the mortgage decree for possession of the Sir lands, the mortgagors contended that the mortgage decree did not comply with the strict conditions mentioned in S. 42 of the Central Provinces Tenancy Act of 1883 and that their rights of cultivation had not been taken away.

Held, that the mortgagors were estopped from maintaining that the decree did not direct the sale of the rights in the Sir land.

The alteration made by agreement of parties in the mortgage decree was not intended to conclude the case in favour of the mortgagor, but to leave open to both sides the rights that would be established in the event of the mortgage deed being decided in the one way or in the other. The circumstances in which that modification was made are circumstances which prevent the mortgagors from asserting that by the result of that alteration the rights of the mortgagee under the original decree with regard to this cultivation were completely taken away. (*Lord Buckmaster.*) **GULAB SINGH v. BALLABH DAS.** (1921) 48 I. A. 220 =

48 C. 591 = (1921) M. W. N. 310 = 19 A. L. J. 361 = 34 C. L. J. 1 = 29 M. L. T. 348 = 14 L. W. 228 = 61 I. C. 769 = 40 M. L. J. 418.

CENTRAL PROVINCES TENANCY ACT XI OF 1898.

—S. 45, Sub-Ss. (1) and (6)—*Sir land—Mortgage before Act—Conciliation award after Act—Foundation of origin of rights of parties—Occupancy right of mortgagor.*

In this case the court below held that a conciliation Award of February 1905 was, for the purposes of the case, a fresh origin of the rights between the parties, and that, although it came into existence in consequence of the mortgages of 1881 and 1884, and transactions thereunder, it was both for the purpose of enforcement and for the purpose of the application of S. 45 of the Central Provinces Tenancy Act of 1898, the transaction between the parties which was the foundation of their rights. Accordingly they concluded that the transfer made or decreed by the proceedings in suit could not be said to be in pursuance of the older mortgages of 1881 and 1884 which, as documents expressly providing

CENTRAL PROVINCES TENENCY ACT XI OF 1898, S. 45 (1) (6) —(Contd.)

for the transfer of the right to occupy *Sir* land as a proprietor within sub-s. (6), would have been saved from the operation of sub-s. (1), but that in truth sub-s. (1) of S. 45 must be applied, and that, therefore, in spite of the terms of the award, which in virtue of the agreement of reference became the agreement of the parties, the mortgagor could not so transfer his right to occupy *Sir* land as to divest himself of his right as an occupancy tenant under the Act.

While of opinion that the question of construction was not incapable of being argued and even decided either way, their Lordships saw no reason to differ from the decision below. (*Lord Sumner.*) **NARAYAN GANESH GHATATE v. BALIRAM.**

(1918) 45 I.A. 179 = 46 C. 76 = 14 N.L.R. 165 = 21 Bom. L.R. 53 = 23 C. W. N. 297 = 28 C.L.J. 447 = 48 I.C. 141 = (1918) M.W. N. 685.

CERTIORARI—WRIT OF.

—Grant of—English rule—Other suitable remedy open—Effect.

Certiorari according to the English rule is only to be granted when no other suitable remedy exists. (*Lord Phillimore.*) **BEASANT v. ADVOCATE-GENERAL OF MADRAS.**

(1919) 46 I. A. 176 = 43 M. 146 (160) = 23 C.W.N. 986 = 17 A.L.J. 925 = 26 M.L.T. 408 = 10 L.W. 451 = 21 Bom. L.R. 867 = (1919) M.W.N. 555 = 20 Cr. L. J. 593 = 52 I.C. 209 = 37 M.L.J. 139.

—Grant of—High Courts—Jurisdiction of—C. P. C. of 1908, S. 115—Cr. P. C., S. 435—Effect.

The three High Courts of Calcutta, Madras and Bombay possess the power of issuing the writ of certiorari.

Quere, whether any of the other High Courts which are by definition High Courts for the purposes of the Indian Press Act of 1910 have the power to issue writs of certiorari.

Supposing that this power once existed, has it been taken away by the two Codes of Procedure? No doubt these Codes provide for most cases a much more convenient remedy. But their Lordships are not disposed to think that the provisions of S. 435, Cr. P. C. and S. 115 of C. P. C. of 1908 are exhaustive. Cases, though rare ones, may be imagined which may not fall under either of those sections. For such cases, the powers of the High Courts, which have inherited the ordinary or extraordinary jurisdiction of the Supreme Court to issue writs of certiorari, cannot be said to have been taken away. (*Lord Phillimore.*) **BEASANT v. ADVOCATE-GENERAL OF MADRAS.**

(1919) 46 I.A. 176 = 43 M. 146 (159) = 23 C.W.N. 986 = 17 A.L.J. 925 = 26 M. L.T. 408 = 10 L.W. 451 = 21 Bom. L.R. 867 = (1919) M.W.N. 555 = 20 Cr. L.J. 593 = 52 I.C. 209 = 37 M.L.J. 139.

—Inferior court—Jurisdiction—Facts necessary to give—Statement of, in conviction regular on its face—Effect.

A conviction, regular on its face, is conclusive of all the facts stated in it, not excepting those necessary to give the jurisdiction, and it is from the facts stated in the conviction that the facts of the case are to be collected (179). (*Lord Sumner.*) **KING v. NAT BELL LIQUORS, LTD.**

(1922) 31 M.L.T. 163 (P. C.).

—Inferior court—Jurisdiction—Usurpation of—Conviction without evidence if an—Jurisdiction to entertain charge admitted.

It has been said that a justice who convicts without evidence is acting without jurisdiction to do so. Accordingly, want of essential evidence, if ascertained somehow, is on the same footing as want of qualification in the magistrate, and goes to the question of his right to enter on the case at all. Want of evidence on which to convict is the same as want of jurisdiction to take evidence at all. This, clearly, is erroneous. A justice who convicts without evidence is

CERTIORARI—WRIT OF—(Contd.)

doing something that he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has and not a usurpation of a jurisdiction, which he has not (178-9). (*Lord Sumner.*) **KING v. NAT BELL LIQUORS, LTD.**

(1922) 31 M. L. T. 163 (P. C.).

—Jurisdictional facts—Determination of—Inferior and superior courts—Powers of.

There is a distinction between facts essential to the existence of jurisdiction in the inferior court, which it is within the competence of that court to inquire into and to determine, and facts essential thereto which are only within the competence of the superior court. As Lord Eshter points out, if a Statute says that a tribunal shall have jurisdiction to inquire into the existence of these facts as well as into the questions to be heard, but while its decision is final, if jurisdiction is established, the decision that its jurisdiction is established is open to examination on certiorari by a superior court. On the other hand, the fact on which the presence or absence of jurisdiction turns may itself be one which can only be determined as part of the general inquiry into the charge which is being heard (183). (*Lord Sumner.*) **KING v. NAT BELL LIQUORS, LTD.**

(1922) 31 M. L. T. 163 (P. C.).

—Law of, in England, before and after 1848—Summary Jurisdiction Act of 1848—Effect of.

The learned judges appear to have thought that under law prior to the Summary Jurisdiction Act of 1848 the superior court on certiorari was entitled to examine generally into the evidence on which the conviction was pronounced on the pretext of inquiring whether the conviction was within the jurisdiction of the justices, and that the said Act has effected a change in the law in that respect. The learned judges have erred in so thinking (184).

The Summary Jurisdiction Act did not justify what was previously error; it did not enlarge the inferior jurisdiction or alter the law to be enforced either in the inferior or the superior court; it simply cut down the contents of the record and so did away with a host of discussions as to error apparent on its face. The superior court acquired no new and more extensive right to admit fresh evidence by affidavit or to contradict the record of the conviction by matter *dehors* its contents. When it would previously have been confined to matter appearing on the face of the record, it continued to be so confined but now that very little appeared on the face of the record, the grounds for quashing on certiorari came in practice to be grounds relating to competence and disqualification. It follows that there is not one law of certiorari before 1848 and another after it (185-6). (*Lord Sumner.*) **KING v. NAT BELL LIQUORS, LTD.**

(1922) 31 M. L. T. 163 (P. C.).

—Nature of—Matter of procedure.

Certiorari and prohibition are matters of procedure (191). (*Lord Sumner.*) **KING v. NAT BELL LIQUORS, LTD.**

(1922) 31 M. L. T. 163 (P. C.).

—Superior court—Evidence before inferior court—Examination of—Jurisdiction—Civil and criminal matters—Distinction.

There is no reason to suppose that, if there were any difference in the rules as to the examination of the evidence below on certiorari before a superior court, it would be a difference in favour of examining it in criminal matters, when it would not be examined in civil matters, but, truly speaking, the whole theory of certiorari shows that no such difference exists. The object is to examine the proceedings in the inferior court to see whether its order has been made within its jurisdiction. If that is the whole object, there can be no difference for this purpose between civil orders and criminal

CERTIORARI—WRIT OF—(Contd.)

convictions, except in so far as differences in the form of the record of the inferior court's determination or in the Statute law relating to the matter may give an opportunity for detecting error on the record in one case, which in another would not have been apparent to the superior court, and, therefore, would not have been available as a reason for quashing the proceedings (181). (*Lord Sumner.*) **KING v. NAT BELL LIQUORS, LTD.**

(1922) 31 M. L. T. 163 (P. C.).

—*Superior Court—Jurisdiction of—Nature and limits of—Inferior Court—Acts done within jurisdiction of—Interference with—Power of.*

The jurisdiction of the superior court is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would itself, in turn, transgress the limits within which its own jurisdiction of supervision, not a review, is confined. That supervision goes to two points. One is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise (182). (*Lord Sumner.*) **KING v. NAT BELL LIQUORS, LTD.**

(1922) 31 M. L. T. 163 (P. C.).

—*Superior Court—Matter not before inferior court—Documents returned by inferior court along with record—Jurisdiction to consider.*

Apart from questions of jurisdiction, a party cannot state further matters to the superior court, either by new affidavits or by producing anything that is not on or part of the record. So strictly has this been acted on, that documents returned by the inferior court along with its record, for example, the information, has been excluded by the superior court from its consideration (182). (*Lord Sumner.*) **KING v. NAT BELL LIQUORS, LTD.**

(1922) 31 M. L. T. 163 (P. C.).

CESSION.

—*Territory acquired by—Inhabitants of—Relationship to new sovereign of. See ALIENS—CONQUERED OR CEDED TERRITORY.* (1836) 1 M. I. A. 175.

CESSION OF TERRITORY.

—*Agreement between new sovereign and inhabitant of ceded territory—Lease for term—Renewal at expiry of term—Agreement conferring right of, on lessee.*

The plaintiff was the sole surviving descendant of the member of the Kasbati class who was in possession of village C in the district of Ahmedabad at the date of the cession of the district by the Gaekwar to the British Government. In an action for an injunction brought by the plaintiff against the Secretary of State for India, the case finally set up by the plaintiff was that though her ancestors took from time to time several leases of the village from the Bombay Government, each for a term of years, they were not mere lessees bound to give up to their lessors at the end of each term the possession of the demised village, but were legally entitled, as each lease terminated, to have a new lease granted to the last lessee or his representative.

It appeared that from the time of the cession the plaintiff and his ancestors were holding under pattas purporting to be only for terms of seven years, which contained no clause for renewal, while the very first of them contained a clause requiring them to hand over the estate on the expiration of the term and that the Government never recognised such right. *Held*, that the plaintiff had failed to discharge the onus which lay upon her of proving an agreement express or implied with the Government imposing on them a legal obligation to renew for all time if required and conferring on the lessee the correlative legal right to demand that renewal.

CESSION OF TERRITORY—(Contd.)

(*Lord Atkinson.*) **SECRETARY OF STATE FOR INDIA v. BAI RAJBAL.** (1915) 42 I. A. 229 = 39 B. 625 = 19 C.W.N. 1087 = 18 M.L.T. 179 = 17 Bom. L. R. 730 = 13 A. L. J. 953 = 2 L. W. 731 = (1915) M. W. N. 563 = 30 I. C. 303 = 29 M. L. J. 242.

British Territory—Cession to Native State of.

—*Ante-cession rights of inhabitants of territory ceded—Agreement by new sovereign to continue—Onus of proof of.*

The burden of proving that, after a cession of territory to a new sovereign, the new sovereign consented to the inhabitants continuing to enjoy their ante-cession rights under his (new sovereign's) own regime is on the inhabitants (239).

(*Lord Atkinson.*) **SECRETARY OF STATE FOR INDIA v. BAI RAJBAL.** (1915) 42 I. A. 229 = 39 B. 625 (648) = 19 C. W. N. 1087 = 18 M. L. T. 179 = 17 Bom. L.R. 730 = 13 A. L. J. 953 = 2 L.W. 731 = (1915) M. W. N. 563 = 30 I. C. 303 = 29 M.L.J. 242.

—*British Indian Courts—Territory within the jurisdiction of—Cession of, to a foreign power in time of peace—Power of British Crown as regards—Imperial Parliament—Concurrence of—Necessity.*

The High Court held that it was beyond the power of the British Crown, without the concurrence of the Imperial Parliament, to make any cession of territory within the jurisdiction of any of the British Courts in India, in time of peace, to a foreign power.

Their Lordships entertained such grave doubts (to say no more) of the soundness of the general and abstract doctrine laid down by the High Court as to be unable to advise Her Majesty to affirm its decision on that ground (143-4). (*Lord Selborne.*) **DAMODHAR GORDHAN v. DEORAM KANJI.**

(1876) 3 I.A. 102 = 1 A.C. 322 = 1 B. 367 (451-2) = 25 W.R. 261 = 3 Sar. 543.

—*Act not amounting to—Secretary of State for India—Opinion of, to the contrary—Effect. See CESSION OF TERRITORY—BRITISH TERRITORY—CESSION TO NATIVE STATE—TRANSFER OF TERRITORY FROM ORDINARY BRITISH JURISDICTION, ETC.* (1876) 3 I.A. 102 (150) = 1 B. 367 (458-9).

—*Governor-General in Council—Cession by—Legality of—Inquiry into—Notification in Gazette of such cession—Effect of. See EVIDENCE ACT, S. 113—CESSION OF BRITISH TERRITORY TO NATIVE STATE.*

(1876) 3 I.A. 102 (152-3) = 1 B. 367 (461).

—*Notifications in Bombay Government Gazette and in Indian Gazette effecting—Sufficiency of.*

Held, that a notification in the Bombay Government Gazette (issued in obedience to the directions of the Indian Government), which merely declared, that "in accordance with the convention, etc." (*i.e.*, with the prior agreement between the British Government and the Thakoor of Bhow-nugger), certain villages were, "from and after the 1st of February, 1866, removed from the jurisdiction of the Revenue, Civil and Criminal Courts of the Bombay Presidency, and transferred to the supervision of the Political Agency in Kathiawar, on the same conditions as to jurisdiction as the villages of the talooka of the Thakoor of Bhow-nugger heretofore in that province" was insufficient for the purpose of effecting a cession of British territory to a native state (151).

Held, further that a subsequent notification, which appeared in the Indian Gazette, to the effect that the same villages "were on the 1st of February, 1866, ceded to the State of Bhownugger", also left the case substantially where it stood before (151).

The nature and effect of the act, so described as a "cession to the State of Bhownugger," remains (as it was

CESSION OF TERRITORY—(Contd.)

British Territory—Cession to Native State of
—(Contd.)

before) a proper subject for judicial inquiry (151). (*Lord Selborne.*) *DAMODHAR GORDHAN v. DEORAM KANJI.*

(1876) 3 I.A. 102 = 1 A.C. 322 = 1 B. 367 (460) =
25 W.R. 261 = 3 Sar. 543.

—Proof of—Equivocal acts—Inference from—Propriety.

A cession of territory within the jurisdiction of any of the British Courts in India to a foreign power would be a transaction too important in its consequences, both to Great Britain and to subjects of the British Crown, to be established by any uncertain inference from equivocal acts (150). (*Lord Selborne.*) *DAMODHAR GORDHAN v. DEORAM KANJI.*

(1876) 3 I.A. 102 = 1 A.C. 322 = 1 B. 367 (458-9) =
25 W.R. 261 = 3 Sar. 543.

—Property situate within such territory—Jurisdiction of British Indian Courts over—Effect on. See MORTGAGE—SUIT UPON—JURISDICTION OF BRITISH INDIAN COURTS IN. (1876) 3 I.A. 102 (153) = 1 B. 367 (461).

—Transfer of territory from ordinary British jurisdiction to supervision, laws and Regulations of Kathiawar Political Agent if a—Secretary of State's opinion that it is—Effect.

The opinion of the Secretary of State for India, even if it could be proved to be well founded, would still not have the effect of converting a transfer of certain British territories from ordinary British jurisdiction "to the supervision, laws, and regulations of the Kathiawar Political Agency," into a cession of British territory to a native state (150). (*Lord Selborne.*) *DAMODHAR GORDHAN v. DEORAM KANJI.*

(1876) 3 I.A. 102 = 1 A.C. 322 = 1 B. 367 (458-9) =
25 W.R. 261 = 3 Sar. 543.

—Foreign state—Cession to British Government by—Government's right in property ceded—Grant of lands in such territory—Obari tenure.

The property in dispute was the riasat or estate Gursarai consisting of sixty villages and some other particulars. It was part of Jalaun, one of the subordinate Mahratta states or chieftainships within the large territory of Bundelkhand, the sovereignty of which passed to the company by treaties with the Peishwa. The chieftainship was continued to the existing chief, called the Rao, which became extinct in the year 1840. The estate of Gursarai was managed for the chief by D, the head of a noble family, till his death in 1831. He had two sons, B and K. B, having no issue, adopted his nephew A, one of K's sons; and he died about the time of the change of dominion.

K was admitted by the British Government to engage for the revenue, which he paid for 40 years (1840-1880), being for the whole of that time in exclusive and undisturbed possession of the estate. It was decided that no village survey should be made of his estate. No record of rights was prepared for the 61 villages, which were always exempted from all inquiries of the settlement officer. The Government, instead of bringing the estate to a direct settlement with the Collector at full jama, allowed K to pay an obari or privileged jama of Rs. 22,500 annually, the relations between him and the British Government being more fully determined by the correspondence between them.

The plaintiffs claimed that the estate was the absolute self-acquired estate of their ancestor K, since his brother B had died before the annexation of Jalaun and had obtained no title under the British Government. The defendant A, as natural son to K but adopted by B, claimed to be entitled to the whole as son to B, the elder brother; otherwise that his title had been derived from the Government and Parliament, or had been conferred by K in his lifetime,

CESSION OF TERRITORY—(Contd.)

British Territory—Cession to Native State of
—(Contd.)

Held, that proprietary right in the estate could not be ascribed to K as self-acquired by adverse possession or otherwise, but was derivable from the British Government, which had full discretion not merely over the jama chargeable, but over the destination of proprietary right. (*Lord Hobhouse.*) *SRI MAHANT GOVIND RAO v. SITA RAM KESHO.*

(1898) 25 I.A. 195 = 21 A. 53 = 2 C. W.N. 681 =
7 Sar. 370.

Inhabitants of Ceded Territory.

—Ante-cession rights of—Adjudication as upon—Municipal Courts—Jurisdiction—Proclamation at time of cession—Statement in, that existing rights will be respected—Effect. See CESSION OF TERRITORY—PROCLAMATION MADE AT. (1924) 51 I.A. 357 (367) = 48 B. 613.
—Relationship to new sovereign of. See ALIENS—CONQUERED OR CEDED TERRITORY.

(1836) 1 M. I. A. 175,

—Rights of, enforceable against new sovereign—Basis of—Ante-cession rights—Enforceability of.

After the cession of territory to a new sovereign, the relation in which its inhabitants stood to the old sovereigns before such cession, and the legal rights they enjoyed under them, are, save in one respect, entirely irrelevant to the decision as to the legal rights enforceable against the new sovereign. They (the inhabitants) cannot carry in under the new regime the legal rights, if any, which they might have enjoyed under the old. The only legal enforceable rights they could have as against their new sovereign are those, and only those, which that new sovereign, by agreement expressed or implied, or by legislation, chooses to confer upon them. Of course this implied agreement might be proved by circumstantial evidence, such as the mode of dealing with them which the new sovereign adopted, his recognition of their old rights, and express or implied election to respect them and be bound by them, and it is only for the purpose of determining whether and to what extent the new sovereign has recognised these ante-cession rights of the inhabitants, and has elected or agreed to be bound by them, that the consideration of the existence, nature, or extent of these rights becomes a relevant subject for inquiry (237). After the cession of territory to a new sovereign, when it comes to be a question of legal right, the contract with the new sovereign is conclusive and the rights against the old sovereign avail nothing (249). (*Lord Atkinson.*) *SECRETARY OF STATE FOR INDIA v. BAI RAJBAL.*

(1915) 42 I.A. 229 = 39 B. 625 (646-7, 661) =
19 C. W. N. 1087 = 18 M. L. T. 179 =

17 Bom. L. R. 730 = 13 A. L. J. 953 = 2 L.W. 731 =
(1915) M. W. N. 563 = 30 I.C. 303 = 29 M.L.J. 242.

—Suit against new sovereign by, for declaration of their proprietary rights in lands within ceded territory—Plea in, of "Act of State," by new sovereign—Specific plea—Necessity.

Suit lands were situated in the Panch Mahals, and, prior to 1860, were in the domain of Scindia of Gwalior. In that year Scindia ceded that territory to the British Government by a treaty. The appellants sued the Indian Government for a declaration that they were proprietors of the suit lands and that they were not bound to accept a lease of the same in the terms offered to them in 1907. In their plaint they said: "After the advent of the British rule the ancestors of the plaintiff used to be treated as proprietors of the estates in the same way as the other taluqdars in the Panch Mahals."

Held, that in such a case no plea specifically using the words "act of State" was required, and that the High Court was justified in dismissing the suits on the ground

CESSION OF TERRITORY—(Contd.)**Inhabitants of Ceded Territory—(Contd.)**

that the Government had not since the cession recognised any proprietary right in the appellants.

If there existed a right either admitted or that could be established by decree of Court, and that right it was alleged was taken by an act of State, it would be necessary so specifically to plead. But where, as in the case, cession is admitted, the appellants become petitioners and have the onus cast on them of showing the acts of acknowledgment, which give them the right they wish to be declared. (*Lord Dunedin.*) **VAJESINGJI JORAVARSINGJI v. SECRETARY OF STATE FOR INDIA IN COUNCIL.** 48 B. 613 =

(1924) 51 I. A. 357 (361) = (1924) M. W. N. 694 = 22 A. L. J. 951 = 26 Bom. L. R. 1143 = 40 C. L. J. 473 = 21 L. W. 28 = 82 I. C. 779 = A. I. R. 1924 P. C. 216 = 47 M. L. J. 574.

—*Suit against new sovereign by, for declaration of their proprietary rights in lands within ceded territory—Question for decision in—Points to be considered.*

In a suit by the inhabitants of a territory which had been by treaty ceded by Scindia of Gwalior to the British Government for a declaration of their proprietary right in lands within the ceded territory, the question for the consideration of the Court is whether the British Government has conferred or acknowledged as existing the proprietary right claimed by the plaintiffs. The tenure under which the plaintiffs held prior to cession has no bearing on the question. Further, what is of moment is what the Government did after investigation of the plaintiff's claims, i.e., whether they recognised them or not, and not what they thought at investigation. (*Lord Dunedin.*) **VAJESINGJI JORAVARSINGJI v. SECRETARY OF STATE FOR INDIA.** (1924) 51 I. A. 357 (362) = 48 B. 613 =

82 I. C. 779 = (1924) M. W. N. 694 = 22 A. L. J. 951 = 26 Bom. L. R. 1143 = 40 C. L. J. 473 = 21 L. W. 28 = A. I. R. 1924 P. C. 216 = 47 M. L. J. 574.

—*Treaties effecting cession—Rights recognised by—Enforcement of—Municipal Courts—Jurisdiction.*

Even if in a treaty of cession it is stipulated that certain inhabitants of the ceded territory should enjoy certain rights, that does not give a title to those inhabitants to enforce those stipulations in the municipal Courts. The right to enforce remains only with the high contracting parties. General declarations of the new sovereign, if they give a right of themselves, well and good; but such declarations can never have the effect of making the inhabitants of the ceded territory, so to speak, a party to the treaty by which the cession was made with a right to enforce the conditions of the same in a municipal Court. (*Lord Dunedin.*) **VAJESINGJI JORAVARSINGJI v. SECRETARY OF STATE FOR INDIA IN COUNCIL.**

(1924) 51 I. A. 357 (360-1) = 48 B. 613 = 82 I. C. 779 = (1924) M. W. N. 694 = 22 A. L. J. 951 = 26 Bom. L. R. 1143 = 40 C. L. J. 473 = 21 L. W. 28 = A. I. R. 1924 P. C. 216 = 47 M. L. J. 574.

Order amounting to.

—*Transfer of British territory from regulation province to extraordinary jurisdiction—Order effecting—Distinction.*

An Article of agreement between the Thakoor of Bhownugger and the British Government was in these terms: Upon the above conditions Her Majesty's Government agree as follows:—Government concedes, as a favour, and not as a right, the transfer of Bhownugger itself, with Wudwa, Sehore and ten subordinate villages, from the district of Gogo, subject to the Regulations, to the Kathiawar Political Agency.

Held, that the language of the Article was not the language of cession (149).

CESSION OF TERRITORY—(Contd.)**Order amounting to—(Contd.)**

It is *prima facie* nothing more than an engagement for the transfer of the places mentioned which were then beyond question, British territory, from a Regulation province to an extraordinary jurisdiction (149). (*Lord Selbourne.*) **DAMODHAR GORDHAN v. DEORAM KANJI.**

(1876) 3 I. A. 102 = 1 A. C. 322 = 1 B. 367 (458) = 25 W. R. 261 = 3 Sar. 543

Proclamation made at.

—*Statement in, that existing rights of inhabitants will be respected—Meaning and effect of—Rights existing before cession—Adjudication as upon—Municipal Courts—Jurisdiction.*

The meaning of a general statement in a proclamation made at the cession of a territory that existing rights of the inhabitants will be respected by the new Government is necessarily that the new Government will recognize such rights as are on investigation determined by the Government officials. To suppose that by such general statements in a proclamation the new Government renounced their right to acknowledge what they thought right and conferred on a municipal Court the right to adjudicate as upon rights which existed before cession, is, in their Lordships' opinion, to misapprehend the law on the point. (*Lord Dunedin.*) **VAJESINGJI JORAVARSINGJI v. SECRETARY OF STATE FOR INDIA.** (1924) 51 I. A. 357 (367) = 48 B. 613 =

A. I. R. 1924 P. C. 216 = (1924) M. W. N. 694 = 22 A. L. J. 951 = 26 Bom. L. R. 1143 = 40 C. L. J. 473 = 21 L. W. 28 = 82 I. C. 779 = 47 M. L. J. 574

CEYLON CIVIL PROCEDURE CODE OF 1889.

—*S. 34—Award—Sum found due under—Pro-notes executed for—Suit upon—Dismissal of—Fresh suit for amount due under award—Maintainability.*

An award found a sum to be due by the appellants to the respondent and provided for the execution of two promissory notes by the appellants in favour of the respondent for the amount so found due. Two such notes were executed by the appellants to the respondent on the same day. A suit brought by the respondent on the said notes was dismissed on the ground that they had been materially altered and were accordingly not enforceable. Thereupon the respondent instituted a fresh suit for the amount found due under the award, representing the amount of the promissory notes.

Held, that the suit was not barred under S. 34 of the Ceylon Civil Procedure Code, 1889 (148).

A claim on the promissory notes and a claim found due under the award and for which payment was provided by the agreement are not the same cause of action, but are in truth inconsistent and mutually exclusive causes of action. So long as the notes were outstanding there was no right of action otherwise than upon the notes. It is therefore impossible to hold that the claim for the amount due was the same cause of action as the claim upon the notes and ought to have been included in the prior action (148). (*Lord Moulton.*) **PAYANA RUNA SAMINATHAN v. PANA LANA PALANIAPPA.** (1913) 41 I. A. 142 = 18 C. W. N. 617 = 26 I. C. 228.

—*Object and meaning of.*

S. 34 of the Ceylon Civil Procedure Code is directed to securing the exhaustion of the relief in respect of a cause of action, and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transactions. The first part of the clause makes it incumbent on the plaintiff to include the whole of his claim in his action. The second portion makes it incumbent on him to ask for the whole of his remedies. The final paragraph is not intended to be an illustration of the foregoing provisions, but a substantive enactment, making an obligation and a collateral security

CEYLON CIVIL PROCEDURE CODE OF 1889— (Contd.)

for its performance (which would otherwise be two independent causes of action) one cause of action for the purposes of the section (148). (*Lord Moulton.*) *PAYANA RUNA SAMINATHAN v. PANA IANA PALANIAPPA.*

(1913) 41 I.A. 142 = 18 C.W.N. 617 = 26 I. C. 228.

CEYLON EVIDENCE ORDINANCE.

—*Scope and effect of—English law if swept away by Ordinance.*

The Evidence Ordinance in force in Ceylon, which is merely the application to Ceylon of the Indian Evidence Act, has not swept away the English law relating to hearsay. (*Lord Darling.*) *VRASAPILLAI GABRIEL v. ELIATAMBY.*

(1925) 52 I. A. 372 (377) =
A. I. R. 1925 P. C. 229.

—S. 9—*Marriage—Dissolution of, on ground of wife's adultery—Suit by husband for—Wife's letters written to co-respondent but in fact delivered to husband—Admissibility against co-respondent of.*

In a suit by the 1st respondent for dissolution of his marriage with the 2nd respondent on the ground of her adultery with the appellant and for damages, letters written by the 2nd respondent and purporting to be addressed to the appellant but in fact delivered to the 1st respondent were filed by the 1st respondent and were held to be admissible in evidence against the appellant under S. 9 of the Ceylon Evidence Ordinance.

Held, that the letters were not admissible in evidence under S. 9 of the Ordinance in question.

It is precisely because the *ex parte* statement of one person made in the absence of the other whom it concerns does not show the relation of the parties, especially in regard to a third party (but merely amounts to a version by one of them probably false), that the law of England excludes such statements as hearsay—as not being evidence. (*Lord Darling.*) *VRASAPILLAI GABRIEL v. ELIATAMBY.*

(1925) 52 I. A. 372 (377) = A. I. R. 1925 P. C. 229.

CEYLON LAW.

—*Deed depriving lady of her status and legal rights of succession—Validity against her of—Deed in English—Lady not knowing English.*

When a deed, which deprived a lady of her status and her legal rights of succession, was written in English, and was signed by the lady who did not know English, and there was no evidence that she executed the deed with full knowledge of its effect, *held*, that it was no bar to her rights under the law. (*Lord Shaw.*) *DINOHAMY v. BALAHAMY.*

(1927) 27 L. W. 678 = 47 C. L. J. 412 =
4 O.W.N. 759 = 104 I. C. 327 = A.I.R. 1927 P.C. 185 =
54 M.L.J. 388.

—*Deed involving extinction of rights and degradation of status of one party—Validity—Party not protected by notary—Effect.*

The most careful examination of the conduct of a notary must be made in a case in which the outstanding feature was that being instructed by one party to a transaction involving not only the extinction and alteration of patrimonial rights, but also a degrading alteration of the status and moral life of others who were to be made parties to the deed, he never suggested that it was a case for another notary being employed to protect the interests of the parties so affected. It would require the very strongest evidence in such circumstances to prevent the parties affected from being protected against such a transaction by a Court of Law. (*Lord Shaw.*) *DINOHAMY v. BALAHAMY.*

(1927) 27 L. W. 678 = 47 C. L. J. 412 = 4 O.W.N. 759 =
104 I. C. 327 = A. I. R. 1927 P. C. 185 =
54 M. L. J. 388.

CEYLON LAW—(Contd.)

—*Marriage—Presumption—Proof—Quantum—Living together as man and wife—Conduct attributable only to valid marriage—Evidence of—Effect.*

According to the Roman Dutch Law there is a presumption in favour of marriage rather than of concubinage; according to the law of Ceylon, where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage and not in a state of concubinage.

D, a Singhalese, whose first wife had died, married one B, with the procession, the giving of gifts and other ceremonies familiar to the law of Ceylon. The marriage was not, however, registered. The parties lived together for 20 years in the same house, and eight children were born to them. The husband during his life recognised, by affectionate provisions, his wife and children. The evidence of the Registrar of the District showed that for a long course of years the parties were recognised as married citizens, and even the family functions and ceremonies, such as, in particular, the reception of the relations and other guests in the family house by D and B as host and hostess—all such functions were conducted on the footing alone that they were man and wife. No evidence whatsoever was afforded of repudiation of the relation by husband or wife or anybody.

Held, that there was unanswerable and conclusive evidence of a legal marriage between D and B and that the Court below was right in coming to the conclusion that they were legally married. (*Lord Shaw.*) *DINOHAMY v. BALAHAMY.*

(1927) 27 L. W. 678 = 47 C. L. J. 412 =
4 O. W. N. 759 = 104 I. C. 327 =
A. I. R. 1927 P. C. 185 = 54 M. L. J. 388.

CHAKERAN.

—*Meaning of.*

Chakeran means "service". (*Mr. Amcer Ali.*) *SECRETARY OF STATE FOR INDIA v. KIRTIBAS BHUPATI HARICHANDRAN MAHAPATRA.* (1914) 42 I.A. 30 (35) =
42 C. 710 (721) = 17 M. L. T. 1 = 2 L. W. 2 =
17 Bom. L. R. 32 = 19 C. W. N. 95 = 26 C. L. J. 31 =
26 I. C. 676 = 28 M. L. J. 457.

CHAKERAN LANDS.

—*Classes into which, divided by Permanent Settlement—Modes in which classes dealt with.*

The effect of the Decennial Settlement was to divide the Chakeran or service lands into two classes:—

First. Tannadhary lands, which, by Bengal Reg. I of 1793, S. 8, cl. (4), were made resumable by the Government, the Government taking upon itself the maintenance of the general police force and relieving the zemindar from that expense.

Second. All other Chakeran lands, which by Bengal Reg. VIII of 1793, S. 41, were, whether held by public officers or private servants, in lieu of wages, to be annexed to the Malguzary lands, and declared responsible for the public revenue assessed on the zemindars' independent talooks or other estates, in which they were included in common with all other Malguzary lands therein (41). (*Lord Kingsdown.*) *JOY KISHEN MOOKERJEE v. COLLECTOR OF EAST BURDWAN.* (1864) 10 M. I. A. 16 =

1 W. R. P. C. 26 = 1 Suth. 542 = 2 Sar. 54.

—The effect of the permanent settlement is to divide Chakeran lands into two classes, namely, (1) Tannadhari Chakeran lands, that is, lands held on service tenure by Police Officials, and (2) all other Chakeran lands. As to Chakeran lands of the former class, they were by Bengal Reg. I, S. 8, cl. (4), made resumable by Government, the Government relieving the Zemindar from the duty of maintaining a Police establishment. These Tannadhari Chakeran lands were, in fact, shortly afterwards resumed and became

CHAKERAN LANDS—(Contd.)

Government lands, the title of the zemindar being extinguished by such resumption. As to all other Chakeran lands, whether held by public officers or private servants in lieu of wages, they are dealt with by Bengal Reg. VIII, S. 41. (*Lord Parker.*) *RANJIT SINGH v. KALI DAS DEBI.*

(1917) 44 I. A. 117 = 44 C. 841 = 2 Pat. L. W. 1 = 21 C. W. N. 609 = 19 Bom. L. R. 462 = 15 A. L. J. 390 = 22 M. L. T. 489 = (1917) M. W. N. 459 = 6 L. W. 101 = 25 C. L. J. 499 = 40 I. C. 981 = 32 M. L. J. 565.

—Meaning of.

Amongst the lands thus granted to the zemindars were often included lands which had been appropriated to the payment and support of public officers of the zemindaries, or villages included in them. These lands were called *Chakeran* lands; and it appears that under the ancient system such lands were usually exempted from assessment in favour of the zemindar, though they had no legal title to exemption (108-9). (*Mr. Pemberton Leigh.*) *RAJA LEELANUND SINGH BAHADOOR v. GOVERNMENT OF BENGAL.* (1855) 6 M. I. A. 101 = 1 Suth. 248 = 4 W. R. 77 (P.C.) = 1 Sar. 505.

—Meaning of—Chowkeedars—Position and rights of.

It appears that these zemindars were entrusted, previously to the British possession of India, as well with the defence of the territory against foreign enemies, as with the administration of law and the maintenance of peace and order within their district; and for this purpose they were accustomed to employ not only armed retainers to guard against hostile inroads, but also a large force of Tannadhars, or a General Police force, and other officers in great numbers, under the name of *Chowkeedars*, *Pykes*, and other descriptions, as well for the maintenance of order in particular villages and districts as for the protection of the property of the zemindar, the collection of his revenue, and other services personal to the zemindar. All these different officers were at that time the servants of the Zemindar, appointed by him and removable by him, and they were remunerated in many cases by the enjoyment of land rent free or at a low rent in consideration of their services. The lands so enjoyed were called *Chakeran* or service lands (40-1) (*Lord Kingsdown.*) *JOYKISHEN MOOKERJEE v. COLLECTOR OF EAST BURDWAN.* (1864) 10 M. I. A. 16 = 1 W. R. P. C. 26 = 1 Suth. 542 = 2 Sar. 54.

—Meaning of—Chowkidari Chakeran lands—Tannadhari lands or Tannadhari chakeran lands—Distinction.

Chakeran lands are lands held by service tenure. Generically the term includes all lands so held, whether by Police Officials, Chowkidars, or persons whose only duties are personal to the zemindar. The expression "Tannadhari lands or Tannadhari Chakeran lands" means lands held on service tenure by Tannadhars or Police Officials. The expression "Chowkidari Chakeran lands" means lands held on service tenure by Chowkidars, or village watchmen. (*Lord Parker.*) *RANJIT SINGH v. KALI DAS DEBI.*

(1917) 44 I. A. 117 = 44 C. 841 = 2 Pat. L. W. 1 = 21 C. W. N. 609 = 19 Bom. L. R. 462 = 15 A. L. J. 390 = 22 M. L. T. 489 = (1917) M. W. N. 459 = 6 L. W. 101 = 25 C. L. J. 499 = 40 I. C. 981 = 32 M. L. J. 565.

—Nature and history of.

The history of chowkidari grants is set out in 10 M. I. A. 16, and the nature of the lands held by chowkidars in lieu of wages is also explained there (35-6). (*Mr. Ameer Ali.*) *SECRETARY OF STATE FOR INDIA v. KIRTIBAS BHUPATI HARICHANDAN MAHAPATRA.* (1914) 42 I. A. 30 = 42 C. 710 (721) = 17 M. L. T. 1 = 2 L. W. 2 = 17 Bom. L. R. 32 = 19 C. W. N. 95 = 26 C. L. J. 31 = 26 I. C. 676 = 28 M. L. J. 457.

CHAKERAN LANDS—(Contd.)

—Permanent settlement—Treatment of lands as chakeran lands in—Condition—Effect.

On the other hand, it seems to follow that if on the occasion of the settlement (of 1802), revenue was assessed on these particular lands as between the Government and the Zemindar, they must, since they produced no money-rent payable to the Zemindar, have been treated as in the nature of *chakeran* lands within the meaning of S. 41 of Regulation VIII of 1793, upon the notion that the services to be performed by the tenant were equivalent to rent payable to the Zemindar (457-8). (*Sir James Colville.*) *FORBES v. MEER MAHOMED TUQUEE.* (1870) 13 M. I. A. 438 = 14 W. R. P. C. 28 = 5 B. L. R. 529 = 2 Suth. 358 = 2 Sar. 588.

—Resumption of—Zemindar's right of—Lands annexed to Malguzary lands by Reg. VIII of 1793.

In the case of chakeran lands, which by Bengal Reg. VIII of 1793, S. 41, were, whether held by public officers or private servants, in lieu of wages, to be annexed to the Malguzary lands, and declared responsible for the public revenue assessed on the Zemindar's independent talooks or other estates, in which they were included in common with all other Malguzary lands therein, such lands, if resumable at all, are resumable by the Zemindar or other person standing in his shoes; and if the services on which such lands are held are police services at all, they are the services of chowkidars, or village watchmen (41-2). (*Lord Kingsdown.*) *JOYKISHEN MOOKERJEE v. COLLECTOR OF EAST BURDWAN.* (1864) 10 M. I. A. 16 = 1 W. R. P. C. 26 = 1 Suth. 542 = 2 Sar. 54.

CHAMPERTY AND MAINTENANCE.

—Agent's contract on behalf of principal—Damages for breach of—Principal's right to sue for—Assignment by agent of interest under contract to principal—If bad for champerty and maintenance.

Respondent entered into an agreement in writing with N, acting as the agent of the appellant. By the agreement N undertook to procure a loan from the appellant to the respondent and the respondent agreed, in the event of such loan being advanced, to grant to the appellant a lease of his (respondent's) zemindary. On default by the respondent to grant the lease, N instituted a suit for specific performance of the agreement, which, however, failed. N then died. After his death the appellant instituted a suit for damages for breach of the agreement. The original agreement having provided that the lease should be made to N, and he having been the ostensible party to the prior suit, the appellant obtained from N's heir an assignment of his interest under the agreement.

Held, that the assignment by N's heir in favour of the appellant was not void for champerty (187-8).

N having acted merely as the appellant's agent in the matter of the agreement, the assignment by his heir should have been treated as merely an unnecessary precaution, unwisely adopted, perhaps, and furnishing an argument for an objector, yet not really altering the quality of the transaction, nor affecting that point on which the whole question of maintenance depended, which was this; was the appellant suing in respect of his own interest for a violation of a contract made with himself, or was he representing another man's interest, and suing on a contract to which he had been originally a stranger, in virtue only of the objectionable assignment (188). (*Sir John Coleridge.*) *FISCHER v. KAMALA NAICKER.* (1860) 8 M. I. A. 170 = 3 W. R. 33 = 1 Suth. 395 = 1 Sar. 733.

—English law—Champerty and maintenance under—Acts amounting to.

To constitute an act champerty or maintenance according to the English law, it must be something against good

CHAMPERTY AND MAINTENANCE—(Contd.)

policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral and to the constitution of which a bad motive in the same sense is necessary. The substance of the transaction must be looked at, and not merely the language of the instruments in question (187). (*Sir John Coleridge.*) **FISCHER v. KAMALA NAICKER.** (1860) 8 M. I. A. 170 =

3 W. R. P. C. 33 = 1 Suth. 395 = 1 Sar. 733.

—English law as to—Inapplicability in India of.

Quære, whether under the law administered in the Mofussil those acts which in the English law are denominated either maintenance or champerty, and are punishable as offences, partly by the common law, and partly by statute, are forbidden (186-7). (*Sir John Coleridge.*) **FISCHER v. KAMALA NAICKER.** (1860) 8 M. I. A. 170 =

3 W. R. 33 = 1 Suth. 395 = 1 Sar. 733.

—The law of champerty or maintenance in India is not the same as it is in England. The statute of champerty, being part of the statute law of England, has of course no effect in the mofussil of India; and the courts of India do admit the validity of many transactions of that nature, which would not be recognised or treated as valid by the courts in England. (*Sir James W. Colville.*) **CHIDAMBARA CHETTY v. RENGAKRISHNA MUTHU VIRAPUCHAIVA NAICKER.**

(1874) 1 I. A. 241 (264-5) = 22 W. R. 148 = 13 B. L. R. 509 = 3 Sar. 373.

—The English laws of maintenance and champerty are not of force as specific laws in India. So far as concerns the Mofussil, there is no ground on which it can be contended that these laws are in force there. The question has chiefly been whether they are in force in the Presidency Towns. The condition of the Presidency towns, inhabited by various races of people, and the legislative provision directing all matters of contract and dealing between party and party to be determined in the case of Mahomedans and Hindus by their own laws and usages respectively, or where only one of the parties is a Mahomedan or Hindu by the laws and usages of the defendant, furnish reasons for holding that these special laws are inapplicable to these towns (45-6).

It would be most undesirable that a difference should exist between the law of the towns and the mofussil on this point. Having regard to the frequent dealings between dwellers in the towns and those in the mofussil, and between native persons under different laws, it is evident that difficult questions would constantly arise as to which law should govern the case (46). (*Sir Montague E. Smith.*) **RAM COOMAR COONDOO v. CHUNDER CANTO MOOKERJEE.**

(1876) 4 I. A. 23 = 2 C. 233 (255-6) = 3 Sar. 654 = 3 Suth. 361.

—The English law of champerty is not in force in India (115). (*Lord Morris.*) **KUNWAR RAM LAL v. NIL KANTH.**

(1893) 20 I. A. 112 = 20 C. 843 = 6 Sar. 302 = R. & J's. No. 129 (Oudh.).

—The proposition that, although the English law as to maintenance and champerty is not, as such, applicable to India, yet on other grounds what is substantially the same law is in force in India, cannot be supported. (*Sir Arthur Wilson.*) **BHAGWAT DAYAL SINGH v. DEBI DAYAL SAHU.** (1908) 35 I. A. 48 (55-6) = 35 C. 420 (426) =

1 C. L. J. 335 = 12 C. W. N. 393 = 5 A. L. J. 184 = 3 M. L. T. 344 = 10 Bom. L. R. 230 = 14 Bur. L. R. 49 = 18 M. L. J. 100.

—English Law as to—Origin and nature of.

The English statutes on the subject of maintenance and champerty were passed in early times, mainly to prohibit high judicial officers and officers of State from oppressing the King's subjects by maintaining suits or purchasing rights in litigation. No doubt, by the common law also, it was an

CHAMPERTY AND MAINTENANCE—(Contd.)

offence for these and other persons to act in this manner. The English laws on the subject were laws of a special character, directed against abuses prevalent, it may be, in England in early times, and had fallen into, at least, comparative desuetude (45-6). (*Sir Montague E. Smith.*) **RAM COOMAR COONDOO v. CHUNDER CANTO MOOKERJEE.**

(1876) 4 I. A. 23 = 2 C. 233 (256) = 3 Sar. 654 = 3 Suth. 361.

—Legality in India of.

In India, champerty or maintenance is not illegal (18). (*Lord Atkinson.*) **VATSAVAYA VENKATA JAGAPATI v. POOSAPATHI VENKATAPATI.** (1924) 52 I. A. 1 =

48 M. 230 = 20 L. W. 298 = A. I. R. 1924 P. C. 162 =

35 M. L. T. 210 = (1924) M. W. N. 607 =

26 Bom. L. R. 786 = 29 C. W. N. 57 = 80 I. C. 807 =

47 M. L. J. 93 (125).

—Litigation—Agreement creating interest in subject of—Validity—Conditions. *See* LITIGATION AGREEMENT CREATING INTEREST IN SUBJECT OF.

—Litigation—Agreement to finance—Sale of property subject of litigation in consideration of—Validity—Consideration—False recital in deed as to—Effect. *See* LITIGATION—AGREEMENT TO FINANCE—SALE OF PROPERTY SUBJECT OF, ETC. (1905) 32 I. A. 113 (121) =

27 A. 271 (290).

—Litigation—Agreement to share subject of—Enforceability of—Conditions. *See* LITIGATION—AGREEMENT TO SHARE SUBJECT OF—ENFORCEABILITY OF.

—Litigation—Agreement to share subject of—Suit to enforce—Money advanced under agreement with interest—Decree for—Grant of—Agreement held to be invalid. *See* LITIGATION—AGREEMENT TO SHARE SUBJECT OF—SUIT TO ENFORCE.

—Plea of—Appeal—Maintainability for first time.

Though the Court would have the right, and perhaps even be under an obligation, to take cognisance, *mutu proprio*, of any objection, manifestly appearing on the face of the proceeding, which showed that the transaction on which the suit was founded was champertous and therefore against morality or public policy; yet where that was only to be collected from the evidence by inference, and was capable of explanation or answer by counter evidence, it is highly inconvenient, as well as contrary to S. 10, Cl. (3) of Madras Regulation XV of 1816, which regulates the practice of the Court, and may lead to the most direct injustice, to enter into the inquiry for the first time in appeal if the issue has not been presented by the pleadings, or the points recorded for proof (186-7).

So held in a case in which the Sudder Court (Court of first appeal) dismissed a suit on the ground that the facts disclosed a case of champerty, a question not raised by the pleadings, or in the Court below. (*Sir John Coleridge.*) **FISCHER v. KAMALA NAICKER.** (1860) 8 M. I. A. 170 =

3 W. R. 33 = 1 Suth. 395 = 1 Sar. 733.

—Reversioner—Sale on widow's death of interest in last owner's property—Validity—Major portion of consideration made payable in event of vendee's success in recovering property.

Persons, who on the death of the life-tenant became entitled to the properties of the last male owner as his heirs sold the whole of their interest therein to a third party for Rs. 52,000, of which Rs. 600 were paid down, and the remainder was made payable in the event of the vendee's success in recovering the properties.

Held that the transaction was not contrary to public policy and void on that ground by reason of the provision as to payment of the purchase-money (56).

CHAMPERTY AND MAINTENANCE—(Contd.)

The condition as to payment of the major portion of the consideration money on the recovery of the property does not carry the case any further than does the champertous character of the transaction generally (56). (*Sir Arthur Wilson.*) **BHAGWAT DAYAL SINGH v. DEBI DAYAL SAHU.** (1908) 35 I. A. 48 = 35 C. 420 (426-7) =

7 C. L. J. 335 = 12 C. W. N. 393 = 5 A. L. J. 184 =
3 M. L. T. 344 = 10 Bom. L. R. 230 =
14 Bur. L. R. 49 = 18 M. L. J. 100.

CHARGE.

—Annuity—Charge in respect of—Grantee and his heirs—Charge on estate for—Validity—Perpetuity—Enforceability against grantor's successors. See ANNUITY—CHARGE IN RESPECT OF. (1918) 46 I. A. 64 (68-9) = 42 M. 581 (585-6).

—Annuity—Charge on immoveable property in respect of—Creation of—What amounts to. See ANNUITY—CHARGE ON IMMOVEABLE PROPERTY IN RESPECT OF. (1892) 19 I. A. 95 (100) = 19 C. 584 (592-3).

—Decree creating—Heir-at-law in possession of property of deceased—Decree directing him to account for property for purposes of being applied for payment of debts of deceased—Nature and effect of. See DECREE—CONSTRUCTION—CHARGE ON PROPERTY. (1878) 5 I. A. 211 (224) = 4 C. 402 (410).

—Equity—Charge in—Creation of—Condition.

In equity no charge can be created unless there is an intent to charge (100). (*Lord Macnaghten.*) **UMRAO BEGUM v. SECRETARY OF STATE FOR INDIA IN COUNCIL.** (1892) 19 I. A. 95 = 19 C. 584 (593) = 6 Sar. 192.

—Extinguishment—Keeping alive—Intention of parties. See MORTGAGE—EXTINGUISHMENT—KEEPING ALIVE.

—Income of specified properties—Payment of amount out of—Direction for—Charge if created by.

A direction in an agreement to pay certain allowances 'out of income' of specified properties shows an intention to create a charge. (*Viscount Cave.*) **KHAJEH SOLEHMAN QADIR v. SALIMULLAH BAHADUR.**

(1922) 49 I. A. 153 (166) = 49 C. 820 (836) =
37 C. L. J. 56 = 21 A. L. J. 1 = A. I. R. (1922) P. C. 107 =
31 M. L. T. 79 = 4 U. P. L. R. (P. C.) 70 =
24 Bom. L. R. 1257 = 27 C. W. N. 101 = 69 I. C. 138 =
43 M. L. J. 385.

—Mortgage or—Deed—Construction. See MORTGAGE—HYPOTHECATION. (1884) 11 I. A. 83 (87) = 10 C. 740 (742-3).

—Mortgage with possession or—Deed—Construction. See MORTGAGE—USUFRUCTUARY MORTGAGE. (1916) 31 M. L. J. 251.

—Possession—Chargee in—Surrender of possession to person entitled to estate subject to charge on payment of balance then due to chargee—Effect of, on his right against estate for further instalments or payments due to him. See MORTGAGE—USUFRUCTUARY MORTGAGE—MORTGAGEE UNDER—SURRENDER OF ETC. (1903) 30 I. A. 238 (244-5) = 31 C. 57 (71).

—Property subject to—Execution sale of—Payment of charge by purchaser at—Setting aside of sale subsequently—Subrogation to rights of charge-holder on—Purchaser's right of. See SUBROGATION—CHARGE. (1922) 49 I. A. 351 (356) = 2 Pat. 10 (17).

—Property subject to—Purchaser of—Defeat of charge by—Purchase for value bona fide and without notice of charge—Necessity.

As one who owns property subject to a charge can, in general, convey no title higher or more free than his own, it lies always on a succeeding owner to make out a case to

CHARGE—(Contd.)

defeat such prior charge. He must assert and prove that he is a purchaser for value, *bona fide*, and without notice of the charge (322). (*Lord Kingsdown.*) **VARDEN SETH SAM v. LUCKPATHY ROYJEE LALLAH.** 1 Sar. 857 = (1862) 9 M. I. A. 303 = Marsh 461 = 1 Suth. 483.

CHARITY.

—Advocate-General—Right to appear on behalf of Crown in proceedings relating to charities—Order made after refusal to hear him—Validity. See ADVOCATE-GENERAL. (1846) 4 M. I. A. 190 (200).

—Charity to be established—Gift to—Validity—Retention of fund in Court till possibility of its application.

Then for the fact reserved, there must be substituted a direction that further inquiry should be made as to the power of the Governor-General to aid trustees, to be appointed by the Court, in giving effect to the bequest regarding the College; and if the Court shall be satisfied that in this, or in any other way, such trustees can give it effect, then the fund to be paid over to such trustees, who are to report, from time to time, to the Master, and to administer the fund under the superintendence of the Court, the Court giving such directions as may be necessary to establish the charity according to the will. Their Lordships are well aware that in pursuing this course, they are sanctioning a proceeding, for which there is no exact and complete precedent in the administration of charitable funds in this country; but, in one respect, there is sufficient authority, *viz.*, as far as regards a postponement of distributions, and the not declaring the gift void, on account of any present difficulty in giving it effect; the case of *Attorney-General v. Bishop of Chester*, furnishes a direct authority for not declaring a legacy void, because it was for an object which could not, at the time, be accomplished, and for retaining the fund in Court until it should be possible to apply it; no doubt, if, in that case, some years had elapsed, and no prospect appeared of an episcopal establishment in Canada the Court would then have declared the legacy void, and distributed the fund to the parties entitled; so here, if it shall be found either at first, that there can be no application of the fund in the manner directed by the will, or that the trustees, after making the attempt, fail in it, the Court will then direct the same application to be made of it, which they would have done had the bequest been at first declared void. (292-3). (*Lord Brougham.*) **MAYOR OF THE CITY OF LYONS v. HON. EAST INDIA CO.**

(1836) 1 M. I. A. 175 = 1 Moo. P. C. 175 =
3 State Tr. (N. S.) 647 = 1 Sar. 107.

—Corpus only—Bequest of, or of accumulations also.

Where a will clearly stated that the revenues and rents of named properties were to be applied in a certain manner, with a direction for accumulation of surplus income, and then continued with a provision that "out of the income of such fund" the shewait should have power to celebrate religious ceremonies, *held* that the words "such fund" meant the whole property, so that the accumulations which were added became part of the corpus, and were equally with it subject to the charitable trust created by the will (1030). (*Lord Buckmaster.*) **GNANENDRA NATH DAS v. SURENDRA NATH DAS.** (1920) 24 C. W. N. 1026 = 61 I. C. 323 = (1921) M. W. N. 550 = 28 M. L. T. 453.

Cy pres doctrine.

—Applicability of—Circumstances excluding—Residuary bequest to charity if one.

It cannot be laid down as a general principle that the cy-pres doctrine is invariably displaced where the residuary bequest is to charity (55).

It was broadly contended that there was no room or necessity for the interposition of the Court where the residu-

CHARITY—(Contd.)**Cy-pres Doctrine—(Contd.)**

any bequest is to charity, and the appellant's counsel sought in the reason of the rule the grounds for supporting this distinction. The rule, they said, was founded on the presumption that although the gift might be to a particular charity, the intention was to give to charity generally, and the court therefore, when the particular disposition could not be carried into effect, undertook to make a cy-pres application of the fund in order that charity should not be disappointed. The reason of the presumption, it was said, being to prevent funds given to charity from falling to residuary legatees or next of kin, and so disappointing the general intention of charity, altogether failed, and left no foundation for the interposition of the Court where the bequest of the residue itself was to charity. Why, it was asked, should the Court interfere to intercept a fund falling into a residue devoted to charity, substituting its own discretion for the testator's? (53)

Their Lordships are unable to perceive satisfactory grounds for such a limitation of the cy-pres doctrine; certainly not as a limitation applicable generally to all cases in which the residuary bequest is to charity, whatever its kind and nature may be (54).

Nor can the suggested distinction, as a general qualification of the doctrine be, in reason, maintained. Cases may be easily supposed where the charitable object of the residuary clause is so limited in its scope, or requires so small an amount to satisfy it, that it would be absurd to allow a large fund bequeathed to a particular charity to fall into it. If a large sum were given to endow a college, and the residue bequeathed for the support of three poor almswomen, or to provide coals at Christmas for ten poor persons, it would be manifestly absurd, supposing the cy-pres doctrine be established at all, to withhold the application of it in instances of this kind (54-5). (*Sir Montague E. Smith.*) **MAYOR OF LYONS v. ADVOCATE-GENERAL OF BENGAL.** (1876) 3 I. A. 32 = 1 C. 303 (317-9) = 26 W. R. 1 = 3 Sar. 561 = 3 Suth. 244.

—Applicability of—Considerations.

The Court, when deciding whether the cy-pres doctrine applies, looks only to the particular gift, and if it finds charity to be the legatee, sustains the legacy as such, without regarding at this stage of the enquiry (whatever may be proper when a scheme comes to be framed) the rest of the will (55). (*Sir Montague E. Smith.*) **MAYOR OF LYONS v. ADVOCATE-GENERAL OF BENGAL.** (1876) 3 I. A. 32 = 1 C. 303 (320) = 26 W. R. 1 = 3 Sar. 561 = 3 Suth. 244.

—Gift—Fund appropriated to—Cy-pres application of—Circumstances excluding—Residuary bequest to charity—Probable intention of testator to increase fund of—Bequest over to residuary legatee—Implication of Conditions—Effect.

The will of a Frenchman contained, among others, the following dispositions:—A gift of Rs. 5,000 per annum for the release of prisoners for debt in Calcutta, and a gift of Rs. 1,000 per annum for the relief of such prisoners; a similar gift of Rs. 4,000 per annum for the liberation of poor prisoners in Lyons; a like gift of Rs. 4,000 per annum to liberate prisoners for debt in Lucknow; three bequests to found charities at Calcutta, at Lyons, and at Lucknow, respectively; and a gift of the residue equally between the said three charities. With reference to the gift in favour of the Lucknow prisoners, the will directed, that, if it should fail, the fund should remain to the estate. No similar direction was given in respect of the gifts in behalf of the Calcutta or Lyons prisoners. The 28th Article contained the bequest for the release and relief of prisoners in Calcutta. The bequests to poor prisoners in Calcutta having failed by

CHARITY—(Contd.)**Cy-pres Doctrine—(Contd.)**

reason of the abolition of imprisonment for debt, the point for decision was, whether those gifts were to be dealt with by the Court upon the principle of a cy-pres application of them, or, whether they fell into the residue, so as to increase the endowments of the charities at Calcutta, at Lyons, and at Lucknow.

Held, affirming the High Court, that the bequest for the release and relief of prisoners in Calcutta contained in Article 28 of the will was an absolute charitable gift capable of being applied cy-pres, and that the Mayor of Lyons, as one of the residuary legatees under the said will, was not entitled to any part of the trust funds appropriated to such gift (56-7).

It certainly cannot be inferred from the terms in which the respective gifts to poor prisoners in Calcutta and Lyons are bequeathed, that the testator had contemplated the failure of either of these charities, or had formed any intention in that case regarding them; on the contrary, the inference arises, upon comparing these clauses with the corresponding gift for the benefit of the prisoners at Lucknow in which there is a direction that in the event of failure it shall remain to the estate, that he had not. If, then, such an implication can be made, it must be from the residuary clause itself, construed with other parts of the will relating to the Martiniere establishments. The frame of the clause is peculiar; and, assuming it to be a residuary disposition into which, in case of failure, legacies other than to charity would fall, yet, in considering the present question, the peculiar frame and language of it cannot be disregarded, and from these it may be inferred that what was present to the testator's mind, and what alone he intended to dispose of, was a residue after the funds for these charities had been provided and set apart (56-7). (*Sir Montague E. Smith.*) **MAYOR OF LYONS v. ADVOCATE-GENERAL OF BENGAL.** (1876) 3 I. A. 32 = 1 C. 303 (319-21) = 26 W. R. 1 = 3 Sar. 561 = 3 Suth. 244.

—Gift—Fund appropriated to—Cy-pres application of—Jurisdiction—Residue given to charity.

The jurisdiction of the Court to act on the cy-pres doctrine upon the failure of a specific charitable bequest arises whether the residue be given to charity or not, unless upon the construction of the will a direction can be implied that the bequest, if it fails, should go to the residue (56). Among charities there is nothing analogous to benefit of survivorship (59). (*Sir Montague E. Smith.*) **MAYOR OF LYONS v. ADVOCATE-GENERAL OF BENGAL.**

(1876) 3 I. A. 32 = 1 C. 303 (320-1) = 26 W. R. 1 = 3 Sar. 561 = 3 Suth. 244.

—Principle of.

The principle on which the doctrine of cy-pres rests appears to be, that the Court treats charity in the abstract as the substance of the gift, and the particular disposition as the mode, so that in the eye of the Court the gift notwithstanding the particular disposition may not be capable of execution subsists as a legacy which never fails and cannot lapse (54). (*Sir Montague E. Smith.*) **MAYOR OF LYONS v. ADVOCATE-GENERAL OF BENGAL.**

(1876) 3 I. A. 32 = 1 C. 303 (318) = 26 W. R. 1 = 3 Sar. 561 = 3 Suth. 244.

Cy-pres Scheme.**—Discretion of Court below—Interference in appeal with.**

Agreeing with what was said in the House of Lords, in the *Case of the Iron-monger's Company*, (10 Cl. & Fin. 908), as to the care and circumspection to be exercised by a Court of Appeal in substituting its discretion for that of the Court below, their Lordships would be reluctant in any case to interfere with a cy-pres scheme framed by the Court below unless it were

CHARITY—(Contd.)**Cy-pres Scheme—(Contd.)**

plainly wrong, and still more to unsettle, by a premature declaration, one which is not regularly before them (59). (*Sir Montague E. Smith.*) MAYOR OF LYONS v. ADVOCATE-GENERAL OF BENGAL. (1876) 3 I. A. 32 = 1 C 303 (323-4) = 26 W. R. 1 = 3 Sar. 561 = 3 Suth. 244.

—Framing of—Considerations.

Whilst regard may be had to the other objects of the testator's bounty in constructing a cy-pres scheme, primary consideration is to be given to the gift which has failed, and to a search for objects akin to it (59).

Acting on the above rule, their Lordships held that, in a case in which the bequests to poor prisoners in Calcutta had failed by reason of the abolition of imprisonment for debt, a scheme framed for the benefit of other poor persons in Calcutta might be supported, as being cy-pres to the original purpose, and that it would not be a valid objection to such scheme that it gave no part of the funds to a charity established by the testator at Lyons in France (59-60).

The gifts to poor prisoners in Calcutta may be considered to have a local character. The gifts bear the character of a charity for the relief of misery in the particular locality. The necessary funds for them were directed by the will to be set apart, and in the case of the Lyons charity, were long ago, paid over to the municipal authorities of that city. It may well be doubted whether if such a contingency as the failure of the gift to Lyons should occur, it would be thought proper that any part of the funds paid over to the authorities there should be restored to India (59-60). (*Sir Montague E. Smith.*) MAYOR OF LYONS v. ADVOCATE-GENERAL OF BENGAL. (1876) 3 I. A. 32 = 1 C. 303 (324) = 26 W. R. 1 = 3 Sar. 561 = 3 Suth. 244.

—Re-opening of, once framed—Right of—Residuary legatee—Petition by, claiming share in fund—Re-opening of scheme in.

A charitable gift made by a will having failed, the Court framed a scheme for the cy-pres application of the fund appropriated to that gift. The appellant put in a petition claiming to be entitled as one of the residuary legatees to a share of such fund as having fallen into the residue.

Held, that it was not competent for the appellant, under such a petition, which was confined to the claim of a share of the residue, as residuary legatee, to open the cy-pres scheme framed by the Court, on the ground that it had improperly excluded the appellant from participation in the fund (59). (*Sir Montague E. Smith.*) MAYOR OF LYONS v. ADVOCATE-GENERAL OF BENGAL.

(1876) 3 I. A. 32 = 1 C. 303 (323) = 26 W. R. 1 = 3 Sar. 561 = 3 Suth. 244.

—Dharam—Bequest for—Void for Vagueness—Rule as to—Reason of.

A devise or bequest for dharam is void for vagueness and uncertainty. The objects which can be considered to be meant by that word are too vague and uncertain for the administration of them to be under any control.

The reasons for the decisions of the English Courts upon devises or bequests of a similar nature are stated as follows: As it is a maxim that the execution of a trust shall be under the control of the Court, it must be of such a nature that it can be under that control so that the administration of it can be reviewed by the Court, or if the trustee dies the Court itself can execute the trust—a trust therefore which in case of maladministration could be reformed and a due administration directed, and then unless the subject and objects can be ascertained upon principles familiar in other cases, it must be decided that the Court can neither reform mala-

CHARITY—(Contd.)**Cy-pres Scheme—(Contd.)**

ministration nor direct a due administration. (*Sir Richard Couch.*) RUNCHORDAS VANDRAWANDAS v. PARVATI-BHAL. (1899) 26 I. A. 71 (80-1) = 23 B. 725 (735) = 3 C. W. N. 621 = 1 Bom. L. R. 607 = 7 Sar. 543.

—Dharam—Meaning of. See DHARAM.

(1899) 26 I. A. 71 (81) = 23 B. 725 (735).

—Gift to—Uncertainty—Gift if void for Annadanam charity.

The material portion of the will of a Hindu testator was as follows:—"The arrangement which I make regarding the aforesaid properties is this—After my decease my properties and my estate shall be managed with all rights by my divided brothers—V & S as executors. The incomes from the villages and gardens shall be divided into 3 portions and 2 portions thereof shall be given to my wife, and the said house and the *ethiradi manai* be given to her for her occupation; and with the remaining one portion, the debts due by me and the debts contracted by me and V on the security of our family properties shall be discharged. After the said two kinds of debts are discharged the said executors shall with the said one-third portion of the said income make *annadanam* in our family choultry in Perumbandi now under the management of V. My wife shall take all the aforesaid moveable properties and enjoy them according to her pleasure, and if she dies leaving any moveable properties, they shall be used by the said executors themselves for the said feeding charity. After my wife's decease, 2 out of 3 portions of the income enjoyed by her shall be utilised for the charity and the remaining out of the 3 shares, and the dwelling house and *manai* in front, shall be taken by V and S and their posterity."

Held that if the words "the charity" in the translation were the correct rendering of the Vernacular they plainly referred to the chattiram charity which had immediately before been indicated and that the gift was not void for uncertainty. (*Sir John Edge.*) VAIDYANATHA AYYAR v. SWAMINATHA AYYAR. (1924) 51 I. A. 282 (289-90) = 47 M. 884 = 35 M. L. T. 189 =

A. I. R. (1924) P. C. 221 (2) = 22 A. L. J. 983 =

26 Bom. L. R. 1121 = 40 C. L. J. 454 =

29 C. W. N. 154 = 20 L. W. 803 = (1924) M. W. N. 749 =

26 P. L. R. 1 = 10 O. & A. L. R. 1076 = 82 I. C. 804 =

47 M. L. J. 361.

—Several charities—Gift to—Failure of gift with regard to one—Effect.

If a gift fails with regard to one charity, the other valid charitable gifts take it and divide it among themselves (290). (*Lord Brougham.*) MAYOR OF THE CITY OF LYONS v. HON. EAST INDIA CO. (1836) 1 M. I. A. 175 = 1 Moo. P. C. 175 = 3 State Tr. (N. S.) 647 = 1 Sar. 107.

—Supreme Court of Madras—Jurisdiction of. See SUPREME COURT OF MADRAS—CHARITIES.

(1846) 4 M. I. A. 190 (199).

CHARTERPARTY.

—See SHIP—CHARTERPARTY.

CHOTA NAGPUR ENCUMBERED ESTATES ACT VI OF 1876.

—Applicability and scope—Immoveable property outside Chota Nagpur—Applicability to.

The Chota Nagpur Encumbered Estates Act of 1876 has no application to immoveable property outside Chota Nagpur (110).

The primary intention to be collected from the language of the Act is that of providing, by a measure of local application, for the relief of the burdens affecting the land within Chota Nagpur owned by a class of landholders there. The governing purpose related to a particular locality. It is not a statute analogous to a Bankruptcy Act, the controlling

CHOTA NAGPUR ENCUMBERED ESTATES ACT VI OF 1876—(Contd.)

purpose of which is provision for creditors in a liquidation. To this end S. 16 confers the jurisdiction requisite to enable the manager to recover immoveable property in the possession of a mortgagee or vendee in the court of the Deputy Commissioner within whose jurisdiction the property is situate. But in the Regulation districts where there is no Deputy Commissioner these words would be inapt, and the inference is that they were intended to apply only to immoveable property in Chota Nagpur, where a Deputy Commissioner has jurisdiction. This conclusion is borne out by S. 23, which saves the jurisdiction of the Courts of Chota Nagpur over certain questions, and not the corresponding jurisdictions of Courts outside it (109-10.)

The main purpose of the Act is the protection of Zemindars within that district, and any provisions which affect rights to enforce in jurisdictions outside it personal debts or liabilities are merely ancillary to the main purpose of the Act, which is directed to improve the position of persons owning land within it. If this be so, no claims *in rem* of land outside it ought to be construed as affected by the merely general and ambiguous expressions which the Act contains (110). (*Viscount Haldane*.) **RAJA OF PACHETE v. KUMUD NATH CHATTERJI.** (1918) 45 I. A. 103 (110) = 46 C. 1 (10 2) = 24 M. L. T. 66 = (1918) M. W. N. 441 = 8 L. W. 186 = 22 C. W. N. 1009 = 28 C. L. J. 165 = 20 Bom. L. R. 856 = 16 A. L. J. 569 = 5 Pat. L. W. 64 = 45 I. C. 827 = 35 M. L. J. 347.

———*Disqualified Proprietor—Contract by, while under disability—Specific Performance of—Ratification of contract by him after release of estate from management.*

It is quite competent to a person emerging from a state of disability to take up and carry on transactions commenced while he was under disability in such a way as to bind himself to the whole (231).

While the defendant's estate was under management under the Chota Nagpur Encumbered Estates Act VI of 1876, he entered into an agreement with the plaintiff whereby the latter was to advance money on mortgage, and also take a lease of part of the estate. The defendant's estate was thereafter ordered to be released from management. After the said order for release the defendant not only took up and carried on the transaction, but he took and retained the benefit of the plaintiff's payments, and he exacted from the plaintiff a part of the consideration which was to move from him. At the defendant's instance the plaintiff also did acts which made it impossible for the defendant to replace the plaintiff in his former position.

Held, that the defendant was clearly bound by the contract though its terms were to be ascertained from what passed when he was disabled from contracting; that the order for release, whether made with or without jurisdiction, had the effect of releasing the estate from management and of making the defendant *sui juris* and free to manage his affairs as any other man; and that it was quite open to him after that order to carry on the transaction and bind himself by it; and that he did so carry it on and bind himself by it (231-2). (*Lord Hobhouse*.) **GREGSON v. RAJAH SRI SRI ADITYA DEB.** (1889) 16 I. A. 221 = 17 C. 223 (232) = 5 Sar. 416.

———*Disqualified Proprietor—Transaction commenced by, while under disability—Completion of, after cessation thereof.*

It is quite competent to a person emerging from a state of disability imposed by the Encumbered Estates Act VI of 1876 to take up and carry on transactions commenced while he was under disability in such a way as to bind himself to the whole (231). (*Lord Hobhouse*.) **GREGSON v. RAJAH SRI SRI ADITYA DEB.** (1889) 16 I. A. 221 = 17 C. 223 (232) = 5 Sar. 416.

CHOTA NAGPUR ENCUMBERED ESTATES ACT VI OF 1876—(Contd.)

———*Manager appointed under—Position, duties and rights of—Dealings with property under management—Power of, only in manager.*

Where property of a disqualified proprietor is vested in a manager appointed by virtue of the Chota Nagpur Encumbered Estates Act, the owner of the property is expressly disabled from making any effective contract with regard to it, and no other officer, whether political or departmental, could occupy the place, enjoy or exercise the rights, of the disposal of the estate the management of which estate is vested in the manager and the manager alone. The manager for the time being stands responsible in law for fidelity in the discharge of the entire duties of management, disposal, realisation and restoration, with regard to the estate under his care. Further in the performance of such duties the manager is neither the servant, nor the agent of another, be that other either a private intervener or a public or political or departmental officer. The manager is himself the principal under the statute, and he must conform in the discharge of his duties to the provisions of the Act. (*Lord Shaw*.) **HUKUM CHAND v. RAN BAHADUR SINGH.**

(1924) 51 I. A. 208 (214-5) = 3 P. 625 = 34 M. L. T. 120 = (1924) M. W. N. 710 = 22 A. L. J. 935 = 5 Pat. L. T. 639 = 21 L. W. 1 = 29 C. W. N. 342 = 3 Pat. L. R. 157 = 80 I. C. 841 = A. I. R. (1924) P. C. 156 = 47 M. L. J. 562.

———*Property vested in manager under—Lease of—Agreement for, by officials of Lieutenant-Governor—Validity of—Specific Performance of—Possibility in law.*

In a suit for specific performance of an agreement for the grant of lease of property the management of which was at all the material dates vested in a manager appointed under the Chota Nagpur Encumbered Estates Act, it appeared that the agreement was not with the manager appointed under the Act and vested in the management of the property but was with the servants and officials of the Lieutenant-Governor of Bengal.

Held, that specific performance of a contract so entered into was an impossibility in law, because the owner of the ground and the person *in titulo domini*—namely, the manager, was no party to the contract. (*Lord Shaw*.) **HUKUM CHAND v. RAN BAHADUR SINGH.**

(1924) 51 I. A. 208 (217) = 3 Pat. 625 = 34 M. L. T. 20 = (1924) M. W. N. 710 = 22 A. L. J. 935 = 5 Pat. L. T. 639 = 21 L. W. 1 = 29 C. W. N. 342 = 3 Pat. L. R. 157 = 80 I. C. 841 = A. I. R. 1924 P. C. 156 = 47 M. L. J. 562.

———*S. 12—Release of estate from management—Order for—Validity—Conditions.*

Defendant's estate of Pattan in Chota Nagpur was on his own application put under management under the Incumbered Estates Act VI of 1876. About 5 years afterwards the defendant presented a petition to the Deputy Commissioner in the Encumbered Estates Department, stating that he had arranged to let out the estate in ijara to the plaintiff at a rent fixed, and to take a loan from him for the purpose of discharging his liabilities to the mahajans, and that the plaintiff had agreed to deposit the amount of the defendant's liabilities in the account of the Encumbered Estates, and praying that on receipt of the same an order might be passed for releasing the estate from the management under Act VI. The petition also stated that, as the Estate was then under the control of the Encumbered Estates Department, the defendant was not in a position to execute the necessary documents to effectually carry out the said arrangement, and that he had undertaken to do so after the release of the estate.

CHOTA NAGPUR ENCUMBERED ESTATES ACT VI OF 1876, S. 12—(Contd.)

The plaintiff paid into the collectorate treasury the amount undertaken to be deposited by him, and got a receipt stating that it was on account of the ijara arrangement referred to in defendant's petition and for the purpose of releasing the estate from management. The Sub-manager reported to the Deputy Commissioner the fact of the said deposit, that all the scheduled debts had been paid off, and that from the balance still at credit of the estate, the law charges and other Management charges still due by that estate could be easily paid. Thereupon a formal order was made for release of the Estate.

Held, that the order for release was difficult to reconcile with the policy, or indeed with the literal terms of the Act (232).

There is nothing in the transactions themselves to operate as a release of the estate. The scheduled debts were not paid; they were only transferred to another creditor, and the transfer was coupled with an agreement for a fresh loan by which the defendant was loaded with debt more heavily than in 1879 when he sought the benefit of the Act. It is a matter of wonder to their Lordships that any order for release should have been made under such circumstances (229-230). (*Lord Hobhouse*.) GREGSON v. RAJAH SRI SRI ADITYA DEB. (1889) 16 I.A. 221 =

17 C. 223 (230, 233) = 5 Sar. 416.

—Release of estate from management—Order for—Validity—Factum valet—Applicability of doctrine of.

An estate which had been put under management under the Chota Nagpur Encumbered Estates Act VI of 1876 was released from management by an order of the Commissioner made under S. 12 of the Act. The order was, however, one which was difficult to reconcile with the policy, or indeed with the literal terms, of the Act. On the basis of that order the defendant, the owner of the estate, took up and carried on an agreement entered into by him with the plaintiff while the estate was under management.

In a suit by the plaintiff for specific performance of the agreement it was contended for the defendant that the contract was against the policy of the Act, and that the order for release had been made without jurisdiction.

Held, that their Lordships must not look beyond the order for release, and that, whether it was made with or without jurisdiction, it had the effect of releasing the estate from management and of making the defendant *sui juris* (232).

Their Lordships applied the doctrine of *factum valet* to the said order (232). (*Lord Hobhouse*.) GREGSON v. RAJAH SRI SRI ADITYA DEB. (1889) 16 I.A. 221 = 17 C. 223 (233) = 5 Sar. 416.

—S. 17 and R. 16—Firm of individuals—Lease to—Sanction for—Limited Company of same men—Lease to—Grant of—If and when intended.

Held, on the facts, that though the sanction of the Commissioner under R. 16 made under S. 19 of the Chota Nagpur Encumbered Estates Act was in terms of a grant of a lease to Robert Watson & Co., what was intended and meant was Robert Watson & Co., Limited, and that a grant of a lease to Robert Watson & Co., Ltd, in pursuance of that sanction was not invalid. (*Lord Shaw*.) RAMKANAI SINGH DEB DARPASHAHA v. MATHEWSON. (1915) 42 I.A. 97 = 42 C. 1029 (1042) = 17 M. L. T. 377 = 2 L. W. 555 = 19 C.W.N. 585 = 13 A.L.J. 534 = 21 C.L.J. 446 = 17 Bom. L. R. 449 = 30 I.C. 55 = 29 M.L.J. 80.

—Firm of individuals—Lease to—Sanction for—Limited Company of same men—Lease to—Grant of—Validity.

Quære, whether, under a sanction for a grant of a putni lease to Robert Watson and Company in other words to a

CHOTA NAGPUR ENCUMBERED ESTATES ACT VI OF 1876, S. 17 and R. 16—(Contd.)

firm of individual men, a lease could be validly granted to Robert Watson & Company, Limited, *i.e.*, a different and incorporated *persona* (101-2).

There is this to be said for the position that the grant is not valid, that the *persona* in the latter case is different from the *persona* in the former, and that a change in the lessee or putnidar ought to be treated as a change in essentials. It may be added that a putni lease of land, an agreement of an important and wide-reaching character might demand separate consideration, and point to a different conclusion when this essential was altered. Questions might arise, and difficulties suggest themselves with regard to a limited company against whom legal remedies at law might not be the same as in the case of individuals, and public and administrative considerations might come into play operative either in the way of restriction or refusal on account of a change in *persona* in the lessee (101-2). (*Lord Shaw*.) RAMKANAI SINGH DEB DARPASHAHA v. MATHEWSON. (1915) 42 I.A. 97 = 42 C. 1029 (1041) = 17 M.L.T. 377 = 2 L.W. 555 = 19 C.W.N. 585 = 13 A.L.J. 534 = 21 C.L.J. 446 = 17 Bom. L.R. 449 = 30 I.C. 55 = 29 M. L. J. 80.

—Sanction of Commissioner—Sufficiency of Transaction—Sanction of, but not of deed prepared pursuant to it.

When it is affirmatively established that a transaction itself in all its essential particulars has obtained the sanction of the Commissioner under R. 16 made under S. 19 of the Chota Nagpur Incumbered Estates Act, 1876, and when it is requisite that the transaction be carried into effect by the preparation of the appropriate deeds, a challenge merely on the ground that the document ultimately prepared had not been submitted for sanction cannot be sustained. In administrative and departmental action it must necessarily be the case that formal details may have to be entered upon in order to carry into practical effect, and put into legal shape the arrangement to which sanction was adhibited (101). (*Lord Shaw*.) RAMKANAI SINGH DEB DARPASHAHA v. MATHEWSON. (1915) 42 I.A. 97 = 42 C. 1029 (1041) = 17 M. L. T. 377 = 2 L.W. 555 = 19 C.W.N. 585 = 13 A.L.J. 534 = 21 C.L.J. 446 = 17 Bom. L.R. 449 = 30 I.C. 55 = 29 M. L. J. 80.

CHOWDHURI.

—Office of—Nature and remuneration of. (*Sir Andrew Scoble*.) RAMAKANTA DAS v. CHOWDHURI SHAMANAND DAS. (1908) 36 I.A. 49 = 36 C. 590 (595-6) = 6 M.L.T. 84 = 9 C.L.J. 499 = 13 C.W.N. 581 = 11 Bom. L.R. 530 = 6 A.L.J. 364 = 1 I.C. 754 = 19 M.L.J. 239.

CHOWHUDDIBANDI.

—Meaning of—"Chowhuddibandi" means boundary. (*Lord Buckmaster*.) HARADAS ACHARJYA CHOWDHURI v. SECRETARY OF STATE FOR INDIA

(1917) 43 I.C. 361 (365) = 22 M.L.T. 438 = 26 C.L.J. 590 = (1918) M.W.N. 28 = 20 Bom. L.R. 49.

CHOWKEEDARS.

—Appointment and removal of—Zemindar's powers in regard to—Rights of Government.

The Zemindar had an interest in the performance of the duties of the village watchmen, inasmuch as they protected his property; but the public also had a great interest in their maintenance, and in the peace and good order which they were employed to preserve, and the Government, as representing the public, reserved therefore a strict control over them. Accordingly, various Regulations were passed for the purpose of enabling the Government to effect this object. Registers were required to be kept of the different persons filling these offices in each Zemindary, with a state-

CHOWKEEDARS—(Contd.)

ment of the funds allotted for their support. The officers themselves were made subject to the orders of the Darogah, or Superintendent of the Police of the District. The Zemindar was required to remove them on complaint of their misconduct by the Darogah, and finally, they were made removable by the Magistrate on sufficient cause. But we can find nothing in these Regulations which takes from the Zemindar the right of nomination of these officers, or which deprives him of the power of himself removing them and appointing other fit persons in their stead, and nothing which deprives him of the right of requiring from the Chowkeedar such services as he was bound by law or usage to render to the Zemindar. It might well happen that, either by long usage or by the original contract, when the lands were granted, the village watchmen might become liable, in addition to his Police duties, to the performance of other services personal to the Zemindar, as the collection of his revenue and the like. Indeed, the rules laid down for the Decennial Settlement appear to us to recognise the interests both of the Zemindars and the public in lands of this description. They were not to be included in the Malguzary lands for the purpose of increasing the *jumma*, because the Zemindars had not the full benefit of them; but they were to be included in the Malguzary lands for the purpose of securing the assessment, because in the event of a sale upon default of payment of the assessment, it would be important that they should be transferred to the purchasers under the Government, with whom the appointment of the person whose duty would in part be to attend to public interests would vest (42-3). (*Lord Kingsdown.*) **JOYKISHEN MOOKERJEE v. COLLECTOR OF EAST BURDWAN.** (1864) 10 M. I. A. 16 =

1 W. R. P. C. 26 = 1 Suth. 542 = 2 Sar. 54.

—Meaning of.

In addition to the police force thus kept by the Zemindar, at the expense of the Government, and which seems to have been usually very inefficient, private individuals and communities were accustomed to keep watchmen for the protection of their persons and property, under the name of *Chokeedars*, and various other names, who were paid by their employees, and from whom no allowance was made by the Government (109). (*Mr. Pemberton Leigh.*) **RAJA LEELANUND SINGH BAHADOOR v. GOVERNMENT OF BENGAL.** (1855) 6 M. I. A. 101 = 1 Suth 248 =

4 W. R. 77 P. C. = 1 Sar. 505.

—Chaukidar means "a watchman". (*Mr. Ameer Ali.*) **SECRETARY OF STATE FOR INDIA v. KIRTIBAS BHUPATI HARICHANDAN MAHAPATRA.** (1914) 42 I. A. 30 (35) =

42 C. 710 (721) = 17 M. L. T. 1 = 2 L. W. 2 =

17 Bom. L. R. 32 = 19 C. W. N. 95 = 26 C. L. J. 31 =

26 I. C. 676 = 28 M. L. J. 457.

—Position and rights of. See CHAKERAN LANDS—MEANING OF. (1864) 10 M. I. A. 16 (40-1).

—*Thanadars*—Duties and remuneration of.

At the time of the English occupation a Zemindar was responsible not only for the payment of the revenue, but for the preservation of peace and order within his district. For the latter purpose he maintained *Thanadars*, or Police Officials, and *Chowkidars*, or village watchmen. Both had from time immemorial been remunerated by allotments of land to be held in consideration of the services they rendered to the Zemindar, either rent-free or at a low rent, but where as the Police Official rendered police service only, the *Chowkidar* not only assisted the police, but rendered acts of service personal to the Zemindar. (*Lord Parker.*) **RANJIT SINGH v. KALI DASI DEBI.** (1917) 44 I. A. 117 =

44 C. 841 = 2 Pat. L. W. 1 = 21 C. W. N. 609 =

19 Bom. L. R. 462 = 15 A. L. J. 390 = 22 M. L. T. 489 =

(1917) M. W. N. 459 = 6 L. W. 101 = 25 C. L. J. 499 =

40 I. C. 981 = 32 M. L. J. 565.

CHOWKEEDARI CHAKERAN LANDS.

—Bengal Act VI of 1870—Lands not Chowkeedari chakeran lands within meaning of—Declaration of—Zemindar's suit for—Onus of proof in—Lands within ambit of zemindary.

In a suit by the plaintiff, a Zemindar, for a declaration that the suit lands, which admittedly lay within the ambit of the estate settled with the plaintiff's ancestor, were not *chowkidari chakeran* lands within the meaning of Bengal Act VI of 1870, and that the Collector of the District, acting on behalf of the defendant, the Secretary of State for India, had no jurisdiction to transfer or to assess the lands under the provisions of that Act, *held*, that the onus was not on the plaintiff to show that the suit lands were not *chowkidari chakeran* lands (41).

The lands in dispute admittedly lie within the ambit of the estate settled with the plaintiff's ancestor. The plaintiff is the Zemindar, and as such he has the *prima facie* title to the full enjoyment of every parcel of land within his zemindary for which he pays revenue to Government. It rests on the defendant to show that when the zemindari was confirmed to the plaintiff's ancestor the confirmation was subject to reservations which gave Government the power of resuming and assessing part of the land (41). (*Mr. Ameer Ali.*) **SECRETARY OF STATE FOR INDIA v. KIRTIBAS BHUPATI HARICHANDAN MAHAPATRA.** (1914) 42 I. A. 30 =

42 C. 710 (727-8) = 17 M. L. T. 1 = 2 L. W. 2 =

17 Bom. L. R. 32 = 19 C. W. N. 95 = 26 C. L. J. 31 =

26 I. C. 676 = 28 M. L. J. 457.

—Bengal Act VI of 1870—Lands not *chowkidari chakeran* lands within meaning of—Resumption of—Government's right of.

The zemindaries of the plaintiffs were held under sanads granted in 1804, and confirmed by S. 33 of Bengal Reg. XII of 1805. The sanad in each case imposed on the Zemindar the duty of preventing the commission of theft, robberies at night, and highway robberies, "and in case of any such occurrence", of arresting the offenders and "sending them for trial." But it made no provision regarding the machinery he was to employ for the purpose, evidently because the Government was content to leave to the Zemindar the manner in which he was to discharge the duty of maintaining peace and order in his zemindari.

The plaintiffs, in discharge of the duties imposed on them by their sanads to maintain peace and order within their estates, retained in their service a large number of *chaukidars* whom, according to the custom of the country, in lieu of wages they remunerated by grants of land. A register of these *chaukidars* was kept in the zemindari office, and in the appointment of the *chaukidars* in more than one instance the Government police officer had a voice. But the records showed that the Zemindar often changed the lands held by these men, and resumed what he considered to be in excess of their requirements.

Held, that the lands assigned to *chaukidars* by the plaintiffs were not *chowkidari chakeran* lands within the meaning of Bengal Act VI of 1870 and that the Government had no jurisdiction to transfer or to assess the lands under the provisions of that Act.

In the present case the defendant has failed to show that any parcel of land was not taken into account in fixing the rent respectively payable by the plaintiffs, nor that there was any obligation on the part of the plaintiffs to make such grants. The only obligation on them was to maintain peace and order within their zemindaries. They entertained the services of *chaukidars* for whose maintenance they allotted from time to time certain lands of their own free-will. The mere fact that some appointments were made with the approval of a Government officer cannot alter the nature of the grants (42). Bengal Act VI of 1870 was designed to

CHOWKEEDARI CHAKERAN LANDS—(Contd.)

deal with lands which, although lying within a mahal, did not form a part of its assets, which is not the case with the suit zemindaries (43). (*Mr. Ameer Ali.*) SECRETARY OF STATE FOR INDIA *v.* KIRTIBAS BHUPATI HARICHANDAN MAHAPATRA. (1914) 42 I. A. 30 = 42 C. 710 (727-8) = 17 M. L. T. 1 = 2 L. W. 2 = 17 Bom. L. R. 32 = 19 C. W. N. 95 = 26 C. L. J. 31 = 26 I. C. 676 = 28 M. L. J. 457.

—Bengal Act VI of 1870—Resumption by Government under, and transfer to Zemindar—Putni lease of lands by Zemindar—Effect on—S. 51 of Bengal Act VI of 1870—Effect.

Not only does Bengal Regulation VI of 1870 recognise the existing title of the Zemindar to the lands resumed but the estate taken by the Zemindar under the order of transfer is in confirmation and by way of continuance of his existing estate, and when the Zemindar or those through whom he claims has or have entered into contracts affecting his existing estate the rights of third parties under these contracts are preserved.

The words "subject to all contracts. . . may be situate" in S. 51 of the Regulation included the right of a patnidar under a patni grant by virtue of which the patnidar is lessee of the Zemindar's interest in the lands resumed, and also the rights of a darpatnidar under a darpatni grant. (*Lord Parker.*) RANJIT SINGH *v.* KALI DASI DEBI. (1917) 44 I. A. 117 = 44 C. 841 = 2 Pat. L. W. 1 = 21 C. W. N. 609 = 19 Bom. L. R. 462 = 15 A. L. J. 390 = 22 M. L. T. 489 = (1917) M. W. N. 459 = 6 L. W. 101 = 25 C. L. J. 499 = 40 I. C. 981 = 32 M. L. J. 565.

—Bengal Act VI of 1870—Resumption by Government under, and transfer to Zemindar—Patni lease of lands by Zemindar—Patnidar's right to khas possession against Zemindar—Rent additional—Liability to Zemindar for.

A patni grant by a Zemindar of his interest in lands includes his interest in *chaukidari chakeran* lands within the boundaries of the grant, and upon their being resumed and transferred to the Zemindar under the Bengal Act VI of 1870 the patnidar or darpatnidar holding from him is entitled under S. 51 of that Act to *Khas* possession, subject, however, to a corresponding right on the part of the Zemindar to have an additional rent fixed for such lands as a condition of the patnidar being put into possession thereof (359-60). (*Lord Carson.*) BHUPENDRA NARAYAN SINGH *v.* NARAPAT SINGH. (1925) 52 I. A. 355 = 53 C. 6 = 42 C. L. J. 227 = (1925) M. W. N. 724 = 90 I. C. 607 = L. R. 6 P. C. 206 = A. I. R. (1925) P. C. 226 = 49 M. L. J. 722.

—Mal Saranjan or Gram Saranjan lands—Chowkidars liable to performances of Chowkidari services to Zemindar and appointed by him—Lands held by—Distinction—Resumption of land of latter class—Zemindar's right of.

Appellant, the talookdar of talook G, originally part of the Zemindary of Burdwan, sued for the resumption of lands in the talook, on the ground that the lands were what were called "Mal Suranjane" or "Gram Suranjane" not liable to the performance of any but personal services to the appellant; that A, the person in possession, had ceased to perform any Zemindary services and the appellant had therefore appointed another person to perform the services, and that the appellant was, therefore, entitled to resume possession of the lands. The Collector, on the other hand, contended that the suit lands were Chakeran lands for the performance of Police or Chowkidari duties; and that the lands being *Chaukidari Chakeran* lands, the Zemindar had no power to interfere with the property so long as the Policemen carried out their various duties.

CHOWKEEDARI CHAKERAN LANDS—(Contd.)

Held, on the evidence, that the suit lands were to be considered as appropriated to the maintenance of a Chowkidar or village watchman in the talook of G, and that the right of appointing such officer belonged to the Talookdar, and that such officer was liable to the performance of such services to the Talookdar, as by usage in the Zemindary of Burdwan, Chowkidars had been accustomed to render to the Zemindar, but that the Talookdar had no right to take possession of them for his own purposes, and hold them discharged of the obligation to which they were subject, and that the suit ought to be dismissed subject to declarations to that effect.

Seem the appellant having appointed a fit person to discharge the duties of village watchman, and to perform the duties personal to himself, may be entitled to recover the land for the purpose of its being held by the person so appointed, or the person so appointed may himself be entitled to recover the land (46). (*Lord Kingsdown.*) JOYKISHEN MOOKERJEE *v.* COLLECTOR OF EAST BURDWAN. (1864) 10 M. I. A. 16 = 1 W. R. P. C. 26 = 1 Suth. 542 = 2 Sar. 54.

—Meaning of.

From time immemorial it has been customary in India to remunerate officers charged with certain public or quasi-public duties by grants of lands to be held either rent-free or at a reduced rent. One of the best known examples of these service-tenures is the grant of lands in lieu of wages to individuals who were charged with the performance of police duties in rural areas. These lands are commonly known as *Chaukidari Chakeran* lands, from the word *Chaukidar*, which means "a watchman," and *Chakeran*, "service" (35). (*Mr. Ameer Ali.*) SECRETARY OF STATE FOR INDIA *v.* KIRTIBAS BHUPATI HARICHANDAN MAHAPATRA. (1914) 42 I. A. 30 = 42 C. 710 (721) = 17 M. L. T. 1 = 2 L. W. 2 = 17 Bom. L. R. 32 = 19 C. W. N. 95 = 26 C. L. J. 31 = 26 I. C. 676 = 28 M. L. J. 457.

—Meaning of—Chakeran lands—Thanadari lands or Thanadari Chakeran lands—Distinction. See CHAKERAN LANDS—MEANING OF—CHOWKIDARI CHAKERAN LANDS. (1917) 44 I. A. 117 = 44 C. 841.

—Onus of proof of lands being—Contest between Zemindar and Government.

The onus of proving that certain lands were *Chaukidari Chakeran* lands, that is, lands which at or before the settlement had been appropriated or assigned for the maintenance of the police force and by reason of such appropriation excluded from the Zemindar's assessment would lie upon the Government (177-8). (*Lord Parker.*) RAM CHANDRA BHANJ DEO *v.* SECRETARY OF STATE FOR INDIA.

(1916) 43 I. A. 172 = 43 C. 1104 = 20 C. W. N. 1245 = (1916) 2 M. W. N. 175 = 20 M. L. T. 235 = 4 L. W. 251 = 14 A. L. J. 1009 = 18 Bom. L. R. 838 = 24 C. L. J. 296 = 31 M. L. J. 745.

—Resumption by Government and transfer to Zemindar of—Suit by patnidar—Limitation. See LIMITATION ACT OF 1908, ARTS. 113, 144—CHOWKIDARI CHAKERAN LANDS. (1918) 45 I. A. 162 = 46 C. 173.

—Resumption of—Government's right of—Bengal Reg. I of 1793, S. 8—Bengal Reg. VIII of 1793, S. 41—Effect.

It is clear from the language of cl. 4, S. 8 of Bengal Regulation I of 1793, and S. 41 of Bengal Regulation VIII of 1793, that the power or "option" of resumption was reserved in respect of those lands that had been appropriated by the Zemindar with the permission or under the authority of Government for the purpose of remunerating the *chaukidars* for their services, lands which, although included in the mahal and "annexed" to the *malguzari* lands,

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were not taken into consideration for the assessment of revenue because in reality they formed no part of his assets (37). (*Mr. Amcer Ali.*) SECRETARY OF STATE FOR INDIA *v.* KIBTIRAS BHUPATI HARICHANDAN MAHAPATRA. (1914) 42 I.A. 30 = 42 C. 710 (722) =

17 M.L.T. 1 = 2 L. W. 2 = 17 Bom. L.R. 32 =

19 C.W.N. 95 = 26 C.L.J. 31 = 26 I.C. 676 =

28 M.L.J. 457.

—Use of, for remunerating personal servants of Zemindar not doing any police duties—Permissibility.

The appellant (Zemindar) would be precluded by Regulations I of 1793 and XIII of 1805 from utilizing *chaukidari chakeran* lands for remunerating persons who were his personal servants and performed no police duties (178). (*Lord Parker.*) RAM CHANDRA BHUNJ DEO *v.* SECRETARY OF STATE FOR INDIA. (1916) 43 I.A. 172 =

43 C. 1104 = 20 C.W.N. 1245 = (1916) 2 M.W.N. 175 =

20 M.L.T. 235 = 4 L.W. 251 = 14 A.L.J. 1009 =

18 Bom. L.R. 838 = 24 C.L.J. 296 = 31 M.L.J. 745.

—Zemindari permanently-settled—Lands within—Zemindar's right to—Patni lease by him of—Validity.

The *prima facie* title of the Zemindar to Chakeran lands within his district is recognized by the permanent settlement. The proprietor with whom a Zemindari was settled under the Bengal Permanent Settlement had in the Chaukidari Chakeran lands situate within the territorial boundaries of a village comprised in his Zemindari an interest capable of being made the subject of a patni lease. (*Lord Parker.*) RANJIT SINGH *v.* KALI DASI DEBI.

(1917) 44 I.A. 117 = 44 C. 841 = 2 Pat. L.W. 1 =

21 C.W.N. 609 = 19 Bom. L.R. 462 = 15 A.L.J. 390 =

22 M.L.T. 489 = (1917) M.W.N. 459 = 6 L.W. 101 =

25 C.L.J. 499 = 40 I.C. 981 = 32 M.L.J. 565.

CHOWRASI GADDIS.

—Origin of—Aboriginal Bhuiyas—Descendants of—Rajputs.

The holders of the chowrasi gaddis all claim to be Surjambansi Rajputs, and, as such, high-caste Hindus. They differ, however, in some customs, social and otherwise, from ordinary high-caste Hindus, and it is now said of them that they are really descendants of an aboriginal tribe called Bhuiyas, who have assimilated the manners of Hindus for many generations, and, having had fictitious pedigrees made out for them by Brahmins, now claim to be Rajputs. Certainly the bulk of the inhabitants in the District are Bhuiyas, and, though it is possible that these particular gaddi holders may be lineal descendants of Rajput invaders and conquerors, the High Court has proceeded on the footing that they are by descent Bhuiyas. Their Lordships, without pronouncing upon the anthropological question, will assume, as the assumption is favourable to the plaintiffs, that this class or collection of families and in particular the family in which the suit (Lachmipur) estate has been held, are aboriginal Bhuiyas (61-2). (*Lord Phillimore.*) SAHDEO NARAIN DEO *v.* KUSUM KUMARI. (1922) 50 I.A. 58 =

2 P. 230 = A. I. R. 1923 P. C. 21 =

32 M. L. T. 121 = 4 Pat. L. T. 217 = 37 C. L. J. 369 =

18 L. W. 597 = (1923) M. W. N. 377 =

27 C. W. N. 901 = 25 Bom. L. R. 560 = 71 I. C. 769 =

44 M. L. J. 476.

CHUDASAMA GAMATI GARASIAS.

—Adoption among—Custom prohibiting—Proof of—Onus.

Held, on the evidence affirming the Courts below, that the plaintiffs had failed to prove that adoption was forbidden by the custom of the caste of Chudasami Gamati Garasias (236-7). (*Lord Lindley.*) VERABHAI AJUBHAI *v.* BAI HIRABA. (1903) 30 I. A. 234 = 27 B. 492 =

7 C. W. N. 716 = 5 Bom. L. R. 534 = 8 Sar. 508.

CHUDASAMA GAMATI GARASIAS—(Contd.)

—Inheritance—Daughters—Exclusion of—Custom of.

The inability of daughters to inherit according to the custom of the caste of Chudasama Gamati Garasias seems to have been established in the courts below. Their Lordships have not to determine this matter and have not reinvestigated it (236). (*Lord Lindley.*) VERABHAI AJUBHAI *v.* BAI HIRABA. (1903) 30 I. A. 234 =

27 B. 492 = 7 C. W. N. 716 = 5 Bom. L. R. 534 = 8 Sar. 508.

—Law governing—Hindu Law—Custom—Presumption—Onus of proof.

The persons concerned belong to the Hindu caste of Chudasama Gamati Garasias, and it is common ground that the ordinary Hindu law applies to this caste unless excluded by special custom (236). (*Lord Lindley.*) VERABHAI AJUBHAI *v.* BAI HIRABA. (1903) 30 I. A. 234 =

27 B. 492 = 7 C. W. N. 716 = 5 Bom. L. R. 534 = 8 Sar. 508.

CHURS.

—See ALLUVION AND DILUVION—CHUR LAND.

CIRCUIT COMMITTEE.

—Purpose of—Records of Committee—Evidentiary value of—Service tenure—Resumption—Zemindar's right of—Statement as regards—Value of.

In a case in which the question was whether the grant of a mokhasa village was a grant subject to a burden of service, or was merely a grant in lieu of wages, great stress was laid, in support of the contention that the grant was one merely in lieu of wages, upon a statement contained in a note to an "Abstract of the Revenue Collections in the Nuzvid Zamin-dari," prepared by the Circuit Committee in 1786, in which it was stated that "the mockawsaw villages and grants being immediately under the Zemindar, and given or resumed when he pleases, are included in Government collections."

Held, that although the records of the Circuit Committee might be good evidence with reference to the system upon which the Government claimed to deal with the Zemindar's property, they could not affect the rights of the mokhasadars as against the Zemindar, with regard to which no independent enquiry appeared to have been made.

The Circuit Committee was appointed by the Government "to enquire into the State of the Northern Circars," with a view, *inter alia*, to the settlement of the revenue, and their Lordships would have been disposed to attach importance to this piece of contemporary evidence as to the relations between the mokhasadars and the Zemindar, were it not that it appears from the Fifth Report of the Select Committee on the affairs of the E. I. Co. that "few of the members of the Circuit Committee appear to have been acquainted with the native languages, and, as it is stated by themselves they depended wholly for what intelligence they obtained on those subjects, on the Zemindars and the native officers in the villages, the very persons most interested to conceal the truth, and to impose upon them false information. (*Sir Andrew Scoble.*) SRI RAJA VENKATA NARASIMHA APPA RAO BAHADUR *v.* SRI RAJA SOBHA-NADRI APPA RAO BAHADUR. (1905) 33 I. A. 46 = 29 M. 52 (57) = 3 C. L. J. 1 = 10 C. W. N. 161 = 3 A. L. J. 55 = 8 Bom. L. R. 1 = 1 M. L. T. 3 = 8 Sar. 897 = 16 M. L. J. 1.

CIVIL COURT.

—Jurisdiction of. See JURISDICTION—CIVIL COURTS.

—Rent Court if a. See BENGAL ACTS—RENT ACT X OF 1859—RENT DECREE UNDER—EXECUTION.

(1882) 9 I. A. 174 (178-9) = 9 C. 295 (300-1).

CIVIL PROCEDURE CODE.

—Construction of—*Stare decisis*—Principle of—Adoption by P. C. of. See STATUTE—INTERPRETATION—INDIAN STATUTE—PRACTICE OF INDIAN COURTS.

(1872) 14 M. I. A. 543 (560-1).

—Scope of—Rights—Remedies and procedure to enforce rights.

The Code of Civil Procedure professes to deal, not with rights, but with remedies, and procedure to enforce rights (522). (*Sir Montague E. Smith.*) MUSSUMAT BUHUNS KOWUR v. LALLA BUHOOREE LALL.

(1872) 14 M. I. A. 496 = 18 W. R. 157 = 10 B. L. R. 159 = 2 Suth. 575 = 3 Sar. 69.

C. P. CODE (ACT VIII OF 1859).

—Construction—Constitution of Courts—Equity and good conscience—Regard for—Necessity.

The Code of Civil Procedure (1859), which is one of procedure, and the Act enacting it, must be construed with reference to the constitution of those courts, and the abiding direction to them to proceed in all cases, according to equity and good conscience. (*Lord Romilly.*) PESTONJEE NUSURWANJEE v. MANECKJEE & CO.

(1868) 12 M. I. A. 112 (129) = 1 Ind. Jur. N. S. 69 = 2 Suth. 164 = 2 Sar. 390 = 10 W. R. 51.

—Creditors—Prior rights of—Effect on—Enforcement of—Mode prescribed by Code for—Conformity with—Necessity.

The Code of Civil Procedure of 1859, no doubt, regulates rather than extinguishes any prior right of a creditor. But the Code is a new starting point, and must be construed on its own terms, and worked in the mode which it prescribes (51-2). (*Lord Justice James.*) SYUD TUFFUZZOOL HOSSEIN KHAN v. RUGHOONATH PERSHAD.

(1871) 14 M. I. A. 40 = 7 B. L. R. 186 = 2 Suth. 434 = 2 Sar. 656 = R. & J.'s No. 10 (Oudh).

—S. 15—Construction—15 and 16 Vict., c. 86—Principles of construction of—Applicability.

S. 15 of C. P. C. of 1859 relating to declaratory decrees ought to receive the same construction as S. 50 of the English Act, 15 and 16 Vict., c. 86; which is similarly worded, has received from the English Courts (111). (*Sir Montague E. Smith.*) SHEO SINGH RAI v. MT. DAKKO.

(1878) 5 I. A. 87 = 1 A. 688 (705) = 2 C. L. R. 193 = 3 Sar. 807 = 3 Suth. 529.

—Construction—15 and 16 Vict., c. 86—Principles of construction of—Applicability—English Equity Courts' decisions—Authority of.

With such slight qualifications as may be required by the different circumstances of India and the different constitution of the Courts in that country, the application of S. 15 of C.P.C. of 1859 is to be governed by the same principles as those upon which the Court of Chancery proceeds (181). The section must be construed upon the principles and by the light of the decisions of the English Courts of Equity, upon S. 50 of the 15 and 16 Vict., c. 86, which is in precisely the same words (180, 184). The decisions in England have an authority and a binding force on the construction of the section of the Indian Statute (181). (*Sir James W. Colville.*) KATHAMA NATCHIAR v. DORASINGA TEVER.

(1875) 2 I. A. 169 = 15 B. L. R. 83 = 23 W. R. 314 = 3 Sar. 456 = 3 Suth. 106.

—Declaration—Declaratory decrees. See SPECIFIC RELIEF ACT, S. 42.

—S. 103—Execution proceedings—Applicability to.

S. 103 of the Code of 1859, which comes under the heading of "Proceeding before judgment" has reference only to a state of things existing before the hearing of the suit or at the hearing of the suit and does not relate to proceedings for

C. P. CODE (ACT VIII OF 1859), S. 103—(Contd.)

execution and after judgment and decree (73). (*Sir Robert P. Collier.*) ABEDOONISSA KHATOON v. AMEEROONISSA KHATOON.

(1876) 4 I. A. 66 = 2 C. 327 (333) = 3 Sar. 677 = 3 Suth. 371.

—Ss. 109, 110, 111, 119 and 147—Ex parte judgment—Appeal from—Right of—Adjourned hearing—Non-appearance at—S. 111—Who has not appeared—Meaning.

After settlement of issues, the hearing of a suit was adjourned several times at the instance of parties. On the 8th April, 1874, the date ultimately fixed for the hearing, the defendant appeared neither in person nor by pleader, and the case was heard and decided *ex parte* under the provisions of Ss. 147 and 111 of C.P.C. of 1859. The defendant applied, under S. 119 of C.P.C. of 1859, for an order to set aside the judgment, but that application was struck off for default. On an appeal presented by the defendant against the decree passed *ex parte* against him, the High Court held that no appeal lay and that the defendant's remedy was to follow the procedure prescribed by S. 119 of C.P.C. of 1859.

Held, that the decision of the High Court was erroneous, and that the case must be remanded to the High Court to hear and determine the appeal.

There is no enactment in S. 147 that, in case the Court disposes of the suit in the manner specified in S. 111, the first part of S. 119 shall apply to such a judgment. The words "who has not appeared", as used in S. 111, mean "who has not appeared at all," and do not apply to the case of a defendant who has once appeared, but who fails to appear on a day to which the case has been adjourned. (*Sir Barnes Peacock.*) SAHIBZADA ZEINULABDIN KHAN v. SAHIBZADA AHMED RAZA KHAN. (1878) 5 I. A. 233 = 2 A. 67 = 3 Sar. 879.

—S. 208—Applicability—Decree—Equitable interest in—Right to—Contest as to—Heir—Legitimacy of—Question as to.

S. 208 of C. P. C. of 1859 was not intended to apply to cases where a serious contest arises with respect to the rights of persons to an equitable interest in a decree. It was not intended to enable them to try an important question, such as the legitimacy or illegitimacy of an heir (74). (*Sir Robert P. Collier.*) ABEDOONISSA KHATOON v. AMEEROONISSA KHATOON. (1876) 4 I. A. 66 = 2 C. 327 (334) = 3 Sar. 677 = 3 Suth. 371.

—Order under—Suit to set aside—Right of.

Proceedings under S. 208 of C.P.C. of 1859 are not subject to appeal, and probably a suit would lie for the purpose of reversing an order made in pursuance of it (74). (*Sir Robert P. Collier.*) ABEDOONISSA KHATOON v. AMEEROONISSA KHATOON. (1876) 4 I. A. 66 = 2 C. 327 (333-4) = 3 Sar. 677 = 3 Suth. 371.

—S. 327—Earlier sections of Act if incorporated into.

The earlier sections of the Act are not incorporated into S. 327 of C.P.C. of 1859, as they were expressly incorporated into S. 326 thereof. (*Sir James W. Colville.*) CHOWDHRI MURTAZA HOSSEIN v. MT. BIBI BECHUNNISSA. (1876) 3 I. A. 209 (213) = 26 W. R. P. C. 10 = 3 Sar. 663 = 3 Suth. 342 = Bald. 86 = R. & J.'s No. 43 (Oudh).

—Sufficient cause—Meaning of.

The words "sufficient cause" in S. 327 of C. P. C. of 1859 should be taken to comprehend any substantial objection which appears upon the face of the award; or is founded on the misconduct of the arbitrators, or on any miscarriage in the course of the proceedings, or upon any other ground which would be considered fatal to an award on an application to the Courts in this country (213). (*Sir James W. Colville.*) CHOWDHRI MURTAZA HOSSEIN v. MUSSUMAT BIBI BECHUNNISSA. (1876) 3 I. A. 209 = 26 W. R. P. C. 10 = 3 Sar. 663 = 3 Suth. 342 = Bald. 86 = R. & J.'s No. 43 (Oudh).

C. P. CODE (ACT X OF 1877).

—**S. 13**—*Court of competent jurisdiction—Meaning of.*

By Court of competent jurisdiction C.P.C. of 1877 means a Court which has jurisdiction over the matter in the subsequent suit in which the decision is used as conclusive, or in other words, a Court of concurrent jurisdiction (204-5). (*Sir Richard Couch.*) **MISIR RAGHOBARDIAL v. RAJAH SHEO BAKSH SINGH.** (1882) 9 I. A. 197 =

9 C. 439 (445) = 12 C. L. R. 520 = 4 Sar. 395 = R. & J.'s No. 70.

—*Intention of—Effect on prior law.*

The intention seems to have been to embody in the Code of Procedure, 1877, by Ss. 12 and 13, the law then in force in India, instead of the imperfect provision in S. 2 of C. P. C. of 1859. And, as the words of the section 13 do not clearly show an intention to alter the law, their Lordships do not think it right to put a construction upon them which would cause an alteration (204). (*Sir Richard Couch.*) **MISIR RAGHOBARDIAL v. RAJAH SHEO BAKSH SINGH.** (1882) 9 I. A. 197 = 9 C. 439 (445) =

12 C. L. R. 520 = 4 Sar. 395 = R. & J.'s No. 70.

—*Law at date of—State of.*

S. 2 of C.P.C. of 1859, the Code of Civil Procedure for which the Code of 1877 was substituted, provided that the civil courts should not take cognizance of any suit brought on a cause of action which should have been heard and determined by a court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim. But independently of this provision in the Code of Procedure, the Courts in India have adopted the rule laid down in the Duchess of Kingston's case, and have applied it in a great number of cases. It was recognised as the law in India by this Board in 7 B. L. R. 673, where, after quoting the passage in the Duchess of Kingston's case in which the rule is stated, their Lordships say, "There is nothing technical or peculiar to the law of England in the rule as so stated. It was recognised by the Civil Law, and it is perfectly consistent with the 2nd section of the Code of Procedure" (of 1859) (202-3). (*Sir Richard Couch.*) **MISIR RAGHOBARDIAL v. RAJAH SHEO BAKSH SINGH.** (1882) 9 I. A. 197 =

9 C. 439 (443) = 12 C. L. R. 520 = 4 Sar. 395 = R. & J.'s No. 70.

C. P. CODE (ACT XIV OF 1882).

—**Ss. 211 and 212**—Mesne profits—Assessment of—Proceedings for—Execution proceedings or proceedings in suit. See MESNE PROFITS—ASSESSMENT OF—PROCEEDINGS FOR. (1925) 4 Pat. 507.

—**S. 325-A**—*Mortgage in contravention of—Validity.*

The execution of a decree ordering the sale of immovable property was transferred to the Collector under S. 320 of C.P.C. of 1882, who thereupon came into possession of the property. While he was still in possession of that property a mortgage upon it was granted by the judgment-debtor. In a suit to enforce the mortgage instituted after the Collector's regime had ended, *held*, that the mortgage was void and unenforceable.

The provision in S. 325-A of C. P. C. of 1882 is absolute, and the section must be read in the complete and operative sense natural to the words, that is to say, of incompetency to mortgage such property. It is not justifiable to read the section with the implied limitation that there still remained in the judgment-debtor a power to mortgage the property so as to become operative over any residue that might arise to the latter after the Collector's administration had ended. (*Lord Shaw.*) **GAURISHANKAR BALMUKUND v. CHINNU-MAYA.** (1918) 45 I. A. 219 = 46 C. 183 =

23 C.W.N. 350 = 29 C.L.J. 201 = 25 M.L.T. 64 =

9 L.W. 327 = 21 Bom. L.R. 541 = 16 A.L.J. 993 =

14 N.L.R. 181 = 48 I. C. 312 = 35 M. L. J. 733.

C. P. CODE (ACT XIV OF 1882)—(Contd.)

—**S. 457**—*Guardian ad litem—Married woman guardian of person of minor—Appointment of—Validity—Guardian and Wards Act, S. 53—Effect.*

A married woman is disqualified under S. 457 of C. P. C. of 1882 from being appointed guardian for the suit, and she cannot be appointed guardian *ad litem* notwithstanding that she is guardian of the person of the minor. The later enactment (Guardian and Wards Act of 1890, S. 53) leaves S. 457 of the Code untouched, and the effect of the two statutes, read together, is that a proper guardian of the person of a minor may, if properly qualified, be preferred as his or her guardian *ad litem* (175). (*Sir Andrew Scoble.*) **MUSSUMAT RASHID-UN-NISSA v. MUHAMMAD ISMAIL KHAN.** (1909) 36 I.A. 168 = 31 A. 572 (582-3) =

6 M. L. T. 279 = 10 C.L.J. 318 = 13 C. W.N. 1182 =

11 Bom. L. R. 1225 = 3 I.C. 864 = 19 M.L.J. 631.

—**S. 584 (a)**—*Specified—Meaning.*

In sub-s. (a) of S. 584 of the Code of 1882, the word "specified" means specified in the memorandum or grounds of appeal (124). (*Lord Macnaghten.*) **MUSSUMAT DURGA CHOUDHRAIN v. JAWAHIR SINGH CHOUDHRI.**

(1890) 17 I.A. 122 = 18 C. 23 (26) = 5 Sar. 560.

—*Specified law—Meaning.*

"Specified law" in cl. (a) of S. 584 of the Code of 1882 does not mean 'the statute law'. "Specified" in that clause means "specified in the memorandum or grounds of appeal" (233). (*Sir Richard Couch.*) **RAM GOPAL v. SHAMSKHATON.**

(1892) 19 I.A. 228 = 20 C. 93 (100) = 6 Sar. 247.

—*Usage having the force of law—Meaning.*

By "usage having the force of law" in S. 584, cl. (a) of the Code of 1882 is not meant "the common customary law of the country or community." The expression means a local or family usage as distinguished from the general law, of which there are many instances (233). (*Sir Richard Couch.*) **RAM GOPAL v. SHAMSKHATON.**

(1892) 19 I. A. 228 = 20 C. 93 (99-100) = 6 Sar. 247.

—**S. 595**—*Account—Suit for—Final decree in—What amounts to. See DECREE—ACCOUNT—SUIT FOR—DECREE IN—FINAL DECREE.*

—*Final decree—Meaning of.*

"Final decree" in S. 595 of C. P. C. of 1882 does not mean last decree, but decree determining rights finally (7). (*Lord Macnaghten.*) **RAHIMBOY HIBIBHOY v. TURNER.**

(1890) 18 I. A. 6 = 15 B. 155.

—*Review—Order on—Final decree if a.*

If there is a decision upon a review of judgment, that decision is to be considered the final decree. (*Sir James W. Colville.*) **NOGENDAR CHUNDER GHOSE v. MAHOMED EUSUFF.** (1868) 12 M. I. A. 107 = 2 Sar. 359.

C. P. CODE (ACT V OF 1908).

—**S. 2 (2)**—*Decree—Meaning of. See DECREE.*

—*Matters in controversy—Meaning of.*

The expression "matters in controversy" in S. 2, sub-s. 2 of the Code of Civil Procedure, 1908, cannot be pressed so as to exclude matters which, though as it happened they were common ground, must have been actually decided, if any question had arisen, and were the foundation of the whole determination (95-6). (*Lord Sumner.*) **AHMED MUSAJI SALEJI v. HASHIM EBRAHIM SALEJI.**

(1915) 42 I. A. 91 = 42 C. 914 (925) = 19 C. W. N. 449 =

(1915) M. W. N. 485 = 17 M. L. T. 312 =

21 C. L. J. 419 = 2 L. W. 377 = 13 A. L. J. 540 =

17 Bom. L. R. 432 = 28 I. C. 710 = 29 M. L. J. 70.

—**S. 2 (11)**—*Hindu Law—Widow—Adoption or alienation by—Presumptive reversioner's suit to set aside—Legal representative of plaintiff in. See HINDU LAW—WIDOW—REVERSIONER—ADOPTION BY HER—SETTING ASIDE OF—PRESUMPTIVE REVERSIONER'S SUIT FOR—LEGAL REPRESENTATIVE OF PLAINTIFF IN.*

(1915) 42 I. A. 125 (131) = 38 M. 406 (413).

C. P. CODE (ACT V OF 1908), S. 2 (11).—(Contd.)

—Hindu Law—Widow—Suit by or against, on behalf of estate—Legal representative of widow in. See HINDU LAW—WIDOW—SUIT BY OR AGAINST, ON BEHALF OF ESTATE—LEGAL REPRESENTATIVE OF WIDOW IN.

(1863) 9 M. I. A. 539 (596).

—Object of—Drafting of—Defect in.

Sub-S. 11 of S. 2 of C. P. C. of 1908 was enacted with the object of putting in statutory language the result of the decisions of the Indian tribunals on the meaning of the words "legal representative"; but it is not clearly worded and has already been the subject of criticism by at least one of the High Courts in India (131). (*Mr. Ameer Ali.*) VENKATANARAYANA PILLAI v. SUBBAMMAL.

(1915) 42 I. A. 125 = 38 M. 406 (413) =

21 C. L. J. 515 = 19 C. W. N. 641 =

17 Bom. L. R. 468 = 17 M. L. T. 435 = 2 L. W. 596 =

(1915) M. W. N. 555 = 29 I. C. 298 = 28 M. L. J. 535.

—Oudh Estate entered in Lists 2 and 3 of Act I of 1869—Succession to—Widow claiming under cl. (7) of S. 22 of that Act—Suit by, against daughter's son claiming under cl. (4) of that section—Dismissal of—Appeal by widow against—Death of widow pending—Daughter's right to revive and prosecute appeal in case of. See OUDH ESTATES ACT OF 1869, S. 22 (4), (7) AND (11)—LISTS 2 AND 3.

(1894) 21 I. A. 163 (168-9) = 21 C. 997 (1004-5).

—Succession to estate—Appeal relating to—Death of plaintiff-appellant, the nearer claimant, pending—Revival and prosecution of appeal by more remote claimant—Right of—Unity of interest between persons in line of succession—Effect. See OUDH ESTATES ACT, S. 22, SUB-SS. 4, 7 AND 11—ESTATE IN LISTS 2 AND 3.

(1894) 21 I. A. 163 (168-9) = 21 C. 997 (1004-5).

—S. 2 (12)—Mesne profits. See MESNE PROFITS.

—S. 9—Portion of claim only not cognizable by civil court—Rejection of whole claim in case of—Propriety.

Plaintiffs, members of the Tungalai sect, claimed to have the exclusive right to the Adhyapaka Miras of reciting certain religious texts, hymns, or chants in a certain pagoda and its dependencies, and denied the right of the defendants, members of the Vadagalai sect, to recite them. The plaintiff alleged that the defendants, holding the office of Dharmakarta of the pagoda, had withheld the payment to the plaintiffs and the others of the Tungalai sect of the amount of the income of the Adhyapaka Miras mentioned in Schedule C to the plaintiff, as also of the incomes which were mentioned in Schedule B to the plaintiff, and that the defendants had also withheld the honors mentioned in Schedule A to the plaintiff. The plaintiff prayed for a decree directing the defendants and others to abstain from reciting, and establishing the exclusive right of the plaintiffs, and also seeking to recover the value of various items stated in the schedules to the plaintiff. The schedules to the plaintiff disclosed a claim as of right to certain dues for services performed; Schedule C to an annual payment for wages which had been assessed in a prior suit between the parties, and adjudicated upon as due to the plaintiffs; Schedule B to certain other payments in kind of a money value, which had been made to the plaintiffs up to the judgment in the former suit, but which had been afterwards withheld.

Held, that the plaintiff disclosed a good cause of action and ought not to have been rejected (124-5).

It may be that no action will lie for the recovery of the sum claimed in Schedule B for presents made annually to the Adhyapakas by the adjoining villagers for the plaintiffs, or in respect of the honors mentioned in Schedule A, and alleged to have been withheld; but that circumstance would not justify the rejection of the whole plaintiff, if it discloses a good cause of action in respect of Schedule C, and

C. P. CODE (ACT V OF 1908), S. 9.—(Contd.)

the greater part of Schedule B (121). (*Sir Robert P. Collier.*) TIRU KRISHNAMA CHARARIAR v. KRISHNASWAMI TATA CHARARIAR. (1879) 6 I. A. 120 = 4 Sar. 28 = 2 M. 62 (66-7) = 6 C. L. R. 201 = 3 Suth. 620.

—Religious ceremonies—Right to perform—Declaration of—Suit for mere.

Quære, whether the Civil Courts in India have any jurisdiction to determine a question involving a mere declaration of a right to perform certain religious ceremonies (380-1). (*Lord Brougham.*) NAMBOORY SETAPATY v. KANOO-BOLANOO PULLIA. (1845) 3 M. I. A. 359 =

7 W. R. 7 (P. C.) = 1 Suth. 163 = 1 Sar. 290.

—Religious services—Pecuniary benefit connected with—Suit claiming—Jurisdiction to entertain—Determination of right to perform such services—Claim depending upon.

Their Lordships accepted the following statement of the law by the High Court as being perfectly correct:—

"The claim is for a specific pecuniary benefit to which plaintiffs declare themselves entitled on condition of reciting certain hymns (in a pagoda). There can exist no doubt that the right to such benefits is a question which the courts are bound to entertain, and cannot cease to be such a question, because claimed on account of some service connected with religion. If to determine the right to such pecuniary benefit it becomes necessary to determine incidentally the right to perform certain religious services, we know of no principle which would exonerate the Court from considering and deciding the point" (123). (*Sir Robert P. Collier.*) TIRU KRISHNAMA CHARARIAR v. KRISHNASWAMI TATA CHARARIAR. (1879) 6 I. A. 120 = 2 M. 62 (65) =

6 C. L. R. 201 = 4 Sar. 28 = 3 Suth. 620.

—Temple—Right to recite mantrams in, and to receive emoluments—Suit to establish. VENKATA VARATHA THATHA CHARARIAR v. ANANTHA CHARARIAR.

(1893) 16 M. 299 = 6 Sar. 364 = 3 M. L. J. 150.

—S. 11.

(See also RES JUDICATA).

APPLICATION OF RULE OF *res judicata*.

CAUSE OF ACTION.

CONSTRUCTIVE ESTOPPEL.

COURT OF COMPETENT JURISDICTION.

DECREE IN PRIOR SUIT—GROUNDS OF.

EVIDENCE OF *res judicata*.

GENERAL LAW OF *res judicata*.

HEARD AND FINALLY DECIDED.

HINDU JURISPRUDENCE.

MATTER DIRECTLY AND SUBSTANTIALLY IN ISSUE.

OPERATION OF RULE UNDER SECTION.

ORIGIN OF RULE UNDER SECTION.

PARTY TO SUIT.

PLEA OF *res judicata*.

CASES UNDER—(N.B.—Under this head are collected in alphabetical order all the cases in which the rule of *res judicata* was or was not held applicable).

S. 11—Application of rule of *res judicata*.

—Certainty as to scope and effect of decision in prior suit—Necessity.

The Judicial Commissioners took the view that the judgment of 1884, being made by a court competent to decide the present case, is binding now. Therefore they do not decide the suit on its merits. Their Lordships doubt whether the judgment of 1884, which is the only evidence before them of that suit, sufficiently discloses what was really contested and decided there, so that they can confidently hold the present issue to be *res judicata*. (*Lord Hobhouse.*) MUHAMMAD MEHNDI ALI KHAN v. MUHAMMAD YASIN KHAN. (1898) 26 I. A. 41 (43) = 26 C. 523 (527) = 3 C. W. N. 218 = 7 Sar. 468.

C. P. CODE (ACT V OF 1908)—(Contd.)**S. 11—Application of rule of *res judicata*—(Contd.)**

—The defendants relied on the decision in the Jeypore suit of 1880 as *res judicata* in bar of the present suit, but the High Court has rightly disallowed that plea. The nature of the Jeypore suit is left too uncertain for any such use to be made of it (7). (*Lord Hobhouse.*) HARANUND ROY CHETLANGIA *v.* RAM GOPAL CHETLANGIA.

(1899) 27 I. A. 1 (7) = 27 C. 639 (646-7) =

4 C. W. N. 429 = 2 Bom. L. R. 562 =

7 Sar. 648.

—Form—Technical considerations of—Matter of substance—Regard for—Duty of Court.

The application of the rule of *res judicata* by the Courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law (99). (*Sir Lawrence Jenkins.*) SHEOPAR-SAN SINGH *v.* RAMNANDAN SINGH.

(1916) 43 I. A. 91 = 43 C. 694 (706) = 33 I. C. 914 =

14 A. L. J. 466 = 20 C. W. N. 738 =

18 Bom. L. R. 397 = 23 C. L. J. 621 =

(1916) M. W. N. 419 = 20 M. L. T. 1 = 3 L. W. 544 =

31 M. L. J. 77.

—Policy or expediency—Considerations of—Application founded on—Permissibility.

An appeal presented to the Governor in Council against a decree erroneously dismissing a suit as barred by *res judicata* was rejected on the ground that it would be inexpedient and would set a bad example and encourage a multitude of suits for the same cause of action.

Held, that the legal right to bring a suit, and to have it determined by the proper Court created for the purpose of determining such suits, could not be barred upon the considerations of policy or expediency which were urged by the judgment under appeal. (*Lord Chancellor.*) MAHARAJAH OF JEYPORE *v.* GUNAPURAM DEENABANDHU PATNAICK. (1904) 32 I. A. 45 = 28 M. 42 = 9 C. W. N. 257 =

7 Bom. L. R. 97 = 2 A. L. J. 135 = 8 Sar. 763.

—Prior proceeding not being a suit immaterial.

To get over the plea of *res judicata* it has been suggested that the previous decision was not in a former suit, but whether this were so or not makes no difference, for the principle which prevents the same case being twice litigated is of general application, and is not limited by the specific words of the Code in this respect. (*Lord Buckmaster.*) RAMACHANDRA RAO *v.* RAMACHANDRA RAO.

(1922) 49 I. A. 129 (138) = 45 M. 320 (331) =

30 M. L. T. 154 = 26 C. W. N. 713 = 35 C. L. J. 545 =

20 A. L. J. 684 = 16 L. W. 1 = (1922) M. W. N. 359 =

24 Bom. L. R. 963 = A. I. R. 1922 P. C. 80 =

67 I. C. 408 = 43 M. L. J. 78.

S. 11—Cause of action.

—Meaning of. See CAUSE OF ACTION.

S. 11—Constructive estoppel.

—If sufficient to satisfy requirements of section.

It was admitted that the judgment of the High Court of 1886 as it stands and of itself would not support a plea of *res judicata*. But it was contended that there must have been some grounds for the decision of the High Court in 1886 or some findings underlying that decision which would support a case of what may be called constructive estoppel. It is enough to say that there is no such thing known to the law as constructive estoppel, and if there were it would not satisfy the requirements of S. 13 of C. P. C. of 1882. "The conditions for the exclusion of jurisdiction on the ground of *res judicata* are," as Wills, J., says, "that the same identical matter shall have come in question already in a court of competent jurisdiction, that the matter shall have been controverted, and that it shall have been finally decided." That

C. P. CODE (ACT V OF 1908)—(Contd.)**S. 11—Constructive estoppel—(Contd.)**

is just what S. 13 requires: there must be a final decision. (*Lord Macnaghten.*) PARSOTAM GIR *v.* NARBADA GIR.

(1899) 26 I. A. 175 (182-3) = 21 A. 505 (514) =

3 C. W. N. 517 = 1 Bom. L. R. 700 = 7 Sar. 538.

S. 11—Court of competent jurisdiction.

—Court deciding first suit adjudged to have no jurisdiction to entertain it—Second suit in competent Court for same cause of action—Not *res judicata*.

A suit was instituted by the plaintiff in the Court of the Agent to the Governor at Vizagapatam to establish his right to resume possession of certain villages. The defendants applied to the High Court of Madras for a transfer of that suit to some other Court, and, no opposition being made to such application by the plaintiff, an order was made transferring the suit to the District Court of V. The suit then became an original suit in that Court; that Court ultimately dismissed that suit; and its judgment was not appealed from. Subsequently, however, the High Court of Madras held that it had no jurisdiction to order the transfer of a suit from the Court of the Governor's Agent to the District Court of V, and that the consent of the parties to the transfer could not cure that defect of jurisdiction. Thereupon the plaintiff presented his plaint to the Court of the Governor's Agent for the same cause of action as was alleged in the former suit, stating the grounds on which he contended that the District Judge had no jurisdiction to decide the suit, and that the decision itself was a nullity. The plaint was rejected on the ground that the decision in the former suit precluded any further proceeding upon the same cause of action.

Held, that the subsequent was not barred by *res judicata*.

The former decision of a Court adjudged by the High Court to be without jurisdiction cannot be treated as *res judicata* against the claim of the plaintiff to have his rights decided by a Court of competent jurisdiction. (*Lord Chancellor.*) MAHARAJAH OF JEYPORE *v.* GUNAPURAM DEENABANDHU PATNAICK. (1904) 32 I. A. 45 =

28 M. 42 = 9 C. W. N. 257 = 7 Bom. L. R. 97 =

2 A. L. J. 135 = 8 Sar. 763.

—Meaning of.

In order to make the decision of one Court final and conclusive in another Court, it must be the decision of a Court which would have had jurisdiction over matter in the subsequent suit in which the first decision is given in evidence as conclusive (36-7). It would not be proper that the decision of a Munsif upon (for instance) the validity of a will or of an adoption, in a suit for a small portion of the property affected by it, should be conclusive in a suit before a District Judge or in the High Court, for property of a large amount, the title to which might depend upon the will or adoption. By taking concurrent jurisdiction to mean concurrent as regards pecuniary limit as well as the subject-matter, this evil or inconvenience is avoided. If this construction of the law were not adopted, the lowest Court in India might determine finally, and without appeal to the High Court, the title to the greatest estate in the Indian Empire (37-8). (*Sir Robert P. Collier.*) RUN BAHADOOR SINGH *v.* LACHOO KOER. (1884) 12 I. A. 23 = 11 C. 301 (308-10) =

4 Sar. 602.

—Rent Court if a. See C. P. C. of 1908, S. 11—CASES UNDER—RENT SUIT.

—Subject-matter of trifling value—Effect.

It is not competent for the Court in the case of the same question arising between the same parties, to review a previous decision no longer open to appeal, given by another Court having jurisdiction to try the second case. If the decision was wrong, it ought to have been appealed from in

C. P. CODE (ACT V OF 1908)—(Contd.)

S. 11—Court of competent jurisdiction—(Contd.)

due time. Nor in such circumstances can the interested parties be heard to say that the value of the subject-matter on which the former decision was pronounced was comparatively so trifling that it was not worth their while to appeal from it. If such a plea were admissible, there would be no finality in litigation. The importance of a judicial decision is not to be measured by the pecuniary value of the particular item in dispute. (*Lord Buckmaster.*) RAMACHANDRA RAO v. RAMACHANDRA RAO.

(1922) 49 I. A. 129 (137-8) = 45 M. 320 (331) =
30 M. L. T. 154 = 26 C. W. N. 713 = 35 C. L. J. 545 =
20 A. L. J. 684 = 16 L. W. 1 = (1922) M. W. N. 359 =
24 Bom. L. R. 963 = A. I. R. 1922 P. C. 80 =
67 I. C. 408 = 43 M. L. J. 78.

—Subsequent suit—Competency to try—Necessity—Hindu Law—Adoption or will—Decision on issue as to—Effect. See HINDU LAW—ADOPTION—WILL—DECISION ON ISSUES AS TO. (1882) 9 I. A. 197 (203) = 9 C. 439 (444).

—Subsequent suit—Competency to try—Necessity—Matter in issue—Competency to try, not enough.

Under S. 13 of the Code of Civil Procedure, 1882, a decree in a previous suit cannot be pleaded as *res judicata* in a subsequent suit unless the Judge by whom it was made had jurisdiction to try and decide, not only the particular matter in issue, but also the subsequent suit itself in which the issue is subsequently raised. In this respect the enactment goes beyond S. 13 of Act X of 1877, and also beyond the law laid down by the Judges in the *Duchess of Kingston's case*, 2 Smith's L. C. 10 Ed. 713 (201-2). GOKUL MANDER v. PUDMANUND SINGH.

(1902) 29 I. A. 196 = 29 C. 707 (715) =
6 C. W. N. 825 = 4 Bom. L. R. 793 = 8 Sar. 323.

S. 11—Decree in prior suit—Grounds of.

—Ascertainment of—Judgment and pleadings in, and records, of prior suit—Reference to—Permissibility. See under this section EVIDENCE OF *Res judicata*.

S. 11—Evidence of *res judicata*.

—Decree in prior suit—Grounds of—Ascertainment of—Judgment in prior suit—Reference to—Permissibility.

The law as to estoppel by a judgment is stated in S. 6 of Act XII of 1879, and S. 13 of C. P. C. of 1882. It is that the matter must have been directly and substantially in issue in the former suit, and have been heard and finally decided. In order to see what was in issue in a suit, or what has been heard and decided, the judgment must be looked at. The decree, according to the Code of Procedure, is only to state the relief granted, or other determination of the suit. The determination may be on various grounds, but the decree does not show on what ground, and does not afford any determination as to the matters which were in issue or have been decided (193). (*Sir Richard Couch.*) KALI KRISHNA TAGORE v. SECRETARY OF STATE FOR INDIA. (1888) 15 I. A. 186 = 16 C. 173 (182-3) = 5 Sar. 237.

—In order to see what was in issue in a suit, or what has been heard and decided, the judgment must be looked at. The decree according to the Code of Procedure is only to state the relief granted or other determination of the suit. The determination may be on various grounds, but the decree does not show on what ground, and does not afford any information as to the matters which were in issue or have been decided (108). The judgment may be and ought to be looked at to see what was decided (107). (*Sir Richard Couch.*) SRI RAJA LAKSHMI KANTAIYAMMI v. SRI RAJA INUGANTI RAJAGOPAL RAO. (1898) 25 I. A. 102 = 21 M. 344 (351) = 2 C. W. N. 337 = 7 Sar. 325.

C. P. CODE (ACT V OF 1908)—(Contd.)

S. 11—Evidence of *res judicata*—(Contd.)

—Decree in prior suit—Grounds of—Ascertainment of—Judgment and pleadings in prior suit—Reference to—Permissibility.

The Deputy Commissioner says it is the decree which contains the formal adjudication, and it is not possible to amplify the decree from the judgment. But when a decree simply dismisses a suit, it is necessary to look at the pleadings and judgment to see what were the points actually heard and decided (176). (*Lord Hobhouse.*) MAHARAJA JAGATJIT SINGH v. RAJAH SARABJIT SINGH.

(1891) 18 I. A. 165 = 19 C. 159 (172) = 6 Sar. 80 =
R. & J.'s No. 125.

—Decree in prior suit—Grounds of—Ascertainment of—Record of prior suit—Reference to—Permissibility.

In cases where a final decree is couched in general terms, the extent to which it ought to be regarded as *res judicata* can only be determined by ascertaining by an examination of the record of the case what were the real matters of controversy in the cause. Such extrinsic evidence as correspondence and orders by officers of the Government, of dates subsequent to the decree cannot be received as aids to its construction. (*Lord Watson.*) AMRITESWARI DEBI v. SECRETARY OF STATE FOR INDIA.

(1897) 24 I. A. 33 (47-8) = 24 C. 504 (519-20) =
1 C. W. N. 249 = 7 Sar. 101.

—A plea of *res judicata*, taken on the ground that the questions in issue in the suit were formerly in issue in probate proceedings, cannot be given effect to, when the said proceedings are not in evidence, as there is thus no sufficient evidence to support the plea. A judgment passed in the previous proceedings, showing what the Judge understood to have been the questions for decision in those proceedings, is not enough to support such a plea. The Court cannot give effect to the plea, unless it can for itself see that the matters in issue in the suit were in issue in the previous proceedings. (*Sir Arthur Wilson.*) MIRZA KURRATU-LAIN BAHADUR v. PEARA SAHIB.

(1905) 32 I. A. 244 (255-6) = 33 C. 116 (127) =
1 C. L. J. 594 = 9 C. W. N. 938 = 2 A. L. J. 758 =
7 Bom. L. R. 876 = 8 Sar. 839 = 15 M. L. J. 336.

—Decree or order relied upon as a bar—Non-production of—Maintainability of plea in case of.

A plea of *res judicata* was taken, upon the ground apparently that a ruling by the Judge in one application for execution ought to be held conclusive against the judgment-debtor in every other application for execution of the same decree. The plea requires no further notice, because the decree or order upon which it is rested has not been produced (186). (*Lord Watson.*) BISHAMBHAR NATH v. NAWAB IRUDAD ALI KHAN. (1890) 17 I. A. 181 = 18 C. 216 (224) = 5 Sar. 619 = R. & J.'s No. 122.

—Extrinsic evidence such as subsequent correspondence and orders by officers of Government (one of parties to suit)—Admissibility.

Such extrinsic evidence as correspondence and orders by officers of the Government, of dates subsequent to the decree, cannot be received as aids to its construction. (*Lord Watson.*) AMRITESWARI DEBI v. SECRETARY OF STATE FOR INDIA. (1897) 24 I. A. 33 (47-8) = 24 C. 504 (519-20) = 1 C. W. N. 249 = 7 Sar. 101.

—Judgment relied upon as a bar—Non-production of—Effect—Scope and effect thereof appearing sufficiently from pleadings in subsequent suit.

The question was whether a suit by the reversionary heirs of a deceased Hindu brought after the death of his last surviving daughter for the recovery of his properties from the defendant was barred by *res judicata* by a decree dismissing a suit brought by that same daughter against the

C. P. CODE (ACT V OF 1908)—(Contd.)**S. 11—Evidence of *res judicata*—(Contd.)**

same defendant for the recovery of the same properties on the ground that her claim was barred by limitation.

The judgment dismissing the daughter's suit, although it had been filed with the plaint in the subsequent suit, was not put in evidence, and could not therefore be looked at. But the High Court had before it the statement in the plaint in the subsequent suit which admitted that there had been that judgment, and the defendant said in his written statement in the subsequent suit that it was on the ground of limitation.

Held, that there was thus sufficient evidence on which the High Court could decide the question of *res judicata* (190-1). (*Sir Richard Couch.*) **HURRINATH CHATTERJI v. MOHUNT MOTHOR MOHUN GOSWAMI.**

(1893) 20 I. A. 183 = 21 C. 8 = 6 Sar. 334.

—Proceedings in prior suit—Non-production of—Maintainability of plea in case of. *See above.*

(1905) 32 I. A. 244 (255-6) = 33 C. 116 (127).

S. 11—General law of *res judicata*.

—*Not excluded by section.*

S. 2 in the C. P. C. of 1859 would by no means prevent the operation of the general law relating to *res judicata*, founded on the principle "*nemo debet bis vexari pro eadem causa.*" This law has been laid down by a series of cases in this country with which the profession is familiar, and has probably never been better laid down than in the case of *Gregory v. Molesworth*, in which Lord Hardwicke held that where a question was necessarily decided, in effect though not in express terms, between parties to the suit, they could not raise the same question as between themselves in any other suit in any other form; and that decision has been followed by a long course of decisions (218). (*Sir Robert P. Collier.*) **SOORJOMONEE DAYEE v. SUDDANUND MOHAPATTER.** (1873) Sup. I.A. 212 = 12 B.L.R. 304 = 20 W. R. 377 = 3 Sar. 285 = 2 Suth. 899.

—*See also* under this CASES UNDER—ADMINISTRATION SUIT. (1921) 48 I.A. 187 (193-4) = 48 C. 499 (507).

S. 11—Heard and finally decided.

—Appeal—Point decided by Court below but left open in. *See* under this section CASES UNDER—APPEAL.

—Confirmation of judgment—Condition of, to make it complete—Absence of such confirmation—Effect. *See* under this section CASES UNDER—CONFIRMATION OF JUDGMENT.

R. & J.'S No. 32

—Grounds for decision and findings underlying it—Effect of, when decision itself as it stands not *res judicata*. *See* C. P. C. OF 1908, S. 11—CONSTRUCTIVE ESTOPPEL. (1899) 26 I. A. 175 (182-3) = 21 A. 505 (514).

—Liberty to bring fresh suit—Reservation of—Dismissal of suit with. *See* C. P. C. OF 1908, S. 11—CASES UNDER—LIBERTY TO BRING FRESH SUIT.

(1869) 13 M. I. A. 160 (171-2).

—Recommendation—Opinion of Court expressed in form of, and not in form of decision. *See* C. P. CODE OF 1908, S. 11—CASES UNDER—RECOMMENDATION.

(1894) 21 I. A. 131 (133) = 22 C. 214.

—Review and original judgments—Conflict between—Effect. *See* C. P. CODE OF 1908, S. 11—CASES UNDER—REVIEW. (1927) 54 I.A. 178 (183-4) = 8 Lah. 573.

—Suit—Point not arising in—Suit subsequent in respect of. *See* under this section CASES UNDER—SUIT—POINT NOT ARISING IN. (1847) 4 M. I. A. 201 (219).

S. 11—Hindu jurisprudence.

—*Rule under section not opposed to.*

The rule of *res judicata*, while founded on ancient precedent, is dictated by a wisdom which is for all time. Though

C. P. CODE (ACT V OF 1908)—(Contd.)**S. 11—Hindu jurisprudence—(Contd.)**

the rule of the Code may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu commentators. Vignaneswara and Nilakantha include the plea of a former judgment among those allowed by law, each citing for this purpose the text of Katyayana, who describes the plea thus: "If a person though defeated at law sue again he should be answered, 'you were defeated formerly.' This is called the plea of former judgment" (98-9). (*Sir Lawrence Jenkins.*) **SHEOPARSAN SINGH v. RAMNANDAN SINGH.**

(1916) 43 I. A. 91 = 43 C. 694 (706) = 33 I. C. 914 = 14 A. L. J. 466 = 20 C.W.N. 738 = 18 Bom. L. R. 397 = 23 C.L.J. 621 = (1916) M. W. N. 419 = 20 M. L. T. 1 = 3 L.W. 544 = 31 M.L.J. 77.

S. 11—Matter directly and substantially in issue.

—*See* C. P. CODE OF 1908, S. 11—CASES UNDER—ISSUES

S. 11—Operation of rule under section.

—Costs—Order as to—Effect. *See* under this section CASES UNDER—COSTS. (1880) 7 C. L. R. 308.

—*Deed excluding—What amounts to.*

In a suit between *V* and *B* in which the question was whether *B* was the adopted son of *V*'s father, it was held by the Provincial Court that *B* was not the adopted son. *B* was about to appeal against the decision of the Provincial Court to the Sudder Court, and thereupon *V* entered into a *razinamah*, by which he agreed that if *B* would withdraw his appeal *V* would pay him Rs. 30,000. It was further stipulated that if *V* should break that agreement and not pay the Rs. 30,000, *B* should be at liberty to apply to the Court to enforce the payment of the Rs. 30,000 in the same way as if *B* had obtained a judgment against *V* for the amount.

Held, that the effect of the *razinamah* was not to prevent the decree of the Provincial Court from operating as *res judicata* but to allow the judgment of that Court to remain in force (21).

The *razinamah* did not get rid of the judgment of the Provincial Court in which it was held that *B* was not the adopted son.

It was a judgment (? an arrangement) intended to prevent *B* from proceeding with his appeal and to allow the judgment of the Provincial Court to remain in force. The decision, therefore, of the Provincial Court stands, and being an estoppel between the parties the *razinamah* does not prevent it from having the effect which would have been given to it if the *razinamah* had not been entered into (21). (*Sir Barnes Peacock.*) **RAJAH OF PITTAPUR v. SRI RAJAH ROW BUCHI SITAYYA GARU.**

(1884) 12 I. A. 16 = 8 M. 219 (228) = 4 Sar. 598.

S. 11—Origin of rule under section.

—*English source.*

The rule of *res judicata* enacted by the Code of Civil Procedure may be traced to an English source (98). (*Sir Lawrence Jenkins.*) **SHEOPARSAN SINGH v. RAMNANDAN SINGH.**

(1916) 43 I.A. 91 = 43 C. 694 (706) = 33 I. C. 914 = 14 A.L.J. 466 = 20 C. W. N. 738 = 18 Bom. L. R. 397 = 23 C.L.J. 621 = (1916) M. W. N. 419 = 20 M.L.T. 1 = 3 L. W. 544 = 31 M. L. J. 77.

S. 11—Party to suit.

—Benefit of suit—Party intended to have. *See* C. P. CODE OF 1908, S. 11—CASES UNDER—BENEFIT OF SUIT. (1905) 32 I. A. 229 (242) = 28 A. 1 (17).

—Co-heirs—Suit by one of—Other heirs if and when parties to. *See* C.P. CODE OF 1908, S. 11—CASES UNDER—CO-HEIRS. (1905) 2 I.A. 229 (242) = 28 A. 1 (17).

C. P. CODE (ACT V OF 1908)—(Contd.)**S. 11—Party to suit—(Contd.)**

——Discovery—Person made party only for purpose of. See C. P. CODE OF 1908, S. 11—CASES UNDER—DISCOVERY. (1892) 20 I. A. 1 (6) = 17 B. 341 (348).

——Execution of decree—Person applying for—Party to suit if becomes thereby. See C. P. C. OF 1908, S. 47—PARTY TO SUIT—EXECUTION OF DECREE. (1876) 4 I. A. 66 (75) = 2 C. 327 (335).

——Intervention in suit—Application for—Rejection of—Applicant if party to suit in case of. See C. P. C. OF 1908, S. 11—CASES UNDER—INTERVENTION IN SUIT. (1866) 10 M. I. A. 476 (487-8) and (1927) 54 I. A. 190 (195).

——Intervenor in suit or in appeal therefrom. See C.P.C. OF 1908, S. 11—CASES UNDER—INTERVENOR IN SUIT OR APPEAL THEREFROM.

——Minor—Guardian *ad litem* properly appointed for—Absence of—Effect. See C.P.C. OF 1908, S. 47—PARTY TO SUIT—MINOR. (1909) 36 I. A. 168 (175) = 31 A. 572 (582).

——Person substantially, though not formally, represented in suit if a. See C. P. C. OF 1908, S. 11—CASES UNDER—MINOR.

——Plaintiff real in suit—Mode of finding out. See C. P. C. OF 1908, S. 11—CASES UNDER—REAL PARTY—PLAINTIFF IN SUIT. (1927) 54 I. A. 238 (245-6).

——*Pro-forma* defendant. See C. P. C. OF 1908, S. 11—CASES UNDER—*Pro-forma* DEFENDANT. (1878) 5 I. A. 206 = 2 M. 23.

——Representative character—Person sued in a, if a party to suit. See C. P. C. OF 1908, S. 47—PARTY TO SUIT—REPRESENTATIVE CHARACTER. (1872) 11 B. L. R. 149.

——Subsequent suit—Parties to, claiming under same party to prior suit. See C. P. C. OF 1908, S. 11—CASES UNDER—PARTIES TO SUBSEQUENT SUIT. (1903) 30 I. A. 71 (75) = 30 C. 556 (564).

——Substantial, though not formal, party. See HINDU LAW—ADOPTION—ADOPTED SON—ADOPTIVE MOTHER—LITIGATION, ETC. (1888) 15 I. A. 195 = 16 C. 40.

S. 11—Plea of *res judicata*.

——Maintainability—Decree and judgment in, and record of, prior suit—Production of—Necessity. See under this section EVIDENCE OF *res judicata*.

S. 11—Cases under.

——Administration suit—Decision in.

Where a matter has been finally settled between the parties, the mere fact that the decision was given in an administration suit does not affect its finality.

The plea of *res judicata* still remains, apart from the limited provisions of the Code. The binding force of such a judgment in such a case depends not upon S. 11 of C.P.C. of 1908 but upon general principles of law. (Lord Buckmaster.) HOOK v. ADMINISTRATOR-GENERAL OF BENGAL. (1921) 48 I. A. 187 (193-4) = 48 C. 499 (507) = (1921) M. W. N. 313 = 19 A. L. J. 366 = 29 M. L. T. 336 = 33 C. L. J. 405 = 23 Bom. L. R. 648 = 25 C. W. N. 915 = 60 I. C. 631 = 40 M. L. J. 423.

——Administration suit—Directions in, regarding rights of parties.

A direction given in an administration suit regarding the rights of parties to certain property has the effect of an order binding all parties and determines the construction to which it gives effect, so that after the lapse of time necessary for

C. P. CODE (ACT V OF 1908)—(Contd.)**S. 11—Cases under—(Contd.)**

appeal it becomes final and conclusive. (Lord Buckmaster.) GOPAL LAL SETT v. PURNA CHANDRA BASAK. (1921) 49 I. A. 100 (106) = 49 C. 459 (467) = 20 A. L. J. 625 = 36 C. L. J. 57 = 24 Bom. L. R. 937 = 16 L. W. 963 = A. I. R. 1922 P. C. 253 = 27 C. W. N. 174 = 67 I. C. 561 = 43 M. L. J. 116

——Appeal—Defendants with principal and derivative interests in subject-matter of suit—Finding allowed to become final in favour of former by reason of his not being made party to appeal—Effect of, as regards defendants with derivative interests impleaded in appeal. See APPEAL—DEFENDANTS SEVERAL. (1927) 55 I. A. 7 = 6 R. 29.

——Appeal—Point decided by Court below but left open in.

To support a plea of *res judicata* it is not enough that the parties are the same, and that the same matter is in issue. The matter must have been "heard and finally decided."

Where, in a suit for a declaration that the defendant was not the son of A, it appeared that in a former suit between the same parties the question was decided against plaintiffs by the first court but the appellate court concurred in dismissing the suit on the ground that the suit was not properly constituted but declined to decide the question of the defendant's status, *held*, that the decision of the first court in the prior suit on the point at issue having been superseded by that of the appellate court, it did not operate as *res judicata* and was no bar to a fresh suit brought for a decision of the same question. (Lord Macnaghten.) SHEOSAGAR SINGH v. SITARAM SINGH. (1897) 24 I. A. 50 (58-9) = 24 C. 616 (626-7) = 1 C. W. N. 297 = 7 Sar. 124.

——It will be a contradiction in terms to say that a court has finally decided matters which it expressly leaves "untouched and undecided."

A suit for possession and for an account instituted against P, and continued, after his death pending suit, against N, who was brought on record as his representative, was dismissed by the High Court by a judgment in which the learned judges expressly stated "we leave untouched and undecided all matters affecting the rights of the plaintiff on the one side and N on the other." *Held*, that the judgment of the High Court did not finally decide any question between the plaintiff and N, and that a subsequent suit by the same plaintiff against N in respect of the same matter was not barred by *res judicata*. (Lord Macnaghten.) PARSOTAM GIR v. NARBADA GIR. (1899) 26 I. A. 175 (182) = 21 A. 505 (513-4) = 3 C. W. N. 517 = 1 Bom. L. R. 700 = 7 Sar. 538.

——To support a plea of *res judicata* under S. 10 of the British Beluchistan Regulation IX of 1896 it is not enough that the parties are the same and that the same matter is in issue. The matter must have been heard and finally decided.

Where, therefore, in a suit on a bond brought in British Beluchistan the defence was that the bond had been obtained by fraud and it appeared that a previous suit by defendant for cancellation of the bond on that ground had been dismissed by two courts on the merits, but that in the third (the final appellate Court) the dismissal had been upheld solely because the suit was not properly constituted and the court purposely refrained from going into the merits, *held*, that the issue as to fraud had not been "heard and finally decided" within the meaning of S. 10 of the Regulation and that the defence based on that allegation was still open to defendant. (Mr. Ameer Ali.) ASHGAR ALI KHAN v. GANESH DASS. (1917) 44 I. A. 213 = 45 C. 442 = 21 C. W. N. 421 = 3 Pat. L. W. 381 = 19 Bom. L. R. 972 = 26 C. L. J. 568 = 15 A. L. J. 889 = 128 P. W. R. 1917 = 22 M. L. T. 451 = 42 I. C. 959 = 34 M. L. J. 12.

C. P. CODE (ACT V OF 1908)—(Contd.)

S. 11—Cases under—(Contd.)

—Award—Application to file, under para. 20 of Sch. II of C. P. C. of 1908—Dismissal of—Effect. See ARBITRATION—AWARD—APPLICATION TO FILE, UNDER PARA. 20, ETC.

—Benamidar—Suit by or against—Decision in—Effect against real owner of. See BENAMI—BENAMIDAR—SUIT BY OR AGAINST—DECISION IN.

(1918) 46 I. A. 1 (9-10) = 46 C. 566 (575).

—Benefit of suit—Person intended to have—Decision in suit if binding on, merely on that ground.

An intention that a suit should be for the benefit of a minor would not support the plea of *res judicata* based upon the decree made in that suit. To maintain that plea it must appear from inspection of the record that the person whose interest it is sought to bind was in some way a party to the suit (242). (Lord Davey.) CHAUDHRI AHMAD BAKSH V. SETH RAGHUBAR DAYAL.

(1905) 32 I. A. 229 = 28 A. 1 (17) = 2 C. L. J. 413 =

7 Bom. L. R. 912 = 2 A. L. J. 813 = 10 C. W. N. 115 =

9 O. C. 7 = 8 Sar. 882 = 15 M. L. J. 407.

—Bond—Consideration for—Decision as to, in suit for interest—Effect of, in subsequent suit to recover principal.

In a suit for Rs. 1,665, the balance due for interest on a bond, the principal not being then due, the plaintiff alleged that it was for interest on a bond for Rs. 12,000. But the defendant denied that the principal due under the bond was Rs. 12,000, and an issue was accordingly raised as to the consideration for the bond.

Held, that the matter in issue in the suit was whether the sum alleged to be due for interest was due, and that the issue as to the consideration for the bond was a collateral rather than a direct issue in the suit (204). (Sir Richard Couch.) MISIR RAGHOBARDIAL V. RAJAH SHEO BAKSH SINGH.

(1882) 9 I. A. 197 = 9 C. 439 (445) =

12 C. L. R. 520 = 4 Sar. 395 = R. & J.'s No. 70.

—Bond—Consideration for—Decision as to, in suit for interest—Effect of, in subsequent suit for principal—Court in first suit not competent to try issue as to consideration.

The appellant sued the respondent for the recovery of a sum of Rs. 1,665 alleged to be the balance due for interest on a bond for Rs. 12,000, alleged to have been given by the respondent to the appellant. The principal under the bond was not payable at the time, and the court in which that suit was instituted had no jurisdiction to try suits exceeding Rs. 5,000 in value. That court, however, found that the principal sum due on the bond was only Rs. 4,700, that the appellant was entitled to interest thereon, and that the appellant had admittedly been paid more than the amount he was entitled to for interest. It accordingly dismissed the suit.

In a subsequent suit brought by the appellant for the recovery of the principal sum of Rs. 12,000, which had then become due, and the balance of interest due under the said bond, in a court having no pecuniary limit of jurisdiction, held, that the issue as to the amount of principal due on the bond was not *res judicata* between the parties (205).

The issue raised in the first suit as to the consideration for the bond was a collateral rather than a direct issue in the suit. And the court in which the first suit was instituted had no jurisdiction to try the question of the consideration for the bond in a suit on the bond (204). (Sir Richard Couch.) MISIR RAGHOBARDIAL V. RAJAH SHEO BAKSH SINGH.

(1882) 9 I. A. 197 = 9 C. 439 (445-6) =

12 C. L. R. 520 = 4 Sar. 395 = R. & J.'s No. 70.

C. P. CODE (ACT V OF 1908)—(Contd.)

S. 11—Cases under—(Contd.)

—British Indian Court—Decision of—Effect of, in Native State—Native State—Suit in—Injunction restraining—Suit in British Indian Court for—Maintainability.

On the death of A, the owner of properties situated partly in British India (Bareilly) and partly in a Native State (Rampur), disputes arose between the plaintiffs and the defendants as to the title to the property situated in both places. In a suit instituted in the court of the Subordinate Judge of Bareilly, the plaintiffs obtained a decree declaring their title in respect of so much of the property as was situate in Bareilly, and that decree was confirmed on appeal by the High Court. Whilst that suit was pending, the defendants instituted another suit in Rampur against the plaintiffs claiming possession of the property situate in Rampur. Thereupon the plaintiffs instituted a second suit in the court of Bareilly against the defendants for a declaration that the prior decision of the Bareilly Court (affirmed on appeal) operated as *res judicata* between the parties even in the Rampur court, and for an injunction restraining the defendants from continuing their suit in the Rampur Court.

The High Court held that the prior decision of the Bareilly court did not operate as *res judicata* in the Rampur Court), that the plaintiffs were not therefore entitled to the declaration sought for, and that they were therefore not entitled to the injunction also.

On appeal, their Lordships affirmed the judgment of the High Court. (Lord Atkinson.) MUSSUMAT MAQBUL FATIMA V. AMIR HASAN KHAN. (1916) 36 I. C. 710 = 20 C. W. N. 1213 = (1916) 2 M. W. N. 153.

—C. P. C. of 1908, S. 92—Suit under—*Res judicata* against public. See C. P. C. OF 1908, S. 92.

—C. P. C. of 1908, O. 21, R. 63—Claim suit under, regarding one property—Dismissal of—Attachment subsequent of different property—Fresh suit in respect of—Maintainability. See C. P. C. OF 1908, O. 21, R. 63—CLAIMANT UNSUCCESSFUL—SUIT BY.

(1890) 17 I. A. 150 (155) = 13 A. 53 (61-2).

—Claim and allegations in two suits different—Claim same, though allegations different—Effect. See CAUSE OF ACTION—IDENTITY—TEST.

(1878) 5 I. A. 149 (154) = 4 C. 190 (195-6).

—Co-defendants—*Res judicata* between.

Plaintiff and S were members of the same family, and there was a family arrangement or partition between them which had been acted upon for a long time. In a suit brought, *inter alia*, against S and plaintiff by the decree-holder execution-purchaser of S's share in the family property, the family arrangement aforesaid was, however, declared to be not binding on the said purchaser, and he was entitled to recover as against it.

Held, that, from the fact that the arrangement was declared to be of no effect as between the decree-holder purchaser and the plaintiff, it did not follow that the arrangement was of no effect as between plaintiff and S, who were co-defendants in the decree-holder's suit (4-5). (Sir James W. Colville.) DEWAN MANWAR ALI V. UNNODA PERSHAD ROY.

(1879) 7 I. A. 1 = 5 C. 644 (652) =

6 C. L. R. 71 = 4 Sar. 86 = 3 Suth. 697.

—Co-defendants—*Res judicata* between.

K purchased certain property benami for a Zemindar. L, the son of K, who had died by that time, executed a conveyance of the property, at the instance of the Zemindar, in favour of R. A, who had obtained a conveyance of the property from the manager of the estate under the Court of Wards, acting on behalf of the minor son of the Zemindar, who had died during the interval, sued for a declaration of her title to the property. To this suit she made R and the

C. P. CODE (ACT V OF 1908)—(Contd.)

S. 11—Cases under—(Contd.)

minor Zemindar parties, and her case was that K was a benamidar for her. The Subordinate Judge held that K was the benamidar of the Zemindar, and not of A (his widow), and dismissed the suit, adding an opinion that the Zemindar himself would have been estopped from denying that the property belonged to R. On appeal, the District Court affirmed the judgment, but did not repeat the dictum as to estoppel.

In a suit brought by the plaintiff, who had obtained a conveyance of the property from R subsequent to the dates of the above judgments, against the Zemindar's son, *held*, that the same did not form a *res judicata*, as between R and the defendant, who were both co-defendants to A's suit, to the effect that the property belonged to R (101). (*Lord Dunedin.*) RAJA OF DEO v. ABDULLAH.

(1918) 45 I.A. 97 = 45 C. 909 (918) = 16 A.L.J. 576 =

(1918) M.W.N. 406 = 22 C.W.N. 891 = 8 L.W. 163 =

24 M. L. T. 62 = 28 C.L.J. 192 = 20 Bom. L.R. 851 =

45 I.C. 770 = 35 M.L.J. 46.

—Co-defendants—*Res judicata* between—Bengal Land Revenue Sales Act of 1859—Sale under—Suit to set aside, against Secretary of State and purchaser at the sale—Decree in favour of plaintiff in—Not *res judicata* between defendants *inter se*. See BENGAL ACTS—LAND REVENUE SALES ACT OF 1859, S. 33—SUIT BY DEFAULTER TO SET ASIDE SALE—DECREE IN FAVOUR OF ETC.

(1898) 25 I. A. 151 (160) = 25 C. 833 (843-4).

—Co-defendants—*Res judicata* between—Hindu Law—Widow—Adoption by—Validity of—Decision as to, in reversioner's suit against widow and adopted son—Effect of, as between widow and adopted son *inter se*. See HINDU LAW—REVERSIONER—WIDOW—ADOPTION BY—VALIDITY OF—DECISION AS TO. (1879) 3 Suth. 600.

—Co-heirs—Mortgage by deceased—Redemption of—Suit by one of heirs for—Dismissal of—Fresh redemption suit by another heir (minor at date of prior suit)—Maintainability. See CO-HEIRS—MORTGAGE BY DECEASED—REDEMPTION OF—SUIT BY ONE OF HEIRS FOR—DISMISSAL OF. (1905) 32 I.A. 229 (241-2) = 28 A. 1 (16-7).

—Co-heirs—Mortgage by deceased—Redemption of—Suit by one of heirs for—Scope of—If on behalf of other heirs also—Redemption sought of entire property. See CO-HEIRS—MORTGAGE BY DECEASED—REDEMPTION OF—SUIT BY ONE OF HEIRS FOR—SCOPE OF.

(1905) 32 I.A. 229 (242) = 28 A. 1 (17).

—Company—Winding up—Liquidator—Decision against—Debenture-holders—Effect on. See COMPANY—WINDING UP—LIQUIDATOR—DECISION AGAINST.

(1919) 47 I.A. 33 (40) = 43 M. 550 (562-3).

—Confirmation of judgment by King of Oudh—Condition of, to make it complete—Absence of such confirmation—Effect.

Judgment *inter partes* which required the confirmation of the King of Oudh to become a complete judgment but had not been so confirmed held not to be *res judicata* but to be very important piece of evidence. CHOWDHRY GHULAM FURREED v. RASSAK BAKHSH. R. & J.'s No. 32.

—Connected suits—Finding in one of—Binding character of, in the other—Parties in two suits, defendants same, but plaintiffs different.

P, a talookdar, had two sons by different women. The plaintiff in the suit out of which the appeal arose was the widow of one of them. The first defendant, R, was the widow of K, the other son, and the 2nd defendant was a boy whom R had purported to adopt. The plaintiff alleged that the adoption was invalid, and that, as the widow of the brother of K, she was the heir of K, subject to his widow's

C. P. CODE (ACT V OF 1908)—(Contd.)

S 11—Cases under—(Contd.)

interest. She brought the suit to set aside the adoption. Her suit was therefore based on the footing that her husband and K were the legitimate sons of P. The defendants contended that plaintiff's husband was only an illegitimate son of P, while K was his legitimate son.

Both the District Judge and the High Court concurred in finding that plaintiff's husband was only an illegitimate son of P and dismissed the suit. Connected with the plaintiff's suit, both in the Original Court and the High Court, was another suit to set aside the adoption, brought by an illegitimate son of K, claiming to be his heir according to the law applicable to the sudra caste. The plaintiff was no party to that suit, but the defendants were the same as in her suit. The two were tried simultaneously, and the evidence in one was admitted in the other. In that suit the High Court expressed an opinion that K was an illegitimate son of P.

On appeal to the P. C. from the decree dismissing her suit, the plaintiff, relying upon the finding in the connected suit that K was only an illegitimate son of P, contended that, as both her husband and K had been found to be the illegitimate sons of P, they could inherit from one another, and that therefore she was entitled to succeed as the heir of K, subject to his widow's interest.

Quare, whether the plaintiff was entitled to avail herself of the finding of the High Court in the connected suit, to establish the illegitimacy of K (182). (*Lord Hobhouse.*) GAJAPATI RADHIKA v. VASUDEVA SANTA SINGARO.

(1892) 19 I.A. 179 = 15 M. 503 (510) = 6 Sar. 218.

—Consideration—Bond—Consideration for—Decision as to. See C.P.C. OF 1908, S. 11—CASES UNDER—BOND.

—Co-sharers—Decree in favour of one of—Partition between that co-sharer and opponent on basis of—Effect of, as regards another sharer. See JUDGMENT—JUDGMENT NOT *inter partes*—*Res judicata*—ADMISSIBILITY IN EVIDENCE—CO-SHARERS.

(1923) 50 I. A. 121 (132-34) = 50 C. 446 (459-60).

—Costs—Order as to—Effect of, upon operation of rule of *res judicata*.

A direction with regard to costs can have no effect whatever upon the judgment given in the issue raised between the parties to the appeal. The decision may therefore operate as *res judicata* against a party even though there is no order for costs against him (787). (*Sir Robert P. Collier.*) BELCHAMBERS v. ASHOOTOSH DHUR.

(1880) 3 Suth. 785 = 7 C.L.R. 308 = 5 Sar. 736 = Bald. 369.

—Debtor—Gift deed by—Nature and operative character of—Decision as to, between him and donee—Effect of against creditors of donor. See C.P.C. OF 1908, S. 11—CASES UNDER—GIFT DEED. (1873) 12 B.L.R. 433.

—Debtor—Heirship to deceased—Decree declaring, in one creditor's suit—Effect of, against another creditor. See JUDGMENT—JUDGMENT *in rem*—HEIRSHIP.

(1872) 14 M.I.A. 605 (616).

—Decision—Grounds for, and findings underlying—Effect of, when decision itself as it stands not *res judicata*. See C.P.C. OF 1908, S. 11—CONSTRUCTIVE ESTOPPEL. (1899) 26 I.A. 175 (182-3) = 21 A. 505 (514).

—Decree—Favourable decree—Finding adverse in spite of, if *res judicata*. See C. P. C. OF 1908, S. 11—CASES UNDER—FINDING ADVERSE.

—Decree—Finding not embodied in. See C. P. C. OF 1908, S. 11—CASES UNDER—FINDING—DECREE NOT EMBODYING.

C. P. CODE (ACT V OF 1908)—(Contd.)**S. 11—Cases under—(Contd.)**

—Decree—Party to—Declaration of non-binding nature of decree—Suit by him for—Maintainability. *See* DECREE—PARTY TO. (1915) 42 I.A. 171 (176) = 37 A. 485 (493-4).

—Deed—Construction of—Abandonment of one—Claim in subsequent suit on basis thereof. *See* DEED—CONSTRUCTION—ABANDONMENT OF ONE. (1861) 11 M I A. 50 (72-3).

—Deed—Effect of—Decision as to—Binding nature of. *See* DEED—EFFECT OF—DECISION AS TO. (1911) 14 I. C. 463.

—Deed—Estate taken under—Nature of—Decision as to. *See* DEED—ESTATE TAKEN UNDER—NATURE OF—DECISION AS TO. (1904) 32 I. A. 17 = 27 A. 37.

—Deed—Nature and operative character of—Decision as to, between parties to deed—Effect of, as against creditors of executant. *See* C. P. C. OF 1908, S. 11—CASES UNDER—GIFT DEED. (1873) 12 B.L.R. 433.

—Defendant—*Pro forma* defendant—Dismissal of suit against—Effect. *See* C. P. C. of 1908, S. 11—CASES UNDER—*Pro forma* DEFENDANT. (1878) 5 I. A. 206 = 2 M. 23.

—Defendants with principal and derivative interests—Finding allowed to become final in favour of former by reason of his not being made party to appeal—Effect of, against latter impleaded therein. *See* APPEAL—DEFENDANTS SEVERAL. (1927) 55 I. A. 7 = 6 R. 29.

—Discovery—Person made party to suit only for purpose of—Decision in suit if binding on.

The assignee of A, who became insolvent in the year 1867, brought a suit against the appellant to recover assets alleged to belong to the insolvent's estate, of which the appellant had wrongfully become possessed. It was contended by the appellant that a prior suit brought by the assignee against another brother of the insolvent (the appellant being also a brother of the insolvent) was a bar to the suit, because the appellant was made a party to it.

It appeared, however, that in the prior suit the appellant was made a party, expressly, as the order termed it, for the purpose of discovery only, but that he was not treated as a party, that there was no decree against him, and that he was dispensed from attendance unless and until the plaintiff gave him notice, and that the Court never made any order about his costs.

Held, affirming the Courts below, that the appellant must not be considered a party to the prior suit, so as to be bound or protected by a decree made in it (6). (*Lord Hobhouse*.) RAHIMBOY HUBIBBOY v. TURNER.

(1892) 20 I.A. 1 = 17 B. 341 (348) = 6 Sar. 256.

—Donor—Decision between, and third party—Effect of, as between donee and third party. *See* HINDU LAW—JOINT FAMILY—MEMBERS OF—PARTITION BETWEEN—SHARES OBTAINED AT—LEGAL COURSE OF DESCENT OF. (1886) 10 M. 15.

—Executing Court—Decision on point which it has no jurisdiction to determine—Effect of, in regular suit. *See* EXECUTING COURT—JURISDICTION. (1876) 4 I. A. 66 = 2 C. 327.

—Execution application—Dismissal for want of jurisdiction—Fresh application in case of—Not barred. *See* EXECUTION APPLICATION—DISMISSAL FOR WANT OF JURISDICTION. (1877) 4 I. A. 127 (136) = 3 C. 47 (58).

—Execution proceedings—Decree—Construction of—Final order as to—Binding nature of.

C. P. CODE (ACT V OF 1908)—(Contd.)**S. 11—Cases under—(Contd.)**

A decree, based on a compromise, provided that a stated sum was payable to the plaintiff by the defendants as due up to a specified date, and that the said sum was to be paid by the defendants "in two years, with interest at 12 annas per cent. per mensem." On objection raised by the judgment-debtors in execution proceedings as to the right of the decree-holder to interest on the decree amount after the period of two years provided by the decree, the executing court decided that the decree-holder was entitled to interest at the rate specified by the decree even after the period of the said two years, and up to the date of realisation. And that order was not appealed from.

Held, that the order was binding on the parties, and that neither the executing court itself nor the High Court on appeal could at a later stage of the execution proceedings set aside that order and disallow interest after the lapse of the said two years. (*Sir Richard Couch*.) BENI RAM v. NANHU MAL. (1884) 11 I. A. 181 = 7 A. 102 = 4 Sar. 564.

—Execution proceedings—Judgment in suit in which decree passed—Binding nature of. *See* C. P. C. of 1908, S. 11—CASES UNDER—SUIT—JUDGMENT FINAL IN.

—Execution proceedings—Law of *res judicata* if applicable in.

In this case a Division Bench of the High Court referred to a Full Bench the question whether the law of *res judicata* applied in proceedings in execution of a decree, and the Full Bench answered the question in the negative.

Their Lordships felt it unnecessary to express any opinion as to the answer of the Full Bench, though they guarded themselves against being understood as concurring in it (40-1). (*Sir Barnes Peacock*.) RAM KIRPAL SHUKUL v. MUSST. RUP KUARI. (1883) 11 I. A. 37 = 6 A. 269 (273-4) = 4 Sar. 489.

—Execution proceedings—Limitation—Judgment-debtor's plea of—Maintainability—Assignment of decree—Order prior recognizing, and allowing assignee to execute decree—Effect.

An application by the appellant to be brought on record as assignee of a decree, and to have the decree executed was resisted by the judgment-debtors, who put the appellant to the proof of his assignment, alleged that the right to execute the decree was barred by limitation, and raised other defences. An order was, however, made recognising the assignment and allowing the appellant to execute the decree. There was no appeal from that order, and an application for review of it was dismissed, the Court observing that the order sought to be reviewed did not reserve any question of limitation for future determination.

Held, that the order recognising the assignment and allowing appellant to execute the decree was a bar to a plea by the judgment-debtors in subsequent proceedings for execution of the decree that execution was barred by limitation, both on the ground that the order legally included the rejection of the plea of limitation, and on the ground that the said plea was in fact before the court and decided against the judgment-debtors. (*Lord Moulton*.) RAJA OF RAMNAD v. VELUSAMI THEVAR. (1920) 48 I. A. 45 = 29 M. L. T. 345 = 23 Bom. L. R. 701 = (1921) M. W. N. 51 = 13 L. W. 290 = 19 A. L. J. 168 = 33 C. L. J. 218 = 25 C. W. N. 581 = 59 I. C. 880 = 40 M. L. J. 197.

—Execution proceedings—Mortgage—Decree for sale—Execution application on foot of particular decree—Dismissal—Fresh application on foot of another decree—Not barred.

In a suit for sale on a mortgage, the plaintiff filed an application in February 1905, against all the defendants in the

C. P. CODE (ACT V OF 1908)—(Contd.)

S. 11—Cases under—(Contd.)

action, asking that a decree in the suit dated 15—8—1902, might be made absolute, and for an order for the sale of the property. To this all the defendants except one, S, filed an objection alleging that the decree of 15—8—1902, was passed against S alone, and that a prior decree in the suit dated 25—8—1900, passed against them "had become extinct" by operation of the Statute of Limitation. The Court upheld their objection and dismissed the plaintiff's application. On a fresh application made by the plaintiff on 21—12—1905 for sale of the property, the same being based on the joint effect of the two orders absolute of 21—12—1901 and 27—11—1905, *held*, that the same was not *res judicata* by reason of the dismissal of the prior application (44).

The present application is different from the prior one. (*Lord Mersey*.) *ASHFAQ HUSAIN v. GAURI SAHAL*.

(1911) 38 I. A. 37 = 33 A. 264 (271-2) =

(1911) 2 M. W. N. 177 = 15 C. W. N. 370 =

8 A. L. J. 332 = 13 C. L. J. 351 = 9 M. L. T. 380 =

13 Bom. L.R. 367 = 4 Bur. L. T. 121 = 9 I. C. 975 =

21 M. L. J. 1140.

—Execution proceedings—Order erroneous in, made after notice to party aggrieved—Binding nature of.

Though a court having jurisdiction to execute a decree ought to dismiss an application for execution upon the ground of limitation, although it is not set up or relied upon by the judgment debtor, still if, instead of dismissing the application upon that ground, it makes an order thereon for attachment, after notice served upon the judgment-debtor to show cause why the decree should not be executed against him, it must be considered to have determined that the decree was not barred, and its order, though erroneous, is valid and binding on the judgment-debtor, unless reversed on appeal (131-2). (*Sir Barnes Peacock*.) *MUNGUL PERSHAD DICHIT v. GRIJA KANT LAHIRI CHOWDHRY*.

(1881) 8 I. A. 123 = 8 C. 51 (59-60) =

11 C. L. R. 113 = 4 Sar. 248.

—Execution proceedings—Order final in—Binding nature of, in subsequent stages of execution of same decree.

A court executing a decree decided that the decree, on its true construction, awarded future mesne profits, and that decision was not appealed against and became final.

Held, reversing the High Court that that decision, whether right or wrong, was binding upon the parties and those claiming under them, and could not in a later stage of the execution proceedings be set aside (43).

The binding force of such a judgment depends not upon S. 13 of C. P. Code of 1877, but upon general principles of law. If it were not binding there would be no end to litigation (41-2). (*Sir Barnes Peacock*.) *RAM KIRPAL SHUKUL v. MUSST. RUP KUARI*. (1883) 11 I. A. 37 =

6 A. 269 (274-5) = 4 Sar. 489.

—Execution proceedings—Relief not granted by decree—Order granting—Binding nature of.

In a case in which a decree for possession did not contain a direction for payment of mesne profits, the plaintiff applied for payment to him of mesne profits accrued due after the date of the decree and the court made an order in assumed execution of the decree giving him mesne profits. This order was not proceeded with for some reason, and a fresh application subsequently made for the same purpose was dismissed on the ground that the decree did not award mesne profits. On a contention being raised that the subsequent order was illegal and without jurisdiction inasmuch as the Court was bound by the prior order, *held*, that the prior order was no decree, was made without jurisdiction and was not a bar to the dismissal of the subsequent

C. P. CODE (ACT V OF 1908)—(Contd.)

S. 11—Cases under—(Contd.)

application. (*Lord Davey*.) *KALKA SINGH v. PARASRAM*.

(1894) 22 I. A. 68 (70) = 22 C. 434 (440) =

R. & J.'s No. 137 = 6 Sar. 545 = 5 M. L. J. 14.

—Executor—Sale invalid by—Heir's suit to set aside, and to recover property—Maintainability—Administration summons prior by heirs against executor—Order in, directing executor to account for proceeds of same sale—Effect. See EXECUTOR—SALE BY—INVALID SALE.

(1874) 2 I. A. 18 (26).

—Executor—Transfer of estate to Administrator-General by—Declaration of invalidity of, and accounts against executor—Beneficiaries' suit for—Decision in, upholding transfer and dismissing suit—Accounts of dealings with estate by executor—Subsequent suit by beneficiary for—Maintainability. See EXECUTOR—TRANSFER OF ESTATE TO ADMINISTRATOR-GENERAL BY.

(1895) 22 I. A. 203 (207) = 22 C. 1011 (1015).

—Ex parte decision—Scope and effect of. See P. C.—APPEAL—Ex parte DECISION. (1879) 6 C. L. R. 121.

—Ex parte decree—Application under O. 9, R. 13 to set aside—Dismissal of—Suit subsequent to set aside decree and sale in execution thereof as being fraudulent—Maintainability. See C. P. C. OF 1908, O. 9, R. 13—Ex parte DECREE—APPLICATION TO SET ASIDE—REJECTION OF—SUIT SUBSEQUENT TO SET ASIDE DECREE AND SALE IN EXECUTION THEREOF AS BEING FRAUDULENT.

(1901) 28 C. 475.

—Finding—Adverse finding—Decree favourable in spite of—Finding if *res judicata* in case of. See C. P. C. OF 1908, S. 11—CASES UNDER—MORTGAGE—POSSESSION—MORTGAGE WITH—REDEMPTION OF—SUIT FOR. (1870) 13 M. I. A. 404 (412).

—Plaintiff, the survivor of two brothers, sued the widow of his deceased brother for the recovery of possession of the property held by the deceased on the ground that the brothers were joint in estate, and that the plaintiff was entitled to the property by survivorship. The widow maintained that the brothers were separate, and claimed a widow's estate in the property of her husband. She further maintained that the question had been conclusively determined in her favour in a former suit between her and the plaintiff. The High Court determined the plea of *res judicata* in her favour and dismissed the plaintiff's suit. They also enquired into the question of fact and held that the brothers were joint in estate.

In an appeal preferred by the plaintiff against the decree of the High Court, *held*, that the finding in the judgment of the High Court, that the brothers were joint could not be held conclusive against the widow, inasmuch as the decree was not based upon it, but was made in spite of it (34). (*Sir Robert P. Collier*.) *RUN BAHADOOR SINGH v. LACHOO KOER*. (1884) 12 I. A. 23 = 11 C. 301 (306) = 4 Sar. 602.

—In a suit by a Zemindar for possession of *chur* land from his tenants the latter pleaded (1) an occupancy right and (2) that the suit was premature. The Court of First Instance dismissed the suit on the ground that it was premature, but held that there was no occupancy right. On appeal by the Zemindar to the High Court, the tenants filed a cross-objection to the finding that there was no occupancy right. The High Court affirmed the decree on the ground that the suit was premature, and upon the cross-objection affirmed the finding that there was no occupancy right. *Held*, that the finding as to occupancy right would not found an actual plea of *res judicata* against the tenants, because, having succeeded on the other plea, they had no occasion to go further as to the finding against them (55). (*Lord Dune-*

C. P. CODE (ACT V OF 1908)—(Contd.)

S. 11—Cases under—(Contd.)

din.) MIDNAPUR ZEMINDARY CO. v. NARESH NARAYAN. ROY. (1920) 48 I. A. 49 = 48 C. 460 (467-8) = 14 L. W. 265 = 30 M. L. T. 279 = 64 I. C. 231 = (1922) P. C. 241.

——Finding—Connected suits — Finding in one of—Binding nature of, in the other—Defendants same but plaintiffs different in the suits. See C. P. C. OF 1908, S. 11—CASES UNDER—CONNECTED SUITS.

(1892) 19 I. A. 179 (182) = 15 M. 503 (510).

——Finding—Decision as it stands not itself *res judicata*—Findings underlying, if have that effect. See C. P. C. OF 1908, S. 11—CONSTRUCTIVE ESTOPPEL.

(1899) 26 I. A. 175 (182-3) = 21 A. 505 (514).

——Finding—Decree not embodying—Effect of finding in case of—Judgment recording finding and granting relief on foot of it. See C. P. C. OF 1908, S. 11—CASES UNDER—HINDU LAW—REVERSIONER—PRESUMPTIVE REVERSIONER—STATUS OF. (1898) 25 I. A. 102 = 21 M. 344.

——Finding—Decree not embodying—Effect of finding in case of. See C. P. C. OF 1908, S. 11—CASES UNDER—ISSUE—UNNECESSARY ISSUE.

(1924) 51 I. A. 293 (299, 303) = 51 C. 631.

——Finding—Defendants with principal and derivative interests—Finding final in favour of former—Effect of, against latter. See APPEAL—DEFENDANTS SEVERAL.

(1927) 55 I. A. 7 = 6 R. 29.

——Finding—Issue—Finding on. See C. P. C. OF 1908, S. 11—CASES UNDER—ISSUE.

——Gift deed—Nature and operative character of—Decision as to, between donor and donee—Effect of, as against creditors of donor.

M, a Hindu lady, executed in favour of her daughter what purported to be an immediate and absolute gift of certain property to her. The daughter died, and, in a suit brought by the plaintiff, her husband, for recovery of possession of the property covered by the deed, the question was, whether as contended by the plaintiff, the deed was an immediate and absolute gift of the property to his wife, or, as contended by M, the defendant, it was intended to be operative only so far as to convey the property after her death. It was not the case either of the plaintiff or of M that the deed was a fraud against the creditors, and was therefore altogether void or inoperative.

It appeared, however, that B, a creditor of M, had instituted a suit against M, to which the plaintiff abovementioned became a party by intervention, for the purpose of setting aside the deed in question, on the ground that it was fraudulent as against creditors, that both the suits were tried together, and one judgment was delivered in both. The substance of the judgment was that the deed was altogether colorable, being intended to have no operation whatever, and that it was fraudulent as against creditors. On that ground a decree was given for B in his suit, and for M in the suit against her by the plaintiff. There was no appeal against the decision in B's suit, and therefore the judgment in that case became final.

Held, that the judgment in B's suit did not operate as an estoppel in plaintiff's suit against M, because the parties were not the same, and the same issue was not involved in the two suits.

In B's suit the issue was fraud or no fraud against the creditors. As between the parties to plaintiff's suit against M, the issue did not arise as to whether the deed was fraudulent as against the creditors, nor whether it was absolutely colorable and void. (*Sir Robert P. Collier.*) RAMANUGRA NARAIN v. MAHASUNDUR KUNWAR.

(1873) 12 B. L. R. 433 = 3 Sar. 277.

C. P. CODE (ACT V OF 1908)—(Contd.)

S. 11—Cases under—(Contd.)

——Grant to two persons and their male descendants—Grantees under—Daughter of one of—Suit by, for share of profits of estate granted, against son of another—Decree allowing—Effect and scope of—Partition and recovery of share of property granted—Suit by her subsequently for—Prior decision if and to what extent *res judicata* in.

A, one of the grantees under an inam grant to M and A and their male descendants in perpetuity, died leaving K, an only son. Then M died leaving three daughters only. The daughters of M instituted a suit against K for the recovery of their share of the profits of the estate covered by the grant in right of their father and obtained a decree for the recovery thereof. K died afterwards, leaving the defendant, his only son. In a suit brought by the daughters of M against the defendant for a partition of the estate covered by the inam grant and the recovery of their share of the said estate, *held*, that the decision in the suit brought by the daughters of M against K was *res judicata* in their favour to the extent that they were entitled during life to the three defined shares of annual income of the estate, but was not *res judicata* in their favour so far as their claim to partition was concerned (303). (*Lord Blanesburgh.*) SUBHAN ALI v. IMAMI BEGUM. (1925) 52 I. A. 294 = 52 C. 971 = 23 A. L. J. 667 = 88 I. C. 347 = (1925) M. W. N. 535 = 21 N. L. R. 117 = 30 C. W. N. 122 = A. I. R. 1925 P. C. 184 = 50 M. L. J. 136 (142-3).

——Heir-at-law—Executor—Sale by—Suit to set aside, and to recover property—Maintainability—Administration summons prior by heir against executor—Order in, directing executor to account for proceeds of same sale—Effect. See EXECUTOR—SALE BY—INVALID SALE.

(1874) 2 I. A. 18 (26).

——Heir-at-law—Suit to recover portion of inheritance—Limitation for—Suspension of, during period of particular litigation—Issue as to—Decision adverse on, in suit by same plaintiff to recover another portion of inheritance—Effect. See DECEASED—HEIR-AT-LAW—SUIT TO RECOVER PORTION OF INHERITANCE. (1874) 22 W. R. 165.

——Heirship to deceased—Decree declaring, in suit by one creditor of deceased—Effect of, as against another creditor of his. See JUDGMENT—JUDGMENT *in rem*—HEIRSHIP. (1872) 14 M. I. A. 605 (616).

——Hindu Law—Adoption—Adopted son—Adoptive mother—Litigation conducted after adoption by—Decision in—Effect on adopted son of. See HINDU LAW—ADOPTION—ADOPTED SON—ADOPTIVE MOTHER—LITIGATION CONDUCTED, ETC.

(1888) 15 I. A. 195 (203, 206-7) = 16 C. 40.

——Hindu Law—Adoption—Authority to adopt—Validity of—Decision as to, between widow and adopted son—Effect of, as between reversioners and another boy adopted under same authority. See HINDU LAW—ADOPTION—AUTHORITY TO ADOPT—VALIDITY OF—DECISION AS TO, BETWEEN WIDOW, ETC. (1862) 9 M. I. A. 287 (302).

——Hindu Law—Adoption—Status of—Finding as to—Effect of, *inter partes*—Properties in two suits different. See HINDU LAW—ADOPTION—STATUS OF—FINDING ON—EFFECT OF, *inter partes*.

(1884) 12 I. A. 16 (21) = 8 M. 219.

——Hindu Law—Adoption of—Status of—Finding of. Committee of Oudh talookdars as to—Effect of, in civil suit—Finding affirmed by Financial Commissioner. See HINDU LAW—ADOPTION—STATUS OF—FINDING ON—OUDH TALOOKDARS. (1907) 34 I. A. 125 (131) = 29 A. 519 (532-3).

——Hindu Law—Adoption—Status of—Finding of Courts of Nizam's dominions as to—Effect of, in British Indian

C. P. CODE (ACT V OF 1908)—(Contd.)

S. 11—Cases under—(Contd.)

Courts. See HINDU LAW—ADOPTION—STATUS OF—FINDING ON—NIZAM'S DOMINIONS.

(1928) 56 I. A. 21 (29.)

—Hindu Law—Adoption—Validity of—Decision as to—Effect of, in subsequent suit—Court disposing of first suit not competent to try second. See HINDU LAW—ADOPTION—WILL—DECISION AS TO.

(1882) 9 I. A. 197 (203) = 9 C. 439 (444).

—Hindu Law—Adoption—Validity of—Decision as to—Reversioner intervening in suit—Effect on. See C. P. C. OF 1908, S. 11—CASES UNDER—INTERVENOR IN SUIT.

(1875) 2 I. A. 283 (285) = 1 C. 144.

—Hindu Law—Adoption—Validity of—Decision as to, in reversioner's suit against widow and adopted son—Effect of, as between widow and adopted son *inter se*. See HINDU LAW—ADOPTION—VALIDITY OF—DECISION AS TO—WIDOW AND ADOPTED SON—REVERSIONER'S SUIT AGAINST.

(1879) 3 Suth. 600.

—Hindu Law—Adoption—Validity of—Decision as to, in suit between widow and adopted son—Effect of, against widow's heirs. See HINDU LAW—ADOPTION—VALIDITY OF—DECISION AS TO—WIDOW AND ADOPTED SON—SUIT BETWEEN.

(1906) 33 I. A. 156 (164) = 28 A. 727 (740).

—Hindu Law—Daughter—Decree for or against—Effect of, against reversioners. See HINDU LAW—DAUGHTER—DECREE FOR OR AGAINST.

(1893) 20 I. A. 183 (191-2) = 21 C. 8.

—Hindu Law—Impartible estate—Holder of—Eldest son of last—Legitimacy of—Decision as to, in suit by one of younger sons to recover estate from him—Effect of, as against another younger son by different wife of last holder. See HINDU LAW—IMPARTIBLE ESTATE—HOLDER OF—ELDEST SON OF LAST—LEGITIMACY OF.

(1871) 14 M. I. A. 367 (375-6).

—Hindu Law—Joint family—Manager—Suit by or against—Decree in—Effect of, against other members. See HINDU LAW—JOINT FAMILY—MANAGER—SUIT BY OR AGAINST—DECREE IN—EFFECT OF, AGAINST OTHER MEMBERS.

(1914) 41 I. A. 216 = 36 A. 383 = (1927) 54 I. A. 122 = 51 B. 450.

—Hindu Law—Joint family—Partition. See C. P. C. OF 1908, S. 11—CASES UNDER—PARTITION.

—Hindu Law—Religious Endowment—Idol—Family idol—Suit by, for declaration that certain property is debutter—Maintainability—Prior suit between members of family as Shebait for scheme—Decision in, that property in question was not debutter—Effect. See HINDU LAW—RELIGIOUS ENDOWMENT—IDOL—FAMILY IDOL—SUIT BY, FOR DECLARATION, ETC.

(1927) 54 I. A. 238 (245).

—Hindu Law—Religious Endowment—Shebait—Decree for or against—Effect of, against succeeding Shebait. See HINDU LAW—RELIGIOUS ENDOWMENT—SHEBAIT—DECREE FOR OR AGAINST—EFFECT OF, AGAINST SUCCEEDING SHEBAITS.

—Hindu Law—Reversioner—Daughter—Decree for or against—Effect of. See C. P. C. OF 1908, S. 11—CASES UNDER—HINDU LAW—DAUGHTER.

(1893) 20 I. A. 183 (191-2) = 21 C. 8.

—Hindu Law—Reversioner—Presumptive reversioner—Status of—Decree declaring—Effect of, *inter partes*—Declaration not embodied in decree—Judgment doing so and granting relief on foot of it. See HINDU LAW—REVERSIONER—PRESUMPTIVE REVERSIONER—STATUS OF—DECREE DECLARING—WHAT AMOUNTS TO.

(1898) 25 I. A. 102 = 21 M. 344.

C. P. CODE (ACT V OF 1908)—(Contd.)

S. 11—Cases under—(Contd.)

—Hindu Law—Reversioner—Presumptive reversioner—Status of—Decree declaring—Effect of, on actual reversioners not parties. See under HINDU LAW—REVERSIONER—PRESUMPTIVE REVERSIONER—STATUS OF—DECREE DECLARING.

(1904) 31 I. A. 67 =

26 A. 238 (243-4) and (1916) 43 I. A. 207 (209) = 39 M. 634 (637-8).

—Hindu Law—Reversioner—Presumptive reversioner—Suit by or against on behalf of estate—Decree in—Effect of, on actual reversioner. See HINDU LAW—REVERSIONER—PRESUMPTIVE REVERSIONER—SUIT BY OR AGAINST, ON BEHALF OF ESTATE—DECREE IN.

—Hindu Law—Reversioner—Presumptive reversioner—Widow—Alienation intended by—Suit to restrain—Dismissal for default of—Actual alienation subsequent—Suit to set aside—Not barred. See HINDU LAW—WIDOW—REVERSIONER—ALIENATION INTENDED BY—PRESUMPTIVE REVERSIONER'S SUIT TO RESTRAIN.

(1888) 15 I. A. 156 (158) = 16 C. 98 (102).

—Hindu Law—Reversioner—Presumptive reversioners—Suit by some only of—Dismissal of—Effect of, against others not parties. See HINDU LAW—REVERSIONER—PRESUMPTIVE REVERSIONERS—SUIT BY SOME ONLY OF.

(1888) 15 I. A. 156 (157) = 16 C. 98 (101).

—Hindu Law—Reversioner—Reversionary character, of—Probate Court—Decision of—Effect of, in civil suit. See PROBATE—PROCEEDINGS FOR—CAVEATOR—REVERSIONARY CHARACTER OF. (1916) 43 I. A. 91 (98-9) = 43 C. 694 (704).

—Hindu Law—Widow—Suit against—Decree in—Suit by her to set aside, on ground of fraud—Dismissal of—Reversioner's suit subsequent in respect of same property after widow's death—Maintainability. See HINDU LAW—WIDOW—SUIT AGAINST—DECREE IN—SUIT BY HER TO SET ASIDE, ETC.

(1914) 41 I. A. 267 (272) =

42 C. 244 (249-50).

—Hindu Law—Widow—Suit against—Decree in—Will of husband giving widow's estate and power of appointment to widow—Suit against widow in case of, before appointment by her—Decree in—Effect of, on heir subsequently appointed by her under power. See HINDU LAW—WIDOW—SUIT AGAINST—DECREE IN—WILL OF HUSBAND, ETC.

(1884) 11 I. A. 197 (207) = 11 C. 186 (197).

—Hindu Law—Widow—Suit by or against—Decree in—*Res judicata* against reversioners. See HINDU LAW—WIDOW—SUIT BY OR AGAINST—DECREE IN—*Res judicata* AGAINST REVERSIONERS.

—Income of estate—Share in—Right to—Decision upholding—Effect of, on question of right to partition and recovery of share of estate. See C. P. C. OF 1908, S. 11—CASES UNDER—GRANT TO TWO PERSONS, ETC.

(1925) 52 I. A. 294 (303) = 52 C. 971.

—Interest—Suit for—Dismissal of, on ground of usury—Principal—Suit subsequent for—Maintainability. See BENGAL REGULATIONS—INTEREST REG. XV OF 1793—INTEREST.

(1847) 4 M. I. A. 201 (219).

—*Interlocutory judgment*—*Binding nature of*.

An interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit (41). (*Sir Barnes Peacock*.) RAM KIRPAL SHUKUL v. MUSST. RUP KUARI (1883) 11 I. A. 37 = 6 A. 269 (274) = 4 Sar. 489.

—*Interlocutory matter*—*Judgment in*—*Binding nature of*.

A decree-holder consented to the appointment of a Receiver of his judgment-debtor's properties and to a scheme of administration which contemplated the gradual extinction

C. P. CODE (ACT V OF 1908)—(Contd.)**S. 11—Cases under—(Contd.)**

of debt out of revenue, if feasible, as being preferable to the throwing of large blocks of property on to the market for sale. Subsequently, the decree-holder changed his mind, and applied for the discharge of the Receiver, insisting on his right to proceed to bring the properties at once to sale in execution of his decrees. That application was dismissed. On an application subsequently presented by him for the same purpose, *held* that, there having been no departure from the terms of the consent order, the order dismissing the prior application operated as a bar to the maintainability of the subsequent application.

The binding force of a judgment in an interlocutory matter depends not upon S. 11 of C.P. Code of 1908 but upon general principles of law. (*Lord Shaw.*) **SIR RAMESHWAR SINGH v. HITENDRA SINGH.** (1924) 3 Pat. L. T. 491 = 20 L. W. 456 = A. I. R. 1924 P. C. 202 = 35 M. L. T. 179 = 81 I. C. 576 = 22 A. L. J. 968 = 26 Bom. L. R. 1153 = 40 C. L. J. 431 = 29 C.W.N. 413 = 3 Pat. L. R. 180 = 47 M. L. J. 286 (292-3).

—Intervention in suit—Application for—Rejection of—Effect of—Decision in suit if binding on applicant.

A party whose application to intervene in a suit has been refused is not bound by the decree in that suit.

It has been contended that the plaintiff was not a party to the suit of *R*; that his application to intervene in it having been refused, it would be unjust and inconsistent to hold him bound by the decree; and that the decision followed so promptly on the refusal to allow him to intervene that he could not reasonably be expected in the interval either to appeal against the order of refusal or to institute a suit as supplemental to the one in which he sought to intervene. Their Lordships concur in this view of the subject. As the law allows a party interested to intervene in the suit, that right should not be rigorously dealt with. There is much danger in India of secret collusion. Their Lordships think that the defendant who obtained his decree so shortly after the above refusal, in the absence of the party really interested in contesting the matter, should not be permitted to prevail by this objection (487-8). (*Lord Justice Turner.*) **TARAKANT BANNERJEE v. PUDDOMONEY DOSSEE.**

(1866) 10 M. I. A. 476 = 5 W. R. P. C. 63 = I Suth. 631 = 2 Sar. 184.

—The refusal to make a person a party to a suit cannot be treated as having the same effect as an order to the opposite effect. (*Lord Salvesen.*) **KALA CHAND BANNERJEE v. JAGANNATH MARWARI.** (1927) 54 I. A. 190 (195) =

54 C. 595 = 29 Bom. L. R. 882 = 101 I. C. 442 = 31 C. W. N. 741 = 25 A. L. J. 621 = 45 C. L. J. 544 = 39 M. L. T. 5 = 26 L. W. 263 = A. I. R. 1927 P. C. 108 = 52 M. L. J. 734.

—Intervenor in suit or in appeal therein—Decision in that suit or appeal if binding on.

The respondent, claiming to be the adopted son of *G*, sued to set aside certain putni leases granted by his adoptive mother, on the ground that she had exceeded her powers, as a Hindu widow, in granting them. The appellant intervened in that suit, on the ground that he was the heir of *G*, and, as the heir, had a right to intervene to dispute the title of the respondent as his adopted son. An issue was raised in the suit—whether it was before or after the appellant intervened was not clear—upon the question of the validity of the respondent's adoption, and it was decided in favour of the respondent. As the trial Judge also held that the putni leases could not be set aside, the putnidars did not appeal from his decree. But the appellant did against the finding in favour of the adoption, but failed in the appeal. A second appeal preferred by him on the point was equally unsuccessful.

Held, in a subsequent suit brought by the appellant

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against the respondent raising the same issue as to the validity of the respondent's adoption, that the suit was barred by reason of the decision in the former suit (285). (*Sir Montague E. Smith.*) **KRISHNA BEHARI ROY v. BROJESWARI CHOWDRANEE.** (1875) 2 I. A. 283 = 1 C. 144 = 25 W. R. 1 = 3 Sar. 559 = 3 Suth. 213.

—During the pendency of a suit, a third person intervened alleging a right derived from the plaintiff prior to the institution of the suit. The Court of First Instance dismissed the suit. The plaintiff alone appealed. The first appellate court reversed the decree of the court below but its decree did not specify the relief granted. That decree was affirmed by the High Court. Throughout the proceedings in the appellate courts the third party did not intervene. On appeal by plaintiff to the Privy Council, it was contended for him that their Lordships should decide the right of the third party who intervened. *Held*, that there was nothing in the record to conclude any question which might thereafter arise between the third party and the plaintiff, although it might be that the third party, not having appealed, and not having taken any further part in the suit, might be barred from any claim against the defendant. Their Lordships therefore declined to adjudicate upon the right of the third party (300). (*Sir Montague E. Smith.*) **LALA SHAM SOONDAR LAL v. SOORAJ LAL.** (1876) 3 Suth. 298 = Bald. 20.

—The question was whether a portion of land belonged to lot 104 or lot 100, which were conterminous lots of land. The plaintiff-respondent, the owner of lot 100, claimed the disputed land as part of that lot. The defendant-appellant claimed it as a part of lot 104.

It appeared that in a prior pending appeal to the P. C. the plaintiff-respondent applied to be made a party-respondent and invoked their Lordships' decision on the self-same question, *viz.*, whether the land in question was part of lot 100 or of lot 104; and that he was added as a party-respondent; and was allowed opportunity of supporting his case, but that the Privy Council decided against him, though it did not impose costs upon him.

Held, that the prior decision of their Lordships was a bar to the subsequent suit. (*Sir Robert P. Collier.*) **BELCHAMBERS v. ASHOOTOSH DHUR.** (1880) 3 Suth. 785 = 7 C. L. R. 308 = 5 Sar. 736 = Bald. 369.

—Intervenor in suit or appeal therein—Decision in that suit or appeal if binding on—Witnesses—Cross-examination of—Opportunity for—Refusal of—Effect of. *See* C. P. C. of 1908, S. 11—CASES UNDER—WITNESSES.

(1875) 2 I. A. 283 (286-7) = 1 C. 144 (147). —Issue—Collateral issue—Finding on—Effect. *See* C. P. C. of 1908, S. 11—CASES UNDER—BOND—CONSIDERATION FOR. (1882) 9 I. A. 197 (204) = 9 C. 439 (445-6).

—Issue—Improper issue—Finding on—Effect of—Acceptance and treatment of issue by parties as main issue.

Semle, the finding on an issue, which though improperly raised on remand by the P. C., was accepted by both parties, and was treated as the main question in the suit, and the decision on which issue became final by reason of the aggrieved party abandoning an appeal to the P. C. which he had begun, will be treated as *res judicata*. (*Lord Macnaghten.*) **THAKUR TIRBHUWAN BAHADUR SINGH v. RAJA RAMESHAR BAKHSH SINGH.**

(1906) 33 I. A. 156 (164) = 28 A. 727 (740) = 10 C. W. N. 1065 = 8 Bom. L. R. 722 = 3 A. L. J. 695 = 4 C. L. J. 405 = 1 M. L. T. 265 = 9 O. C. 377 = 16 M. L. J. 440.

—Issue—Incidental issue—Rent suit—Title in—Issue as to—Decision on—Effect of, in civil suit subsequent be-

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tween parties. *See* C. P. C. of 1908, S. 11—CASES UNDER—RENT SUIT—TITLE IN.

——Issue—Point covered by—Decision on—Implication of.

A matter which was in issue in a suit must be taken to have been decided by the judgment therein. (*Lord Westbury.*) SRIMUT RAJAH MOOTTOO VIJAYA R. B.G. TEVAR *v.* KATAMA NACHIAR. (1866) 11 M. I. A. 50 (73) = 10 W. B. P. C. 1 = 2 Sar. 212 = 2 Suth. 46.

——Issue—Point not covered by—Finding on—Effect of.

Held, that the expression of opinion in a judgment of the High Court in Special Appeal on a point which was not raised either in the lower courts or in the grounds of Special Appeal and on which there was no issue would not operate as *res judicata* under S. 13 of the Code of 1882. (*Sir Richard Couch.*) BITTO KUNWAR *v.* KESHO PERSHAD. (1897) 24 I. A. 10 (18) = 19 A. 277 (288) = 1 C. W. N. 265 = 7 Sar. 131.

——Issue—Point not covered by—Parties invoking decision on—Effect of finding on point in case of.

If both parties invoked the opinion of the Court upon this question, if it was raised by the pleadings and argued, their Lordships are unable to come to the conclusion that, merely because an issue was not framed which, strictly construed, embraced the whole of it, therefore the judgment upon it was *ultra vires*. To so hold would appear scarcely consistent with the case reported in 13 M.I.A. 573, wherein it was held that in a case where there had been no issues at all, but where nevertheless it plainly appeared what the question was which was raised by the parties in their pleadings, and was actually submitted by them to the Court, the judgment upon it was valid. (*Sir Robert P. Collier.*) SOORJOMONEE DAYEE *v.* SUDDANUND MOHAPATTER. (1873) Sup I.A. 212 = 12 B. L. R. 304 = 20 W. B. 377 = 3 Sar. 285 = 2 Suth. 899.

——Issue—Point not covered by—Parties and Court proceeding on footing that it was—Finding on point in case of—Effect of.

C, who had first adopted the plaintiff and subsequently adopted B, made a will dividing his ancestral and personal estate between the plaintiff and B, in a certain manner. Plaintiff having disputed C's competence to make the said will, C disowned the plaintiff as his son, and purported to deprive the plaintiff of the share of the property given to him thereunder in pursuance of a clause in the will to that effect. Thereupon the plaintiff filed a suit, *inter alia*, against C and B to set aside the will on the ground that the property disposed of by it was all ancestral, either as having been originally acquired by C by inheritance from his father, or as having been purchased by him with the income of ancestral estate, and that C was not therefore competent to dispose of the same by will.

Though the point as to the nature of the property purchased out of the income of ancestral property was not as distinctly raised by the issues in that suit as it might have been, still it appeared clearly from the proceedings that the plaintiff sought for a decision on that point, that C opposed him on that footing, and that the point was decided by the court against the plaintiff.

Held, that the question whether the property purchased by C out of the income of ancestral estate was itself ancestral or not and therefore disposable by C by will was *res judicata* between the plaintiff and B (219). (*Sir Robert P. Collier.*) SOORJOMONEE DAYEE *v.* SUDDANUND MOHAPATTER. (1873) Sup I.A. 212 = 12 B.L.R. 304 = 20 W. B. 377 = 3 Sar. 285 = 2 Suth. 899.

——Issue—Property comprised in suit but claim to it not in issue nor heard and decided—Dismissal of suit—Effect

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of, on right to that property. *See* C. P. C. of 1908, S. 11—CASES UNDER—PROPERTY—CLAIM TO, NOT IN ISSUE, ETC. (1891) 18 I. A. 165 (176-7) = 19 C. 159 (172-3).

——Issue—Unnecessary issue—Finding on, insisted on by parties and embodied in decree—Effect of.

A suit for khas possession of land was resisted on the ground that, as defendants had *jotedari* rights in the land, the plaintiff was in any event not entitled to recover khas possession. The plaintiff maintained, and the first Court held, that a decision on the question of the *jotedari* right set up was unnecessary. The defendants, however, insisted that a decision on that question was necessary and urged that point in their appeal from the decree for possession passed by the first Court. The appellate Court went into the point, held against the defendants thereon, and affirmed the decree below. The decree drawn up on appeal did not, however, expressly refer to the *jotedari* right.

Held, that, whether or not the decision of the point was necessary, the defendants having insisted upon the decision of that point by the appellate Court, and that Court having decided the same against the defendants, the issue as to the *jotedari* right was *res judicata* against the defendants.

The decree, though did not expressly refer to the *jotedari* right, must be deemed to have given effect to the finding in the judgment. (*Sir John Edge.*) MIDNAPUR ZEMINDARI CO., LTD. *v.* NARESH NARAIN ROY.

(1924) 51 I. A. 293 (299-303) = 51 C. 631 = 26 Bom. L. R. 651 = A. I. R. 1924 P. C. 144 = 35 M. L. T. 169 = 20 L. W. 770 = 23 A. L. J. 76 = (1924) M. W. N. 723 = 80 I. C. 827 = 29 C. W. N. 34 = 47 M. L. J. 23.

——Judgment not *inter partes*—*Res judicata*—Admissibility in evidence. *See* JUDGMENT—JUDGMENT NOT *inter partes*.

——Land—District in which it is situate—Decision as to—Binding nature of, in subsequent suit.

A brought a suit in the Court of S against B for certain land as being an accretion to an estate in the district of S. B claimed it as being part of his estate in the district of G, to which district he alleged the land had in a former decision been found to belong. The Court of S held that the land was an accretion to A's estate in the district of S. In a subsequent suit brought by B in the Court of G against A for the land to which the subject of the former suit had been found to be an accretion, *held*, that the holding in the former suit necessarily decided that the land claimed by B was in the district of S, and therefore that the Court of G, under Act VIII of 1859, S. 14, had no jurisdiction PAHALWAN SINGH *v.* MUHESHUR BUKSH SINGH BAHADOOR. (1872) 12 B. L. R. 391 = 18 W. B. 182 = 2 Suth. 660.

——Land Acquisition Act—Dispute as to compensation money raising question of title to land—Decision of—Effect of, in civil suit raising question of title to the land. *See* LAND ACQUISITION ACT OF 1894, S. 54—DISPUTE AS TO COMPENSATION MONEY, ETC.

——Landlord and tenant—Tenant—Criminal proceeding against, by rival landlord—Compromise in—Effect of, as against landlord of that tenant. *See* EVIDENCE—DEED NOT *inter partes*. (1878) 6 I. A. 33 (41-2) = 4 C. 633 (640).

——Law—Question of—Decision not *inter partes* on.

The judgment of this Committee on the former occasion is not and cannot be relied upon in this suit as binding the parties to it, the now plaintiff not being a party to the former suit; but it is treated as a decision upon the law which

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should be considered as binding (243). (*Sir Richard Couch.*) PUDMA COOMARI DEBI *v.* COURT OF WARDS.

(1881) 8 I. A. 229 = 8 C. 302 (308) = 4 Sar. 285.

———*Liberty to bring fresh suit—Reservation of—Dismissal of suit with—Fresh suit in case of—Maintainability—Propriety of reservation—Consideration of, in subsequent suit—Power of.*

A suit brought in the year 1856, to set aside an auction sale of a Putnee Talook for arrears of rent under Bengal Reg. VIII of 1819, was dismissed for want of evidence on the part of the plaintiffs, with a reservation by the Court that the order made was not to be a bar to the plaintiff or any other person who might substantiate their rights, from proceeding to recover on a fresh suit by the same parties for the same matter, *held*, that such reservation was of no effect, as, under S. 2 of C. P. C. of 1859, the former suit was a bar, and a plea of *res judicata* allowed (171-2).

It has been argued that the decree in the prior suit not having been appealed against by the respondents in the original suit, was, at all events, whether regularly or irregularly, made binding in the particular case, and that it was not competent to the High Court in this suit to question its propriety. Their Lordships are not disposed to take that view. Without laying down positively, that in no case could such a reservation be properly made by a Judge in one of the Indian Courts, they think that it was open to the High Court in a case in which the former decree had been pleaded as *res judicata*, and in which all the circumstances under which it was made were before the Court, to consider the propriety of the reservation, and they entirely agree with the Judges of the High Court in thinking that, admitting that the Judge of the lower court had in any case such a discretion as was exercised in making the reservation in question, that discretion was improperly exercised in the particular case (171-2). (*Sir James W. Colville.*)

WATSON & CO. *v.* COLLECTOR OF RAJSHAHYE.

(1869) 13 M. I. A. 160 = 12 W. R. P. C. 43 =

3 B. L. R. 48 = 2 Suth. 269 = 2 Sar. 500.

———*Limitation—Period of pendency of particular litigation—Exclusion of—Right of heir-at-law to, in suit to recover one portion of inheritance—Prior suit by him to recover another portion of inheritance—Decision in, negating right—Effect. See DECEASED—HEIR-AT-LAW—SUIT TO RECOVER PORTION OF INHERITANCE.*

(1874) 22 W. R. 165.

———*Lunacy—Date of commencement of—Issue as to, in civil suit—Act XXXV of 1858—Proceeding under—Report of Munsif in—Finding in—Effect. See LUNACY ACT XXXV OF 1858—PROCEEDING UNDER—DATE OF COMMENCEMENT OF LUNACY.* (1870) 13 M. I. A. 519 (526).

———*Mahomedan Law—Deceased member of family—Widow and infant son of—Suit against—Deceased if represented in. See MAHOMEDAN LAW—BROTHER DECEASED.*

(1904) 32 I. A. 23 (34) = 32 C. 296 (313).

———*Mahomedan Law—Dower—Widow in possession of husband's estate under claim of—Heirs' suit to recover possession of estate—Dismissal of, on ground of non-payment of balance of dower directed by decree—Subsequent suit by heirs for recovery of estate on payment of the amount so directed—Maintainability. See MAHOMEDAN LAW—DOWER—WIDOW IN POSSESSION OF HUSBAND'S ESTATE UNDER CLAIM OF—HEIRS' SUIT ETC.*

(1924) 52 I. A. 145 (156-7) = 47 A. 250.

———*Mahomedan Law—Maintenance—Suit for, by younger brother against elder in possession of paternal estate—Maintainability—Prior suit by plaintiff against father on different cause of action—Dismissal of—Effect. See*

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MAHOMEDAN LAW—MAINTENANCE—SUIT FOR, BY YOUNGER BROTHER, ETC. (1883) 10 I. A. 45 (47) = 9 C. 945 (948).

———*Mahomedan Law—Will—Probate of—Effect—Two-thirds of property not disposable by testator under Mahomedan Law—Heirs' claim to—Maintainability. See PROBATE AND ADMINISTRATION ACT OF 1881, SS. 59 AND 88—MAHOMEDAN WILL—PROBATE OF—EFFECT.*

(1905) 32 I. A. 244 (258-9) = 33 C. 116 (130-1).

———*Minor—Courts below—No proper representation in—Attainment of majority pending P. C. appeal and conduct thereof taken up by him—Effect of decision in P. C. appeal on him.*

M, an Oudh Talookdar, executed a will appointing his wife full owner and proprietor of the talook after his death, with power to appoint an heir to and representative of the talook. On *M's* death, his widow executed a will appointing the respondent heir to and representative of the talook after her death. Thereupon the appellant, the daughter's son of *M*, instituted a suit for a declaration that he was entitled to succeed to the talook as heir, by virtue of Act I of 1869, being, as he alleged, a daughter's son, who had been treated by *M* as a son within the meaning of S. 22, cl. (4) of the Act. He also prayed for the cancellation of the wills of *M* and of his widow. That suit was dismissed by both the courts in India, but was decided by the P. C. in favour of the appellant, on the ground that the will of *M* had been duly revoked by him in his lifetime, and that the appellant was entitled, under Act I of 1869, to succeed, as *ab intestato*, to the talookdaree estate of *M*.

The respondent was a defendant in that suit, along with *M's* widow, and two others. He was a minor at the date of the suit, and continued a minor until after the appeal to the P. C. was filed therein, and he attained his legal majority only during the pendency of the P. C. appeal. He was admittedly not represented by a duly appointed guardian in the courts below. But after he attained his legal majority during the pendency of the appeal to the P. C., *M's* widow executed a deed transferring to him full ownership and present possession of the talooka. Thereafter, the respondent, who was personally aware of the proceedings in the P. C. appeal, upon the conduct of it, and supplied funds for its prosecution. And, although no formal appearance was entered for him, his name appeared in some of the proceedings as a party to the suit. He did not, however, bring the transfer of the talooka to him to the notice of the Board until the order in council had been issued, and upon his application for a rehearing.

In a suit subsequently instituted by the respondent raising the same issue upon the revocation of the will of *M*, *Quære*, whether in thus carrying on the appeal to the P. C. in the prior litigation the respondent should be deemed to be a party to it, and bound as a party by the final order of the Queen in Council therein (205-6). (*Sir Montague E. Smith.*) PARTAB NARAIN SINGH *v.* TRILOKIANATH SINGH.

(1884) 11 I. A. 197 = 11 C. 186 (195-6) =

4 Sar. 567 = Bald. 174 = R & J's No. 86 (Oudh).

———*Minor—Guardian ad litem duly appointed—Non-representation by—Effect. See C.P.C. OF 1908, S. 47—PARTY TO SUIT—MINOR.*

(1909) 36 I. A. 168 (175) = 31 A. 572 (582).

———*Minor—Substantial representation—Binding nature of decision in case of. See HINDU LAW—ADOPTION—ADOPTED SON—ADOPTIVE MOTHER—LITIGATION CONDUCTED, ETC.* (1885) 15 I. A. 195 = 16 C. 40.

———*Minor not properly represented in suit—Effect of decision in suit on him.*

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A judgment in a suit instituted by a person who was neither the natural nor appointed guardian of a minor and not purporting to be instituted on behalf of the minor will not bind such minor. (*Lord Davey.*) CHAUDHRI AHMAD BAKHSI v. SETH RAGHUBAR DAYAL.

(1905) 32 I. A. 229 (241-2) = 28 A. 1 (17) =
2 C. L. J. 413 = 7 Bom. L. R. 912 = 2 A. L. J. 813 =
10 C. W. N. 115 = 9 O. C. 7 = 8 Sar. 882 =
15 M. L. J. 407.

—Mortgage—Amount due under—Finding as to, in suit for redemption dismissed on ground of failure of mortgagor to deposit full and entire amount—Effect of, in subsequent suit for redemption. See MORTGAGE—REDEMPTION—SUIT FOR—AMOUNT DUE UNDER MORTGAGE—FINDING AS TO. (1870) 13 M. I. A. 404 (412).

—Mortgage—Foreclosure of—Genuineness and effective nature of—Judgment not *inter partes* as to—Effect of. See MORTGAGE—FORECLOSURE OF—GENUINENESS AND EFFECTIVE NATURE OF—JUDGMENT NOT *inter partes* AS TO—EFFECT OF. (1898) 25 I. A. 54 (76) = 20 A. 267 (293).

—Mortgage—Redemption of—Co-heirs—Mortgage by deceased—Redemption of—Suit by one of heirs for—Dismissal of—Fresh redemption suit by another heir (minor at date of prior suit)—Maintainability. See CO-HEIRS—MORTGAGE BY DECEASED—REDEMPTION OF—SUIT BY ONE OF HEIRS FOR—DISMISSAL OF.

(1905) 32 I. A. 229 (241-2) = 28 A. 1 (16-7)

—Mortgage—Redemption of—Suit for—Amount due under mortgage—Finding as to—Effect of, in subsequent suit for redemption—Dismissal of prior suit on ground of failure of mortgagor to deposit entire mortgage amount. See MORTGAGE—REDEMPTION—SUIT FOR—AMOUNT DUE UNDER MORTGAGE—FINDING AS TO.

(1870) 13 M. I. A. 404 (412).

—Mortgage—Redemption of—Suit for—Lease to mortgagor forming part of same transaction as mortgage—Rent due under, charged on property—Payment of, as condition of redemption—Failure of mortgagee to insist upon—Fresh suit by him to enforce charge in respect of such rent—Maintainability. See MORTGAGE—REDEMPTION OF—SUIT FOR—LEASE TO MORTGAGOR, ETC.

(1926) 54 I. A. 68 (78) = 50 M. 180.

—Mortgage—Redemption of—Suit for—Maintainability—Mortgagee's suit prior and decree therein—Possession given to him in execution—Effect. See MORTGAGE—REDEMPTION—SUIT FOR—MAINTAINABILITY—MORTGAGEE'S SUIT PRIOR, ETC. (1873) 13 B.L.R. 205.

—Mortgage—Redemption of—Suit for—Maintainability—Prior suit by mortgagor for possession as proprietor—Dismissal of—Effect. See MORTGAGE—REDEMPTION—SUIT FOR—MAINTAINABILITY—PRIOR SUIT BY MORTGAGOR FOR POSSESSION, ETC.

(1888) 15 I. A. 106 (111-2) = 15 C. 800 (807-8).

—Mortgage—Suit to enforce—Decree in—Execution of—Application for, on foot of particular decree—Dismissal of—Fresh application on foot of another decree—Maintainability. See C.P.C. OF 1908, S. 11—EXECUTION PROCEEDINGS—MORTGAGE—DECREE FOR SALE.

(1911) 38 I. A. 37 (44) = 33 A. 264 (271-2).

—Mortgage—Suit to enforce—Insolvency of mortgagor or his heir pending—Foreclosure decree obtained against insolvent without impleading receiver—Suit subsequent by receiver to set aside—Maintainability—Application by receiver to be made party rejected—Effect. See MORTGAGE—SUIT TO ENFORCE—INSOLVENCY OF, ETC.

(1927) 54 I. A. 190 (194-5).

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S. 11—Cases under—(Contd.)

—Mortgage—Suit to enforce—Maintainability—Prior suit by mortgagor for possession—Mortgage set up as a defence in—Possession decree to mortgagor notwithstanding—Effect. See MORTGAGE—SUIT TO ENFORCE—MAINTAINABILITY—PRIOR SUIT BY MORTGAGOR FOR POSSESSION. (1915) 3 L. W. 454.

—Mortgage—Suit to enforce—Prior and subsequent mortgages on same property—Person holding, not impleaded—Effect—Suit by him subsequently to enforce those mortgages—Maintainability. See MORTGAGE—SUIT TO ENFORCE—PARTIES. (1911) 39 I. A. 68 (82-3, 84) = 39 C. 527 (557-8).

—Mortgage—Suit to enforce—Redemption—Persons interested in, failing to set up redemption right, and setting up paramount title—Dismissal from suit of, on that ground—Purchase by mortgagee in execution and suit by him for possession of property—Redemption right if can be set up by such persons in that suit. See MORTGAGE—SUIT TO ENFORCE—REDEMPTION—PERSONS INTERESTED IN, FAILING TO SET UP, ETC.

(1885) 12 I. A. 171 (178, 181-2) = 12 C. 414 (420-1).

—Parties to subsequent suit—Both claiming under one of parties to prior suit—Effect.

The principle of *res judicata* has no application in a dispute between parties, all of whom claim under the person in whose favour the decision in the prior suit was given (75). (*Lord Lindley.*) SYED ASHGAR REZA KHAN v. SYED MAHOMED MEHDI HOSSAIN KHAN. (1903) 30 I. A. 71 = 30 C. 556 (564) = 7 C.W.N. 483 = 8 Sar. 439.

—Partition—Brothers—Partition between—Suit for, after death of father—Maintainability—Suit prior by plaintiff against father and defendants—Dismissal of, for want of jurisdiction and of right in plaintiff to sue during father's lifetime—Effect. See HINDU LAW—JOINT FAMILY—PARTITION—BROTHERS—PARTITION BETWEEN—SUIT FOR, AFTER DEATH OF, ETC. (1880) 7 I.A. 181 (190) = 5 B. 48 (57).

—Partition—Decree for—Defendant co-sharer—Effect against. See HINDU LAW—JOINT FAMILY—PARTITION—DECREE FOR—EFFECT OF, AGAINST DEFENDANT CO-SHARER. (1914) 41 I. A. 247 = 27 M. L. J. 76 (79).

—Partition—Decree for—Error in—Remedy of aggrieved party—Fresh partition suit by him—Maintainability. See HINDU LAW—JOINT FAMILY—PARTITION—DECREE FOR—ERROR IN. (1914) 41 I.A. 247 = 27 M. L. J. 76.

—Partition—Legal course of descent of divided shares—Partition altering—Invalidity of—Decision as to, between surviving member and widow of deceased member—Effect of, between that member and donee from widow. See HINDU LAW—JOINT FAMILY—MEMBERS OF—PARTITION BETWEEN—SHARES OBTAINED AT—LEGAL COURSE OF, ETC. (1886) 10 M. 15.

—Partition—Right to—Issue as to—Income of estate sought to be partitioned—Right to share of—Decision prior between parties upholding—Effect. See C. P. C. OF 1908, S. 11—CASES UNDER—GRANT TO TWO PERSONS, ETC. (1925) 52 I. A. 294 (303) = 52 C. 971.

—Possession—Suit for—Dismissal of, on ground that plaintiff was not then entitled to possession—Subsequent suit for possession by him—Maintainability.

Where all that was decided in a suit was that the plaintiff was not entitled therein to the relief prayed for, and was not then entitled to possession of the property claimed, held, that the decision therein was no bar to a subsequent suit by the same plaintiff for possession of the same property (193).

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S. 11—Cases under—(Contd.)

(*Sir Richard Couch.*) KALI KRISHNA TAGORE *v.* SECRETARY OF STATE FOR INDIA. (1888) 15 I. A. 186 = 16 C. 173 (183-4) = 5 Sar. 237.

——Principal. *See* C. P. C. OF 1908, S. 11—CASES UNDER—INTEREST.

——Probate—Proceedings for—Caveator—Reversionary character of—Decision as to—Effect of, in civil suit between parties. *See* PROBATE—PROCEEDINGS FOR—CAVEATOR—REVERSIONARY CHARACTER OF.

(1916) 43 I. A. 91 (98-9) = 43 C. 694 (704).

——Probate — Proceedings for — Parties to—Person setting Administrator-General executor under will in motion and undertaking to indemnify him if one. *See* PROBATE—PROCEEDINGS FOR—PARTIES TO—PERSON SETTING, ETC. (1905) 32 I. A. 244 (254-5) = 33 C. 116 (126).

——Probate—Proceedings for—Will—Genuineness of—Decision as to—Binding nature of, on court exercising other than testamentary jurisdiction. *See* PROBATE—PROCEEDING FOR—WILL—GENUINENESS OF.

(1916) 43 I. A. 91 (97) = 43 C. 694 (704).

——Probate—Purdanashin—Will of, confirming prior transactions with her manager—Probate of—Grant of, in spite of opposition by heirs of lady—Suit subsequent by them impugning prior transactions with manager and seeking to recover properties in his hands—Maintainability. *See* PROBATE—PURDANASHIN—WILL OF, ETC.

(1905) 32 I. A. 244 (255) = 33 C. 116 (126-7).

——Proforma defendant—Dismissal of suit against—Effect.

A instituted a suit against his grandmother and *B* to restrain the grandmother from committing acts of waste on the suit property to which she was entitled for life. The plaintiff did not make any allegation nor was any evidence offered to connect *B* with the property or with any of the acts alleged against the grandmother and the suit was dismissed both against the grandmother and against *B*. In a suit brought by *A* after the death of his grandmother, for the recovery of the same property against *B*'s heirs, the latter pleaded that the suit was barred by virtue of the decision in the earlier suit. *Held*, overruling the plea, that the former suit was one to restrain the grandmother from waste, that she was substantially the only defendant to the suit, that *B* was not a party to it at all; that the parties to the suits were not the same; and that the cause of action in the subsequent suit was not determined in the prior suit. (*Sir Barnes Peacock.*) ZEMINDAR OF PITTAPURAM *v.* PROPRIETORS OF THE MUTTA OF KOLANKA. (1878) 5 I. A. 206 = 2 M. 23 = 3 C.L.R. 263 = 3 Sar. 850.

——Property—Claim to, not in issue nor heard and decided—Dismissal of suit in case of—Effect of, on right to that property.

S. 13 of C. P. C. of 1882 does not enact that no property comprised in a suit which is dismissed shall be the subject-matter of further litigation between the parties. What it does enact is that no Court shall by any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit, and has been heard and finally decided.

Where the decree, read with the pleadings and the judgment, in the prior suit showed that it was the express intention of both the Courts to decide nothing about a particular piece of land included in that suit, *held*, that the decree had not the effect of *res judicata* as regards that piece of land (176-7). (*Lord Hobhouse.*) MAHARAJAH JAGATJIT SINGH *v.* RAJAH SARABJIT SINGH. (1891) 18 I. A. 165 = 19 C. 15 (172-3) = 6 Sar. 80 = R. & J.'s No. 125.

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S. 11—Cases under—(Contd.)

——Property—Descriptions of, in body and schedule of plaint—Conflict between—Decree for property in case of—Property passing under. *See* DECREE—PROPERTY SUED FOR—DESCRIPTIONS OF, ETC. (1880) 7 C. L. R. 404.

——Property—Identity of, in two suits—Necessity.

It was contended that the cases do not establish that an estoppel is binding unless the suit relates to the same subject-matter, but the cases which have been referred to do not establish that position (18). (*Sir Barnes Peacock.*) RAJAH OF PITTAPUR *v.* SRI RAJAH ROW BUCHI SITAYYA GARU. (1884) 12 I. A. 16 = 8 M. 219 (225-6) = 4 Sar. 598.

——*See also* DECEASED—HEIR-AT-LAW—SUIT TO RECOVER PORTION OF INHERITANCE (1874) 22 W. R. 165, AND C. P. C. OF 1908, S. 11—CASES UNDER—STATUS.

——Property — Immoveable property—Situation of—Place of—Decision as to—Binding nature of, in subsequent suit between parties. *See* C. P. C. OF 1908, S. 11—CASES UNDER—LAND. (1872) 12 B. L. R. 391.

——Property—Possession of—Suit for—Dismissal of, on ground that plaintiff was not then entitled to possession—Subsequent suit for possession by him—Maintainability. *See* C. P. C. OF 1908, S. 11—CASES UNDER—POSSESSION. (1888) 15 I. A. 186 (193) = 16 C. 173 (183-4).

——Putni talookdar—Rent arrear due by—Sale of talook for—Money paid by durputnidar to avert—Suit to recover, from putnidar—Decision prior in suit under Bengal Rent Act of 1859 that money paid could not be set off against putnidar for arrears of durputni rent—Not *res judicata*.

Suit to recover a sum of money lodged by the plaintiffs in Court, in order to stay the sale of a putnee talook for an arrear of rent due to the Zemindar from the defendants, who were the putnee talookdars, and thereby to save a durputnee talook of the second degree, which had been created by the defendants out of their said putni talook.

Held, that the decision in a suit under Bengal Rent Act X of 1859 that the money deposited by the plaintiffs could not be set off in an action against plaintiff's assignor for arrears of the durputnee rent, was no bar to the plaintiffs' suit, because that determination was not one within the meaning of S. 2 of C.P.C. of 1859 (905). LUCKHINARAIN MITTER *v.* KHETTRO PAI. SINGH ROY.

(1873) 2 Suth. 903 = 20 W. R. 380 = 13 B.L.R. 146 = 3 Sar. 273.

——Real party—Plaintiff in suit—Mode of finding out—Cause-title in plaint not enough.

Where the question was whether a certain suit was brought by or on behalf of a family idol, or whether it was between the members of the family as shebait for the settlement of a scheme, *held* that, for the consideration of that point, it was necessary to examine not only the heading of the plaint, but also the allegations therein (245-6). (*Sir Lancelot Sanderson.*) RADHA BENODE MANDAL *v.* GOPAL JIN THAKUR. (1927) 54 I.A. 238 =

54 C. 770 = (1927) M.W.N. 448 = 45 C. L.J. 605 = 26 L.W. 85 = 25 A.L.J. 681 = 31 C.W.N. 1063 = 29 Bom. L. R. 961 = 101 I.C. 873 = A. I. R. 1927 P.C. 128 = 53 M.L.J. 123.

——Recommendation — Opinion of Court expressed in form of, and not in form of decision—Effect.

An expression of opinion by a Court perfectly competent to deal with the matter in issue between the parties is binding on and conclusive between them in regard to that matter, notwithstanding the fact that the opinion was expressed in the form of a recommendation, and not in the form of a decision. This is especially so when the parties have for a period of nearly 50 years treated

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S. 11—Cases under—(Contd.)

that expression of opinion as binding (133). (*Lord Macnaghten.*) RANI HEMANTA KUMARI DEBI v. MAHARAJAH JAGADINDRA NATH ROY BAHADUR.

(1894) 21 I. A. 131 = 22 C. 214 = 6 Sar. 473.

—Religious Endowment. See C.P.C. of 1908, S. 11—CASES UNDER—HINDU LAW—RELIGIOUS ENDOWMENT.

—Rent suit—Title in—Decision as to—Effect of, in civil suit subsequent between parties.

The decision of a Revenue Court in a summary suit for arrears of rent brought by A against B and others, in which B set up an *ikrarnamah* under one of the terms of which he claimed on behalf of himself and others to hold certain land rent-free, which suit was dismissed by the Revenue Court, who held the *ikrarnamah* to be valid, *held* to be no bar as *res judicata* to a suit for redemption by B against A on his title as mortgagee, in which B set up the same *ikrarnamah*.

The decision of the claim for rent did not turn upon the validity of the deed. But if the judgment of the Deputy Collector had been final in the matter before him, his incidental finding that the deed was a valid instrument would not be conclusive between the parties in the present litigation. For the question before him was not the issue now raised between the parties (*viz.*, whether the mortgage deed was established or not), and his decision was not that of a Court competent to adjudicate on a question of title. He had only a special jurisdiction to try summary suits for the recovery of rent. So his decision is not *res judicata*. KHUGOWLEE SING v. HOSSEIN BUX KHAN.

(1871) 7 B.L.R. 673 = 15 W. R. P.C. 30 = 2 Sar. 645 = 2 Suth. 404 = 6 M. J. 146.

—A Hindu widow brought a suit in the Court of the Munsif against a tenant of a portion of her husband's estate for the recovery of rent due in respect thereof. Her husband's brother intervened in the suit, asserting that the deceased and he were undivided and that he was therefore entitled to the share of the deceased by survivorship in preference to the widow. The widow, on the other hand, alleged that her husband died a separated Hindu, and that she was therefore entitled to his estate, and not the intervenor. An issue was framed in these terms:—"Did the plaintiff or her deceased husband realise the rent of the 8 annas separately and in a state of separation before this, or did the plaintiff's husband during his lifetime realise the rent with Run Bahadur" (the deceased's brother) "jointly, and after him, did Run Bahadur alone receive rent of the entire 16 annas?"

The Munsif decided in favour of the widow, and his decision was, on appeal, affirmed by the Subordinate Judge.

In a suit subsequently brought by the brother against the widow in the Court of the Subordinate Judge for the recovery of the estate of the deceased in her possession.

Held that, having regard to the subject-matter of the prior suit, to the form of the issue raised therein, and to some expressions of the learned Judge who decided it, the question of title was no more than incidental and subsidiary to the main question, *viz.*, whether any and what rent was due from the tenant, and the judgment therein was not therefore conclusive between the parties (35, 38). (*Sir Robert P. Collier.*) RUN BAHADUR SINGH v. LACHOO KOER.

(1884) 12 I.A. 23 = 11 C. 301 (307-8) = 4 Sar. 602.

—In a suit brought by a Hindu widow in the Court of a Munsif for the recovery from a tenant of a portion of her husband's estate of rent due in respect thereof, the husband's brother intervened, asserting that he and the deceased were undivided, and that he was therefore entitled to the share of the deceased by survivorship. The widow

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alleged that her husband died a separated Hindu, and that she, and not the intervenor, was therefore entitled to her husband's estate. The Munsif decided in favour of the widow, and his decision was, on appeal, affirmed by the Sub-Judge.

In a suit subsequently instituted by the brother against the widow in the Court of the Sub-Judge for the recovery of the estate of the deceased in her possession, alleging that he and the deceased were joint, and that he became entitled to the deceased's share by survivorship, *held*, that the judgment in the suit in the Munsif's Court was not conclusive in the subsequent suit on the question of the status of the deceased, because the jurisdiction of the Munsif was only a limited jurisdiction, and was not concurrent with that of the Sub-Judge (38).

In order to make the decision of one Court final and conclusive in another Court, it must be the decision of a Court which would have had jurisdiction over the matter in the subsequent suit in which the first decision is given in evidence as conclusive (36-7). It would not be proper that the decision of a Munsif upon (for instance) the validity of a will or of an adoption, in a suit for a small portion of the property affected by it, should be conclusive in a suit before a District Judge or in the High Court, for property of a large amount, the title to which might depend upon the will or adoption. By taking concurrent jurisdiction to mean concurrent as regards pecuniary limit as well as the subject-matter, this evil or inconvenience is avoided. If this construction of the law were not adopted, the lowest Court in India might determine finally, and without appeal to the High Court, the title to the greatest estate in the Indian Empire (37-8). (*Sir Robert P. Collier.*) RUN BAHADUR SINGH v. LACHOO KOER.

(1884) 12 I.A. 23 = 11 C. 301 (308-10) = 4 Sar. 602.

—The proprietor of an estate first granted it in putni, and afterwards mortgaged his proprietary interest therein, to defendant, who sued upon his mortgage, obtained a decree and himself purchased the property at the sale held in execution thereof. While defendant's suit upon his mortgage was pending, the same property was sold in execution of a money decree against the proprietor and purchased by plaintiff. After the two sales, plaintiff, claiming to be proprietor, sued defendant as putnidar for the rent due upon the putni and his claim was that he stood in the shoes of the proprietor. Defendant resisted the suit on the ground that he, and not plaintiff, stood in the shoes of the proprietor; and the suit was dismissed on the ground that inasmuch as the defendant's suit to enforce his charge was pending at the time of the sale to the plaintiff, he was bound by the proceedings against the proprietor. In a suit brought subsequently by plaintiff to redeem defendant's mortgage, the right to redeem being rested on the same ground as the right to rent had been rested in the prior suit, *held*, that the question in both the suits was who was the true representative of the proprietor, and that as that question had been expressly decided against plaintiff in the prior suit, his suit was barred. (*Lord Hobhouse.*) RADHAMADHUB HOLDAR v. MANOHUR MOOKERJEE.

(1888) 15 I.A. 97 = 15 C. 756 = 5 Sar. 211.

—Representation in suit—Substantial, though not formal, representation—Effect. See C. P. C. OF 1908, S. 11—CASES UNDER—MINOR.

—Representative suit—Decree in—*Res judicata* against public—Compromise decree—Decree passed after contest—Distinction.

Quære, whether the broad rule that persons instituting a suit on behalf of the public have no right to bind the public by a compromise decree, though a decree passed against

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S. 11—Cases under—(Contd.)

them on contest would bind the public is the same as the law in India under S. 11 of C. P. C. (*Lord Sinha.*) **ABDUR RAHIM v. SYED ABU MAHOMED BARKAT ALI SHAH.**

(1927) 55 I. A. 96 = 55 C. 519 = I L. T. 40 C. 19 = 9 P. L. T. 65 = 27 L. W. 339 = 32 C. W. N. 482 = 26 A. L. J. 464 = 108 I. C. 361 = 30 Bom. L. R. 744 = 48 C. L. J. 55 = 1928 M. W. N. 926 = A. I. R. 1928 P. C. 16 = 54 M. L. J. 609.

—Revenue Court—Tenant's status—Decision on—If *res judicata* in subsequent civil suit.

Quære, whether the decision of a revenue officer on an issue as to a tenant's status, which he has no jurisdiction to decide, can be pleaded as *res judicata* in a subsequent civil suit. (*Lord Davey.*) **GOKUL MANDAR v. PUDMANUND SINGH.** (1902) 29 I. A. 196 (201-2) = 29 C. 707 (715) = 6 C. W. N. 825 = 4 Bom. L. R. 793 = 8 Sar. 323.

—Revenue Court—Thakbust proceeding—Decision in—Binding nature of, on parties. See REVENUE OFFICER—THAKBUST PROCEEDING—DECISION IN.

(1914) 27 M. L. J. 365 (372-3).

—Revenue Court—Title—Decision as to—Effect of, in civil suit subsequent between parties. See C. P. C. OF 1908, S. 11—CASES UNDER—RENT SUIT—TITLE IN.

—Review judgment—Original judgment—Opinions in—Conflict between—Effect.

In a suit in ejectment brought by a landlord against a tenant, the question was whether the tenancy of 1871 under which the tenant claimed to hold the suit land was a permanent tenancy or a mere tenancy at will. It appeared that up to March, 1904, the rent paid for the land by the tenant had been Rs. 12-8-0 per mensem, that, in that month, the landlord served the tenant with notice requiring him to pay an enhanced rent of Rs. 25 per mensem or vacate the land, that, on 9-1-1905, the landlord filed a suit against the tenant claiming to recover arrears of rent at that rate of Rs. 25, and that the tenant resisted the suit pleading a permanent tenancy. In that suit the Divisional Judge, on appeal, seemed to be of opinion that the tenancy was a permanent tenancy but held that the landlord was entitled to enhance the rent notwithstanding that the tenancy was a permanent one, and affirmed the decree below declaring the landlord's right to enhance the rent to the extent claimed by him. An application for review presented by the landlord complaining of the decision to the extent to which it held that the tenancy was a permanent one was rejected by the Divisional Judge on the technical ground that, the decree being in favour of the landlord, an application for review thereof by him did not lie. In his judgment rejecting the review application, the learned judge, however, stated that the plain implication of his decree sought to be reviewed was that the tenancy was not permanent. There was no appeal from his decree.

Held, that the decree of the Divisional Judge was not *res judicata* in favour of either party in the subsequent suit on the issue whether or not the tenancy was a permanent one (183).

It is impossible, as a matter of ordinary fairness to go no more deeply into the question—that after the landlord's application for review was refused for the reason given the previous expression of opinion of the Divisional Judge that the tenancy was permanent could be relied upon by the tenant for any purpose whatever. The learned judge, treating his pronouncement as entirely irrelevant, must be taken to have withdrawn it as the expression of a concluded opinion. For similar reasons, the learned judge's decree affirming the enhancement of rent, however unjustifiable in point of law it was, if the tenancy were really permanent, cannot be treated as a pronouncement binding as between these parties

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S. 11—Cases under—(Contd.)

that the tenancy was not permanent (183-4). (*Lord Blanesburgh.*) **DHANNA MAL v. MOTI SAGAR.**

(1927) 54 I. A. 178 = 8 Lah. 573 = 39 M. L. T. 161 = 26 L. W. 634 = 28 Punj. L. R. 658 = 25 A. L. J. 959 = 29 Bom. L. R. 870 = 31 C. W. N. 677 = 101 I. C. 355 = A. I. R. 1927 P. C. 102 = 52 M. L. J. 663.

—Settlement Court—Decision of—Binding nature of in civil suit between parties. See SETTLEMENT COURT—DECISION OF—BINDING NATURE OF, ETC.

(1920) 39 M. L. J. 115.

—Situation of immoveable property—Place of—Decision as to—Binding nature of, in subsequent suit between parties. See C. P. C. OF 1908, S. 11—CASES UNDER—LAND. (1872) 12 B. L. R. 391.

—Status—Decision as to—Binding, nature of.

By the general law where a material issue has been tried and determined between the same parties in a proper suit, and in a competent court, as to the status of one of them in relation to the other, it cannot be again tried in another suit between them (285). (*Sir Montague E. Smith.*) **KRISHNA BEHARI ROY v. BROJESWARI CHOWDRANEE.**

(1875) 2 I. A. 283 = 1 C. 144 (146) = 25 W. R. 1 = 3 Sar. 559 = 3 Suth. 213.

—By the general law, when a material issue has been tried and determined between the same parties in a proper suit and in a competent court as to the status of one of them in relation to the other, it cannot be again tried in another suit between them (157). (*Sir Barnes Peacock.*) **TEKAIT DOORGA PERSAD SINGH v. TEKAITNI DOORGA KUNWARI.**

(1878) 5 I. A. 149 = 4 C. 190 (198-9) = 3 C. L. R. 31 = 3 Sar. 827 = 3 Suth. 540.

—Status—Decision as to—Binding nature of—Properties in suits different. See HINDU LAW—ADOPTION—STATUS OF—FINDING ON—EFFECT OF, ETC.

(1884) 12 I. A. 16 (21) = 8 M. 219.

—Status—Heirship to deceased—Decree declaring, in suit by one creditor of deceased—Effect of, on another creditor of his. See JUDGMENT—JUDGMENT *in rem*—HEIRSHIP. (1872) 14 M. I. A. 605 (616).

—Subsequent suit—Parties to—Both claiming under party to prior suit—Applicability of rule of *res judicata* in case of. See C. P. C. OF 1908, S. 11—CASES UNDER—PARTIES TO SUBSEQUENT SUIT. (1903) 30 I. A. 71 (75) = 30 C. 556 (564).

—Substantial, though not formal, representation in suit—Effect. See C. P. C. OF 1908, S. 11—CASES UNDER—MINOR.

—Succession certificate—Proceedings for—Hindu widow and brother of her deceased husband—Contest between, depending upon status of deceased—Decision as to his status upon—Effect of, in civil suit. See SUCCESSION CERTIFICATE—HINDU WIDOW.

(1884) 12 I. A. 23 (34-5) = 11 C. 301 (306-8) = (1919) 46 I. A. 259 = 47 C. 466 (475).

—Suit—Award—Application to file, under para. 20 of Sch. II of C. P. C. of 1908—If a suit. See ARBITRATION—AWARD—APPLICATION TO FILE, ETC.

(1891) 18 I. A. 73 (76) = 18 C. 414 (419).

—Suit—Judgment final in—Binding character of, in proceedings for its execution.

A final judgment in a suit is binding upon the parties to it in carrying the judgment into execution (41). (*Sir Barnes Peacock.*) **RAM KIRPAL SHUKUL v. MUSST. RUP KUARI.** (1883) 11 I. A. 37 = 6 A. 269 (274) = 4 Sar. 489.

—Suit—Party to. See C. P. C. OF 1908, S. 11—PARTY TO SUIT.

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S. 11—Cases under—(Contd.)

———*Suit—Point not arising in—Suit subsequent in respect of—Maintainability.*

If the question has not arisen, whether the principal may be recovered, without interest, then the plea of *res judicata* cannot be applied to a subsequent proceeding which has for its object to recover the principal, without interest; because, if that question does not arise here, it cannot be adjudged here, and the plea, *res judicata*, can be no bar to a subsequent proceeding, (219). (*Lord Campbell.*) *WISE v. KISHENKOOMAR BOUS.* (1847) 4 M. I. A. 201.

———*Suit—Representation of party in—Substantial, though not formal, representation—Effect.* See C. P. C. OF 1908, S. 11—PARTY TO SUIT—PERSON SUBSTANTIALLY, ETC.

———*Suit—Subsequent suit—Parties to—Both claiming under a party to prior suit—Rule of res judicata if applicable in case of.* See C. P. C. OF 1908—S. 11—CASES UNDER, PARTIES TO SUBSEQUENT SUIT.

(1903) 30 I. A. 71 (75) = 30 C. 556 (564).

———*Tenure—Rent of—Fixity of—Issue as to—Judgment not inter partes as to—Effect.* See JUDGMENT = JUDGMENT NOT *inter partes*—*Res judicata*—ADMISSIBILITY IN EVIDENCE. (1894) 22 I. A. 60 (68) = 22 C. 533 (542).

———*Will—Genuineness of—Decision as to.*

A will established in a former suit cannot be impeached in a subsequent suit brought by the same party. (*Mr. Baron Parke.*) *MULRAZ LACHMIA v. CHALEKANY VENKATA.* (1838) 2 M. I. A. 54 = 1 Sar. 154.

———*Effect of, in subsequent suit raising same question—Court disposing of first suit not competent to try second.* See HINDU LAW—ADOPTION—WILL—DECISION ON ISSUES AS TO. (1882) 9 I. A. 197 (203) = 9 C. 439 (444).

———*Will—Genuineness of—Probate Court—Decision of—Effect of, on court exercising other than testamentary jurisdiction.* See PROBATE—PROCEEDINGS FOR—WILL—GENUINENESS OF. (1916) 43 I. A. 91 (97) = 43 C. 694 (704).

———*Will—Genuineness and validity of—Decision as to.*

In a prior suit between plaintiff, as defendant, and defendants, as plaintiffs, it was decided that the will of R (plaintiff's father), which the plaintiff had alleged was not genuine was wholly valid and passed the entire estate to an idol. In a suit subsequently instituted by plaintiff against defendants and founded upon the total, or at least the partial, invalidity of the said will, *held*, that the question as to the genuineness and total validity of the will was *res judicata* by reason of the decision in the prior suit. (*Lord Hobhouse.*) *SRIMATI KAMINI DEBI v. ASUTOSH MOOKERJEE.*

(1888) 15 I. A. 159 = 16 C. 103 = 5 Sar. 246.

———*Will—Release by testatrix confirmed by—Setting aside of, on ground of undue influence—Heir's suit for—Maintainability—Probate of will granted under Probate and Administration Act—Effect.* See PROBATE AND ADMINISTRATION ACT OF 1881, SS. 59, 88—MAHOMEDAN WILL—PROBATE OF—EFFECT. (1905) 32 I. A. 244 (258-9) = 33 C. 116 (130-1).

———*Will—Revocation of—Decision as to—Effect of, inter partes.*

An Oudh talukdar died leaving a will whereby he gave all his property, moveable and immoveable, to his widow, with power to her to appoint a successor. In pursuance of the power conferred upon her the widow appointed the appellant before their Lordships to be her successor. The respondent before their Lordships, who was the daughter's son of the talukdar, brought a suit against the widow and the

C. P. CODE (ACT V OF 1908)—(Contd.)

S. 11—Cases under—(Contd.)

appellant for a declaration that the will of the talukdar had been revoked by him and consequently that the widow had no right to appoint appellant. That suit was finally decreed by the Privy Council, it being held that the will had been revoked and that the widow had no power to appoint appellant. Their Lordships' decree was confined to the talukdari estate, the widow being held entitled to the non-talukdari property. In a second suit brought by the appellant for a declaration of his right to the whole of the estate of the talukdar, talukdari as well as non-talukdari, he based his right on the appointment made by the widow in pursuance of the will held by the prior decree to have been revoked. That suit was also dismissed by the Judicial Committee on the ground that appellant had no such title to the whole or any part of the estate. In a third suit brought by him for possession of all the estate of the deceased as well as a declaration of right thereto, the claim was also founded upon appellant's appointment by the widow in pursuance of the will. *Held*, that the third suit was barred by the decision in the second. (*Sir Barnes Peacock.*) *TRILOKINATH SINGH v. PERTAB NARAIN SINGH.* (1888) 15 I. A. 113 = 15 C. 808 = 5 Sar. 219.

———*Will—Revocation of—Decision as to—Effect as against strangers—Res judicata—Admissibility in evidence.* See JUDGMENT—JUDGMENT NOT *inter partes*—*Res judicata*—ADMISSIBILITY IN EVIDENCE—WILL—REVOCATION OF. (1897) 24 I. A. 10 (19) = 19 A. 277 (289).

———*Will—Validity of—Decision as to—Effect.* See C. P. C. OF 1908, S. 11—CASES UNDER—WILL—GENUINENESS AND VALIDITY OF. (1888) 15 I. A. 159 = 16 C. 103.

———*Witnesses—Cross-examination—Opportunity for—Refusal to intervenor of—Effect of, on finality of judgment in suit against him.*

It was suggested that the former judgment ought not to be held binding on the appellant, because certain witnesses had been examined before he intervened in the suit, and he was refused the opportunity of cross-examining them. Such an objection is no answer to the defence of *res judicata* arising from the former judgment. If there had been any miscarriage of that kind, the matter was one for appeal in that suit. The objection does not appear to have been raised in the appeals which were successively made in that suit to the Civil Judge and to the High Court; but whether it was so raised or not, that cannot affect the operation of the final judgment which must be taken to have been rightly given (286-7). (*Sir Montague E. Smith.*) *KRISHNA BEHARI ROY v. BROJESWARI CHOWDRANEE.* (1875) 2 I. A. 283 = 1 C. 144 (147) = 25 W. R. 1 = 3 Sar. 559 = 3 Suth. 213.

———*S. 11, Expl. IV—Deed—Construction—Abandonment of one—Claim subsequent on basis thereof—Maintainability.* See DEED—CONSTRUCTION—ABANDONMENT OF ONE. (1866) 11 M. I. A. 50 (72-3).

———*Defences—Alternative defences—Omission to put forward one or some of—Effect.*

Where matters are so dissimilar that their union might lead to confusion, the construction of the word "ought" in Expl. II to S. 13 of C. P. C. of 1882 would become important. But where the matters were the same, and the matter pleaded to be barred by the prior suit was only an alternative way of seeking to impose a liability upon the defendant the matter "ought" to have been made a ground of attack in the former suit, and is *res judicata* (238). (*Lord Morris.*) *KAMESWAR PERSHAD v. RAJKUMARI RUTTUN KOER.* (1892) 19 I. A. 234 = 20 C. 79 (85-6) = 6 Sar. 241.

C. P. CODE (ACT V OF 1908), S. 11 Expl. IV—
(Contd.)

—See also C. P. C. OF 1908, S. 11, EXPL. IV—(1) EJECTMENT SUIT AND (2) MORTGAGE — PERSONAL LIABILITY UNDER—SUIT TO ENFORCE.

—Defences—Omission to put forward all—Effect.

A defence which might and ought to have been, but was not, taken in a prior suit could not be raised in a subsequent suit between the parties to the former suit or their representatives (18). (*Sir Arthur Wilson*.) **RAJA RAMPAL SINGH v. RAM GHULAM SINGH.**

(1904) 32 I. A. 17 = 27 A. 37 = 1 C. L. J. 46 = 2 A. L. J. 237 = 8 Sar. 727.

—Ejectment suit—Alternative defences—Omission to put forward all—Effect.

When a plaintiff claims an estate, and the defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his then knowledge, to bring forward (73). (*Lord Westbury*.) **SRIMUT RAJAH MOOTTOO VIJAYA R.B.G. TEVAR v. KATAMA NACHIAR.**

(1866) 11 M. I. A. 50 = 10 W. R. P. C. 1 = 2 Suth. 46 = 2 Sar. 212.

—A suit was brought by A to recover property in which on appeal to the Privy Council, two questions arose, *viz.*, whether the property was to pass as divided or undivided property, and whether such property was conveyed away to A's, father by a deed of testamentary disposition. The lower court had decided only the latter point, and the Privy Council remanded the case for determination of the former point. On a second appeal to the Privy Council, that committee were about to enter upon the question as to the validity of the testamentary paper, when A gave up the point that the paper was in any sense testamentary in its character, and disclaimed having any title under it as a testamentary devise, and the Privy Council did not therefore decide the question.

In a subsequent suit by A to recover the property by setting up the paper as a valid will and testament, *held*, that the suit was one instituted without *bona fides*, and could not be allowed to proceed.

A had the power in the prior suit of relying upon that document as a valid will. He in effect stated, or might have stated, his defence in the prior suit in the alternative. He might, first, have insisted that it was an undivided property; and, secondly, he might have pleaded:—"But if it shall turn out to be a divided property, then my title arises under this instrument, and I plead and rely upon it as amounting to a valid devise in my favour." When a plaintiff claims an estate, and the defendant being in possession resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge, then to bring forward. A might have insisted on the validity of the alleged will; but instead of doing so, when his suit came on to be heard and decided in the court of final appeal, he in effect disclaimed all title under the instrument as a will, and insisted that it must be regarded by the Court as not being testamentary. There would be an end to all security in the administration of justice if the course now taken by A of setting up the will were allowed.

On every ground, therefore,—first on the general ground that the thing was in issue, and that what was in issue must be taken to have been decided by the judgment; secondly, upon the personal ground that A, having used this paper and abandoned all right to it as a will, cannot now use it for a different purpose,—we are of opinion that the court below was right in dismissing the suit. (*Lord Westbury*.) **SRIMUTH RAJAH MOOTTOO VIJAYA R. B. G. TEVAR v. KATAMA NATCHIAR.**

(1866) 11 M. I. A. 50 = 2 Suth. 46 = 10 W. R. P. C. 1 = 2 Sar. 212.

C. P. CODE (ACT V OF 1908), S. 11, Expl. IV—
(Contd.)

—When a plaintiff claims an estate, and the defendant being in possession resists that claim, he is bound to resist it upon all the grounds that it is possible for him according to his knowledge then to bring forward (155). (*Sir Barnes Peacock*.) **TEKAIT DOORGA PERSAD SINGH v. TEKAITNI DOOKGA KUNWARI.**

(1878) 5 I. A. 149 = 4 C. 190 (196) = 3 C.L.R. 31 = 3 Sar. 827 = 3 Suth. 540.

—Heir—Suit by—Defendant resisting, on ground of preferential title as heir—All grounds of defence — Duty to put forward—Omission to do so—Effect.

D sued, as the mother and heiress of her deceased infant son, to recover possession of two-thirds of his property from her co-widows. The plaintiff was a defendant in that suit and set up a preferential claim to succeed to the estate of the deceased infant to the exclusion of D. The plaintiff's defence was over-ruled, a decree was passed in favour of D confirming her right to the one-third of the property of her infant son in her possession, and giving her possession of the remaining two-thirds claimed by her. D took possession of the said two-thirds in execution of that decree.

In a suit subsequently instituted by the plaintiff for the recovery from D of the whole of the property of her infant son, on the ground that, according to koolachar or family usage, he, and not D, was entitled to inherit the estate of the deceased infant, *held*, that the decision in the prior suit that D was the heiress of her son and that she as such heiress was entitled to possession was conclusive against the plaintiff and precluded him from recovering possession from her on the ground that she was not the heiress, and that he was entitled to succeed to the property upon the death of her son (158).

It is contended on behalf of the plaintiff that he did not in the prior suit set up the family usage which has been set up in the present suit, and that consequently the adjudication in the former suit is no bar to his recovering possession (154). The plaintiff ought to have resisted the claim in the former suit upon the ground of the family custom, and, if he did not do so, he is not entitled in the present suit to upset the former decision, because he failed to set up a custom which he ought to have relied upon at the time. The decision in the former suit would be utterly useless if the present suit could be maintained (155).

Seemle the causes of action in the two suits are the same (156-7). (*Sir Barnes Peacock*.) **TEKAIT DOORGA PERSAD SINGH v. TAKAITNI DOORGA KUNWARI.**

(1878) 5 I. A. 149 = 4 C. 190 (195-6) = 3 C.L.R. 31 = 3 Sar. 827 = 3 Suth. 540.

—Hindu Law—Father—Company limited—Will conveying all property to a, whose registration was procured by him—Son's suit to set aside — Suit subsequent by him for declaration of invalidity of incorporation of Company—Maintainability. See HINDU LAW—JOINT FAMILY—FATHER—COMPANY LIMITED. (1912) 39 I. A. 237 (245-6).

—Hindu Law—Inheritance—Custom of — Widow — Exclusion of—Succession by—Custom of—Decision against — Suit subsequent founded on custom of right to succeed after her death—Maintainability. See HINDU LAW—INHERITANCE—CUSTOM OF — WIDOW — EXCLUSION OF — SUCCESSION BY. (1878) 5 I. A. 149 (158) = 4 C. 190 (200).

—Hindu Law—Remote reversioner—Widow—Alienation by—Possession of property subject of—Suit for—Dismissal of, on ground of existence of nearer reversioner (a defendant in the suit)—Suit subsequent by him alleging family custom by which he was entitled to succeed equally with the nearer reversioner—Maintainability. See HINDU

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(Contd.)

LAW — REVERSIONER — REMOTE REVERSIONER — WIDOW—ALIENATION BY—PROPERTY SUBJECT OF,
(1924) 52 I.A. 100 (105) = 47 A. 158.

—Hindu Law—Reversioner—Widow—Sale by—Pre-emption right in respect of—Suit during widow's lifetime to establish—Dismissal of—Suit after her death to set aside sale for want of necessity—Maintainability. See **HINDU LAW—REVERSIONER—WIDOW—SALE BY—PRE-EMPTION RIGHT IN RESPECT OF.** (1906) 34 I.A. 72 (77-8) = 29 A. 331 (338-9).

—Mortgage—Personal liability under—Suit to enforce—Maintainability—Prior suit to enforce liability of property in defendant's hands—Personal liability of defendant capable of being, but not, sought for in—Effect. See **MORTGAGE—PERSONAL LIABILITY UNDER—SUIT TO ENFORCE—MAINTAINABILITY.** (1892) 19 I.A. 234 (237-8) = 20 C. 79 (85-6).

—Mortgage—Prior mortgage—Omission to set up, in suit brought to enforce subsequent mortgage—Effect. See **MORTGAGE—PRIOR AND SUBSEQUENT MORTGAGES—PRIOR MORTGAGE—OMISSION TO SET UP, ETC.** (1902) 29 I.A. 118 (123-4) = 24 A. 429 (436-7) = (1919) 47 I.A. 11 (15-6) = 47 C. 662 (668-9).

—Mortgage—Prior mortgage—Redemption of—Subsequent mortgagee's suit for—Mortgage held by prior mortgagee subsequent to plaint mortgage—Redemption right of prior mortgagee under—Omission to set up—Effect. See **MORTGAGE—PRIOR AND SUBSEQUENT MORTGAGES—PRIOR MORTGAGE—REDEMPTION OF—SUBSEQUENT MORTGAGEE'S SUIT FOR.** (1902) 29 I.A. 118 (125-6) = 24 A. 429 (438).

—Mortgage—Suit to enforce—Lease of portion of mortgaged property by mortgagor to mortgagee—Rent due under—Set-off in regard to—Omission to claim—Subsequent suit by him to enforce claim—Maintainability. See **MORTGAGE—SUIT TO ENFORCE—LEASE OF PORTION OF MORTGAGED PROPERTY BY MORTGAGOR TO MORTGAGEE.** (1889) 16 I.A. 107 (113-4) = 16 C. 682 (691).

—Mortgage—Suit to enforce—Personal decree in—Omission to claim—Suit subsequent on mortgage claiming—Maintainability. See **MORTGAGE—SUIT TO ENFORCE—PERSONAL DECREE IN—OMISSION TO CLAIM.** (1925) 52 I.A. 418 (435) = 5 Pat. 135.

—Mortgage—Suit to enforce—Prior and subsequent mortgagees impleaded in—Omission of, to put forward their rights—Fresh suit by them to enforce same—Maintainability. See **MORTGAGE—SUIT TO ENFORCE—PRIOR AND SUBSEQUENT MORTGAGEES IMPEADED IN.** (1911) 39 I.A. 68 (79) = 39 C. 527 (552).

—Mortgage—Usufructuary mortgage—Redemption of—Suit for—Limitation—Plea by mortgagee of—Maintainability—Prior suit by mortgagee for possession and decree for possession in same—Prior suit brought after right to redeem barred—Effect. See **MORTGAGE—USUFRUCTUARY MORTGAGE—REDEMPTION OF—SUIT FOR—LIMITATION.** (1913) 40 I.A. 74 (81-2) = 35 A. 227 (233-4).

—Vendor and Purchaser—Purchaser—Possession of property purchased and damages—Suit for—Dismissal—Specific performance—Fresh suit for—Maintainability. See **VENDOR AND PURCHASER—PURCHASER—POSSESSION OF PROPERTY PURCHASED AND DAMAGES.** (1901) 28 I.A. 221 (226-7) = 24 M. 491 (503-4).

S. 11, Expl. VI—Hindu Law—Joint family—Manager—Suit by or against—Decree in—Effect of, against

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(Contd.)

other members. See C.P.C. OF 1908, S. 11—CASES UNDER—**HINDU LAW—JOINT FAMILY—MANAGER.**

—Hindu Law—Reversioner—Presumptive reversioner—Suit by or against—Decision in—Effect of, on actual reversioners. See C. P. C. OF 1908, S. 11—CASES UNDER—**HINDU LAW—REVERSIONER—PRESUMPTIVE REVERSIONER—SUIT BY OR AGAINST.**

—Tengalais—Suit by Vadagalais against individual, as wrong-doers—Decision in favour of Vadagalais in—Not res judicata against Tengalai community.

A number of Vadagalais in a certain village brought a suit against a number of Tengalais in the same village complaining of the latter having publicly worshipped their saint and carried his idol in procession through the streets. In that suit a decree was passed permitting worship of the Tengalai idol in private houses, but prohibiting public processions, and awarding damages to the Vadagalais.

In a suit subsequently brought by the Vadagalais of the village for a declaration of their rights to prohibit any public worship or procession of any Tengalai idol in any of the streets of the village, and consequent injunction, held that the prior decision was not *res judicata* in favour of the Vadagalais (101).

The prior suit was not a representative suit binding property, or even designed or framed for the purpose of binding for all time the Tengalai community. It was a suit against certain persons alleged to be wrong-doers in their individual capacity (101.) (*Lord Macnaghten.*) **SADAGOPACHARIAR v. RAMA RAO.** (1907) 34 I.A. 93 =

30 M. 185 (190) = 5 C. L. J. 566 = 11 C. W. N. 585 = 2 M. L. T. 204 =

9 Bom. L. R. 663 = 4 A. L. J. 333 = 17 M. L. J. 240

—S. 13—Foreign judgments. See **JUDGMENTS—FOREIGN JUDGMENTS.**

—S. 13 (b)—Applicability—Conditions.

Sub-S. (b) of S. 13 of C. P. C. of 1908 refers to those cases where, for one reason or another, the controversy raised in the action has not, in fact, been the subject of direct adjudication by the court. (*Lord Buckmaster, L. C.*) **KEYNER v. VISWANATHAM REDDI.**

(1916) 44 I.A. 6 = 40 M. 112 =

21 M. L. T. 78 = 15 A. L. J. 92 = 21 C. W. N. 358 = 5 L. W. 342 = 19 Bom. L. R. 206 = 25 C. L. J. 233 =

38 I. C. 683 = 32 M. L. J. 35.

—S. 16—Situation of property—Place of—Issue as to—Prior decision between parties as to—Binding, nature of.

S. 14 of C. P. C. of 1859 provides "that, if it be shown that the land in dispute has been adjudged by competent authority to belong to an estate, village, or other known division of land, situate within the local jurisdiction of another court, the court in which the suit is brought shall reject the plaint, or return it to the plaintiff, in order to its being presented in the proper court."

In a suit brought in the Ghazee-pore court, in which the question was whether that court had jurisdiction to try the cause, in view of S. 14 of C. P. C. of 1859, it appeared that there was a prior binding adjudication between the parties to the effect that the land in dispute was an accretion to the respondents' settled estate in Shahabad. Held, that that decision was a bar, under S. 14 of C. P. C. of 1859, to the jurisdiction of the Ghazee-pore court to try the suit in respect of the same land. **BABOO PUHLWAN SINGH v. MAHARAJAH MOHESSUR BUKSH SINGH.**

(1872) 2 Suth. 660 = 18 W. R. 182 = 12 B. L. R. 391 = 3 Sar. 163.

—S. 17—Courts—Meaning of.

The word "courts" in S. 17 of C. P. C. of 1908 means courts to which the Code of Civil Procedure applies. (*Lord*

C. P. CODE (ACT V OF 1908), S. 17—(Contd.)

Dunedin.) SETRUCHERLA RAMABHADRA RAJU v. MAHARAJA OF JEYPORE. (1919) 46 I. A. 151 (156-7) = 42 M. 813 (820) = 17 A. L. J. 694 = 21 Bom. L. R. 914 = 23 C. W. N. 1033 = 30 C. L. J. 209 = 10 L. W. 362 = (1919) M. W. N. 502 = 26 M. L. T. 127 = 51 I. C. 185 = 37 M. L. J. 11.

—Mortgage—Suit to enforce—Jurisdiction of British Indian Court to entertain—Mortgaged property situate in part in place to which C. P. C. does not apply—Decree for sale in suit—Validity of, as regards that part.

A suit was brought in the sub-court of Vizagapatam to enforce a mortgage over land which was situate partly in the district of Vizagapatam and partly in a Scheduled district, and a decree for sale was passed therein in respect of all the suit lands.

Held that the decree as regards the property in the Scheduled district could not be justified by S. 17 of C. P. C. of 1908, and was a nullity so far as that property was concerned.

The decree was accordingly varied by deleting the order for sale so far as applicable to the lands situate within the Scheduled district without prejudice, however, to the mortgagee's right to apply to the proper court for an order for sale of those lands. (*Lord Dunedin.*) SETRUCHERLA RAMABHADRA RAJU v. MAHARAJA OF JEYPORE.

(1919) 46 I. A. 151 (156-7) = 42 M. 813 (820) = 17 A. L. J. 694 = 21 Bom. L. R. 914 = 51 I. C. 185 = 23 C. W. N. 1033 = 30 C. L. J. 209 = 10 L. W. 362 = (1919) M. W. N. 502 = 26 M. L. T. 127 = 37 M. L. J. 11.

—Ss. 19 and 20—Contract—Breach of—Improper procuring of—Compensation for—Suit for—Jurisdiction—Limitation—Limitation Act of 1908—Art 27—Applicability.

In a suit for compensation for the improper enticing away by the defendant of the Jamadars of the plaintiff into breaking their contracts with the plaintiff by putting the animals which they had contracted to supply to him at the disposition of the defendant himself, *held* that the court within whose jurisdiction the wrong complained of was committed or the defendant carried on business would have jurisdiction to entertain the suit, and that the period of limitation applicable to the suit was that provided by Art. 27 of the Limitation Act of 1908. (*Viscount Haldane.*) HAVELI SHAH v. SHEIKH PAINDA.

(1926) 31 C. W. N. 174 = (1926) M. W. N. 592 = A. I. R. (1926) P. C. 88 = 96 I. C. 887.

—Residence ordinary—Carrying on of business—Places of—Jurisdiction—Test.

Held that a person who was ordinarily resident in one place but who carried on business at another was, under Ss. 19 and 20 of C. P. C. of 1908, liable to be sued at the latter place. (*Viscount Haldane.*) HAVELI SHAH v. SHEIKH PAINDA.

(1926) 31 C. W. N. 174 = (1926) M. W. N. 592 = A. I. R. (1926) P. C. 88 = 96 I. C. 887.

—S. 20—Agent—carrying on business through—Jurisdiction by reason of Hindu law—Joint family—Manager—Junior member—Acts and payments to, in respect of his share in joint family property—Manager if an agent in respect of. *See* HINDU LAW—JOINT FAMILY—MANAGER—JUNIOR MEMBER—ACTS, ETC.

(1903) 30 I. A. 220 (228) = 26 M. 544 (552-3).

—Foreigner—Jurisdiction against, if confined solely by reason of. *See* JURISDICTION—FOREIGNER.

(1903) 30 I. A. 220 (227) = 26 M. 544 (552).

—Plea of—Onus of proof in case of. *See* JURISDICTION—AGENT—CARRYING ON BUSINESS THROUGH.

(1903) 30 I. A. 220 (228) = 26 M. 544 (552-3).

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—Award—Application to file—Jurisdiction to entertain—Subject-matter of award not within jurisdiction of Court. *See* ARBITRATION—AWARD—APPLICATION TO FILE—JURISDICTION TO ENTERTAIN.

(1923) 51 I. A. 72 (81-2) = 51 C. 361.

—Award—Application to file—Jurisdiction to entertain—Subject-matter of award in part not within jurisdiction of Court. *See* ARBITRATION—AWARD—APPLICATION TO FILE—JURISDICTION TO ENTERTAIN.

(1923) 51 I. A. 72 (81) = 51 C. 361.

—Jurisdiction—Facts giving—Onus of proof of. *See* JURISDICTION—FACTS GIVING—ONUS OF PROOF OF.

(1880) 7 I. A. 196 (204) = 3 A. 91 (100).

—Place of suit—Rule general as to—Defendant's residence at time of suit. *See* JURISDICTION—PLACE OF SUIT.

(1894) 21 I. A. 171 (185) = 22 C. 222 (237-8).

—S. 20 (a)—Residence of defendant—Place of. *See* JURISDICTION—RESIDENCE OF DEFENDANT—PLACE OF.

—S. 20 (a) and (b)—Carrying on business within jurisdiction. *See* JURISDICTION—CARRYING ON BUSINESS WITHIN.

—Dwelling within jurisdiction. *See* JURISDICTION—DWELLING WITHIN.

—Ss. 20 (c)—Cause of action, *See* CAUSE OF ACTION.

—Debt—Suit to recover—Cause of action—Jurisdiction—Debt contracted at Hyderabad and debtor and sureties all resident there—Jurisdiction of Secunderabad Court to entertain suit. *See* DEBT—SUIT TO RECOVER—JURISDICTION TO ENTERTAIN.

(1925) 53 I. A. 58 = 53 C. 88.

—Partnership contract—Balance resulting from—Suit by one partner against another for—Jurisdiction—Contract at one place—Business intended to be, and, in fact, carried on principally at another. *See* JURISDICTION—PARTNERSHIP CONTRACT—BALANCE RESULTING FROM.

(1860) 8 M. I. A. 291.

—Ss. 20 and 19—*See* C.P.C. OF 1908—Ss. 19 AND 20.

—S. 21—Applicability—Mortgage suit—Lands in Scheduled district to which code inapplicable—Decree for sale of—Objection to—Appeal—Maintainability for first time in.

A suit was brought in the Sub-Court of Vizagapatam to enforce a mortgage over land situate partly in the district of Vizagapatam and partly in a Scheduled district, and a decree for sale was passed therein in respect of all the suit lands.

Held, that an objection to the validity of the decree as regards the land in the scheduled district was not one as to the place of suing but was an objection going to the nullity of the order of sale, that S. 21, C. P. C. of 1908 had no application to the case, and that the failure to take the objection in the trial Court was not fatal to its being taken in appeal. (*Lord Dunedin.*) SETRUCHERLA RAMABHADRA RAJU v. MAHARAJA OF JEYPORE.

(1919) 46 I. A. 151 (156-7) = 42 M. 813 (820) =

17 A. L. J. 694 = 21 Bom. L. R. 914 =

23 C. W. N. 1033 = 30 C. L. J. 209 =

51 I. C. 185 = (1919) M. W. N. 502 = 10 L. W. 362 =

26 M. L. T. 127 = 37 M. L. J. 11.

—S. 24—Court without jurisdiction—Suit instituted in—Transfer of—Validity of.

It was decided by the High Court of Calcutta that the Superior Court cannot make an order of transfer of a case under S. 25 of C.P.C. of 1877, unless the Court from which the transfer is sought to be made has jurisdiction to try it.

C. P. CODE (ACT V OF 1908), S. 24—(Contd.)

Having regard to the terms of S. 25, their Lordships entirely approve of that decision (144). (*Lord Watson.*) **LEDGARD v. BULL.** (1886) 13 I. A. 134 = 9 A. 191 (202) = 4 Sar. 741.

———*Transfer of suit—Grounds—Feeling in district against party if one.*

When there is a general feeling in a district against a party to a suit, and such party feels that he is not likely to have a fair trial from the local judge with that feeling in the district against him, his proper course is to petition the European Judge to remove the case into his Court and to try it in the first instance. **MOHUR SINGH v. GHURIBA.**

(1870) 6 B. L. R. 495 (499-500) = 15 W. R. P. C. 8 = 2 Suth. 379 = 2 Sar. 616.

———*Transfer of suit at its then stage—Jurisdiction—Pauperism of plaintiff—Finding of original Court as to—If imported into suit in transferred Court.*

Plaintiff presented a petition in the Court of the Subordinate Judge of Meerut praying for leave to sue *in forma pauperis*. The claim embraced landed property which was situate partly within the jurisdiction of the High Court of the N.-W. Provinces, and partly within the jurisdiction of the Chief Court of the Punjab. The Judge of Meerut rejected the petition, on the ground that the question of the plaintiff's pauperism could be more conveniently tried in the Punjab. The plaintiff thereupon filed it in the Court of the Deputy Commissioner of Delhi, and an order was made by that Court admitting the plaintiff's suit *in forma pauperis*. Before proceeding further with the suit, the Deputy Commissioner applied to the Chief Court of the Punjab for authority to proceed under cl. 13 of C. P. Code of 1859. The Chief Court directed that the plaint should be returned to the plaintiff, with instructions that he should present it to some Court in the N.-W. Provinces." Accordingly, the plaintiff took the proceedings back to the Court of Meerut, and, in pursuance of an order of the Sub-Judge the plaint was brought upon the file of that Court, and was numbered.

Quære whether the finding of the Deputy Commissioner of Delhi that the plaintiff was a pauper could be imported into the suit when it found its way upon the file of the Court at Meerut (131).

What clause 13 of C. P. Code of 1859 enacts is that the Judge shall apply to the High Court to which he is subject for authority to proceed, and the Court to which such application is made may, with the concurrence of the other High Court, give authority to proceed. There is no express power to transfer (131-2). (*Sir Montague E. Smith.*) **SKINNER v. ORDE.** (1879) 6 I. A. 126 = 2 A. 241 (246-7) = 4 C. L. R. 331 = 4 Sar. 31 = 3 Suth. 627.

———*Transfer to Court having no jurisdiction over property in suit—Validity of.*

The defendant executed on different dates two *kut-kobalas* in favour of one G. By the 1st she mortgaged 4 mouzahs, one of which was in Nuddea, and the other three were in the 24-Pergunnahs. By the 2nd, she mortgaged the said 4 mouzahs, together with three others, which were in Nuddea.

The plaintiff, the assignee from G of all his interest under the two *kut-kobalas*, instituted a suit in the Court of the Sub-Judge of the 24-Pergunnahs. That suit related only to the 1st mortgage; and prayed for forclosure. While that suit was pending, he instituted another suit in the Court of the Sub-Judge of Nuddea against the defendant to recover the principal and interest under the second *kut-kobala*. The claim in the second suit was against the defendant personally.

The two suits were dismissed by the two Sub-Judges. On appeal from the two decrees, the High Court affirmed the

C. P. CODE (ACT V OF 1908), S. 24—(Concl'd.)

decree of the Nuddea Court, reversed the decree dismissing the suit in the Court of the 24 Pergunnahs, turned both suits into a contribution suit, and remanded it to the Court of the 24-Pergunnahs with directions as to the mode in which contribution should be effected.

Held that the order of the High Court was *ultra vires* (224).

The case of property the subject of suit being situated in two jurisdictions is provided for in S. 12 of C. P. Code of 1859, the Act governing the procedure in this action. This section, in their Lordships' judgment, is not applicable to the circumstances of this case. Neither suit comprised the whole property, nor did either District Court apply to the High Court (now substituted for the Sudder) for leave to deal with the whole of it. The plaintiffs intentionally divided their claim, and preferred its parts in different jurisdictions (224).

Their Lordships are aware of no power of the High Court in its appellate capacity to give jurisdiction to the Court of the 24-Pergunnahs to deal with a suit commenced and prosecuted in Nuddea relating to lands in Nuddea (224). (*Sir Robert P. Collier.*) **SRIMATI KAMINI SOONDARI CHOWDHURANI v. KALI PROSUNNO GHOSE.**

(1885) 12 I. A. 215 = 12 C. 225 (236-7) = 4 Sar. 652.

———**S. 34—Costs—Interest on—Award of—Discretionary or obligatory.** See **COSTS—INTEREST ON—AWARD OF.**

(1877) 4 I. A. 137 (143) = 3 C. 161 (169-70).

———**Decree—Date of—Interest up to—Rate of.** See **INTEREST—DECREE—DATE OF.**

(1880) 7 I. A. 196 (211) = 3 A. 91 (107).

———**Decree—Reduced rate of interest awarded by—Benefit of—Right to—Strangers to decree claiming relief inconsistent with it—Right of.** See **INTEREST—DECREE—REDUCTION OF RATE BY—BENEFIT OF.**

(1890) 17 I. A. 201 (213-4) = 18 C. 164 (180).

———**Discretion under—Exercise of—Appeal—Interference in.** See **INTEREST (1) SUIT—INTEREST AFTER DATE OF AND (2) SUIT AND DECREE.**

———**Discretion under—Exercise of—Implication of, though point not expressly dealt with.** See **INTEREST—SUIT—INTEREST AFTER DATE OF—AWARD OF—DISCRETION AS TO—P. C'S INTERFERENCE WITH—IMPLICATION OF EXERCISE OF DISCRETION ETC.**

(1913) 40 I. A. 68 (73-4) = 37 B. 326 (339).

———**Discretion under—Exercise of—Mode of—Guide to—Mode pointed out by statute.** C. P. C. OF 1908—S. 34—**DISCRETION UNDER—JUDICIAL AND NOT ARBITRARY.**

(1898) 25 I. A. 179 (182) = 26 C. 39 (45).

———*Discretion under, judicial not arbitrary—Mode of exercise of—Guide to.*

The discretion given by S. 209 of C. P. Code, 1882 is a judicial discretion to be exercised on proper judicial grounds. And where the Legislature has stated what should be the rule in a particular class of cases, the Courts cannot have a better guide to their discretion (182). (*Lord Hobhouse.*) **RAMESWAR KOER v. SYED NAWAB MEHDI HOSSEIN KHAN.**

(1898) 25 I. A. 179 = 26 C. 39 (45) = 2 C. W. N. 633 = 7 Sar. 413.

———**Mortgage—Suit to enforce—Interest in.** See **MORTGAGE—SUIT TO ENFORCE—INTEREST IN.**

———**Suit—Interest after date of—Award of—Discretion as to—Appeal—Interference in.** See **INTEREST—SUIT—INTEREST AFTER DATE OF.**

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—Suit and decree—Interest between dates of—Rate of—Discretion as to—Appeal—Interference in. *See* INTEREST—SUIT AND DECREE. (1922) 43 M. L. J. 66.

—S. 35—Costs—Interest on—Calculation of—Mode of—Appellate decree allowing costs of all Courts below—Costs of each Court—Interest on, as from date of its decree—Right to—Appellate decree not expressly providing for same—Executing Court—Jurisdiction to award. *See* P. C.—APPEAL—DECREE IN—CONSTRUCTION—COSTS OF ALL COURTS AWARDED BY. (1877) 4 I. A. 137 (142)=3 C. 161 (169).

—S. 38 ; O. 21, R. 10—Execution of decree—Jurisdiction of original court—Decree transmitted by it to another Court for execution and not re-transmitted by latter Court. *See* LIMITATION ACT OF 1908—ART. 182 (5)—PROPER COURT (1916) 43 I. A. 238=39 M. 640.

—S. 39—Transmission of decree for execution. *See* also under C. P. C. OF 1908—O. 21, RR. 6 TO 10.

—Concurrent transmission to several Courts—Jurisdiction—Discretion—Exercise of—Conditions.

There is nothing in the Code of Civil Procedure of 1859 to prevent the transmission of a decree being made to three Zillah Courts concurrently, for the purpose of execution. On the contrary, the procedure is well adapted to allow of it, and of its being done most beneficially for the creditor, and without injustice to the debtor. If it were not so, the debtor might be able to get rid of his property before it could be attached. On the other hand, there is provision for the protection of the debtor, for the issuing of the execution in more Zillahs than one is made subject to the control of the Judge, who may refuse to do so, where "he saw there was any sufficient reason to the contrary" (S. 286). Again, after the attachments have been granted, if there should be any grounds of complaint, the debtor and any parties interested may apply, under the provisions of the Code, to remove or stay proceedings under them (540).

It would, no doubt, in many cases, be a right exercise of the discretion of the Court not to act on the power, and to refuse to send a decree for concurrent execution into several places; and when it did act on it, it would be, in many cases, proper to impose terms on decree-holders, that they should not proceed to sale under all the attachments at once (540-1). (*Sir Montague E. Smith.*) SARODA PROSAUD MULLICK v. LUCHMEPUT SINGH DOOGUR.

(1872) 14 M. I. A. 529=17 W. R. 289=10 B. L. R. 214=2 Suth. 560=3 Sar. 77.

—District Court—Decree of—Transmission by Sub-Judge of, on direction of District Judge—Validity.

The decree in a suit originally commenced in the Court of the Judge of G was ultimately affirmed by the Queen in Council, and was sent back to the Judge of G for the purpose of being executed. But in the meantime an order had been made by Government for changing the boundaries of the districts of G & S, and by virtue thereof the lands which were the subject of the suit, and which were originally in the district of G, had become lands in the District of S. The Judge of G, therefore, could not execute the decree, and it was necessary for him to send the decree to the Judge of S, for the purpose of being executed. The Judge of G did not do it himself, but he referred it to the Sub Judge, and directed him to send a certified copy of the judgment to the Judge of S to be executed.

It was contended that, inasmuch as the judgment which got to Court S for the purpose of being executed was sent by the Sub-Judge instead of by the Judge himself, the Judge of S when he got it, had no power to execute it,

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Held that the objection was not one which could be maintained (171). (*Sir Barnes Peacock.*) PULUKDHARI ROY v. RAJAH RADHA PERSHAD SINGH.

(1881) 8 I. A. 165=8 C. 28=4 Sar. 279.

—High Court, original side decree—Transmission of—Judicial or ministerial act—Notice to judgment-debtor—Necessity.

Under the present and regular practice the judgment-debtor has no notice of the application for the order of transmission of a decree of the High Court to a District Court for execution. His first information is when he gets a notice from the Court to which the case has been transferred and is required to show cause why the decree should not be executed against him. The procedure of giving him notice of the application for transmission is not authorized by the Code. The order for transmission is rightly made *ex parte* and as a ministerial act (134-5). (*Lord Phillimore.*) BANKER BEHARI CHATTERJI v. NARAIN DAS DUTT.

(1927) 54 I. A. 129=54 C. 500=26 L. W. 180=(1927) M. W. N. 336=4 O. W. N. 474=101 I. C. 24=31 C. W. N. 589=38 M. L. T. (P. C.) 90=29 Bom. L. R. 850=A. I. R. 1927 P. C. 75=52 M. L. J. 565.

—Transmission of decree for execution—Attachment directed to be made by Court of transfer—Injunction or sequestration only or proceeding in execution—Construction of order of transmission.

M, the manager of the estate of her husband—a Lunatic—obtained a decree in the Zillah Court of East Burdwan against one J, for a certain sum. A small sum only having been realised in that Zillah, proceedings were taken to obtain execution of the decree on properties of the defendant, J, within the jurisdiction of the Zillah Courts of Moorshedabad, Hooghly, and Dinagepore. On 19-3-1864 a certificate and other papers were sent by the Judge of East Burdwan to the Judge of Dinagepore. The certificate or order contained, in substance, a recital or statement of the decree of the East Burdwan Court, the amount recovered by execution, the balance due, and that the decree-holder had given a list of properties in Zillahs, Moorshedabad, Hooghly, and Dinagepore, and then declared that "a certificate, etc., are sent" to Moorshedabad, under Ss. 284 and 285 of C.P. Code of 1859, requesting that properties in that district might be attached and brought to sale, and that certificates, etc., be sent, under S. 235, for attachment; with a view to prevent alienations of properties, in Zillahs, Hooghly, and Dinagepore. It ended thus, "afterwards, when proceedings for attachment and sale of the properties in Zillah Moorshedabad shall have been completed, the proper order will be passed on the decree-holder's application."

It was contended that the abovesaid order ordered the lands of the judgment-debtor to be attached, not as the first step in an execution which might terminate in a sale, but by way of sequestration or injunction only, and therefore, that the proceedings were not an execution or a step in it within the meaning of the Civil Procedure Code.

Held, overruling the contention, that what was meant was that the attachment should be a proceeding in execution of the decree (539).

The proceeding was, on the face of it, declared to be a direction to attach under S. 235; and that section only authorises the attachment as a step in execution. What the Court intended to do was to transmit the proceedings to the three Zillahs for execution, *viz.*, by attachment; should take place in all, but that further proceedings under the attachments should not be taken in Hooghly and Dinagepore until the result of the completed execution in Moorshedabad

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was known (539-40). (*Sir Montague E. Smith.*) SARODA PROSAUD MULLICK *v.* LUCHMEEPUT SINGH DOOGUR.

(1872) 14 M. I. A. 529 = 17 W. R. 289 =
10 B. L. R. 214 = 2 Suth. 560 = 3 Sar. 77.

—Ss. 39, 41 and 50—Transmission for execution—Effect of—Jurisdiction of Court which passed decree and of Court of transfer—Death of judgment-debtor after starting of execution in latter Court—Order of that Court bringing his L. R. on record—Illegal or irregular—Submission to order by L. R.—Right to dispute order subsequently—Estoppel.

A decree absolute for sale on a mortgage which was passed by Court L was, by that Court, transferred to Court H, under S. 39 of C.P.C. After an execution proceeding had been started in the latter Court, the judgment-debtor died, and the appellant, his son, was, by an order of Court H made after due notice to him, substituted in the place of his deceased father upon the record of the execution proceeding. During the sale proceedings the appellant made various objections, which were all overruled, from time to time, but he never raised the plea that the order substituting him in place of his father was a nullity as being in contravention of the provisions of S. 50 of C.P. Code. He also obtained postponements of the sale from Court H with the decree-holder's consent, undertaking not to raise any objections relating to the proclamation or any other objection. After the proceedings had been pending for 3½ years, the appellant for the first time put in a petition before the sale officer of Court H that the sale proceedings were illegal and without jurisdiction, inasmuch as the decree-holder did not get the name of the appellant entered in the decree of the Court executing the same in accordance with the provisions of S. 50, C. P. Code.

Held, that Court H had jurisdiction to deal with the matter of the execution transferred to it; that the exercise of such jurisdiction as against the appellant, though irregular in the first instance, was submitted to for a considerable time by him; and that he could not therefore be heard to object to the exercise of such jurisdiction and it would be to permit a gross abuse of procedure if he was allowed to do so.

Under cl. (c) of S. 39, of the Code of 1908, a decree, directing the sale of immovable property situate outside the local limit of the jurisdiction of the Court which passed it, may be transferred for purposes of execution to the Court within whose jurisdiction the property is situated. On such transfer the former Court does not altogether lose seizin of the decree. But the Court of transfer obtains jurisdiction to deal with that particular execution proceeding and retains such jurisdiction until such execution is withdrawn or stayed or until it certifies to the Court which passed the decree either that the decree has been executed or if it fails to execute the decree, the circumstances attending such failure (S. 41). If the judgment-debtor dies before any such certificate is issued, the Court of transfer does not lose its jurisdiction over the execution proceeding, which does not abate by reason of the death. But before execution can proceed against the legal representative of the deceased judgment-debtor, the decree-holder must get an order for substitution from the Court which passed the decree. This is a matter of procedure and not of jurisdiction. The jurisdiction over the subject-matter continues as before, but a certain procedure is prescribed for the exercise of such jurisdiction. If there is non-compliance with such procedure the defect might be waived; and the party who has acquiesced in the Court exercising it in a wrong way cannot afterwards turn round and challenge the legality of the proceedings. (*Lord Sinha.*) JANG BAHADUR *v.* BANK OF UPPER

C. P. CODE (ACT V OF 1908), Ss. 39, 41 and 50—(Contd.)

INDIA, LTD., LUCKNOW. (1928) 55 I. A. 227 =
3 Luck. 114 = 5 O. W. N. 502 = 9 L. W. N. 4 =
32 C. W. N. 790 = 26 A. L. J. 681 = 48 C. L. J. 23 =
28 L. W. 25 = 109 I. C. 417 = 30 Bom. L. R. 1373 =
(1928) M. W. N. 863 = A. I. R. (1928) P. C. 162 =
55 M. L. J. 545.

—Ss. 39 and 50—Transmission for execution—Judgment-debtor's death after—L. R. of—Execution against, without application under S. 50 to Court which passed decree—Jurisdiction of Court of transfer as regards.

A decree obtained in the Court of the Principal Sudder Ameen of Moorshedabad under Act XX of 1866 on a specially registered bond against one Gopal Chand was, on the application of the decree-holder, transferred to the Court of the District of Nuddea to be executed against the estate in the hands of Gopi Chand, the minor son of Gopal, who had died in the interval. On 25-1-1878, an application for execution was made to the Nuddea Court. Gopi Chand, the minor, died in November 1878. The application to the Court, which became necessary on his death, either under S. 210 of C. P. Code of 1859, or S. 234 of C. P. Code of 1877 whichever might be applicable, was not made. And notwithstanding this omission the execution proceedings were continued against the respondent, the grandmother of the minor, who, on his death, succeeded as his heir to the possession of all his properties.

Held that the proper steps consequent upon the death of Gopi Chand not having been taken in the Moorshedabad Court, the Nuddea Court had no authority to execute the decree against the respondent (128).

The proceeding in the Nuddea Court against the respondent was altogether irregular, if it was not without jurisdiction (128). (*Sir Richard Couch.*) MINA KONWARI *v.* JUGGUT SETANI. (1883) 10 I. A. 119 =
10 C. 196 (205-6) = 13 C. L. R. 385 = 4 Sar. 454.

—Transmission of decree—Judgment-debtor's death after—L. R. of—Order of Court of transfer bringing on record of—Irregular or illegal—Submission to—Effect. See C. P. C. OF 1908—Ss. 39, 41 AND 50—TRANSMISSION OF DECREE FOR EXECUTION—EFFECT OF.
(1928) 55 I. A. 227 = 3 Luck. 114.

—S. 47.

APPLICABILITY OF.

BAR UNDER.

CONSTRUCTION OF.

OBJECT OF.

PARTY TO SUIT.

REPRESENTATIVE OF PARTY TO SUIT.

EXECUTION PROCEEDING—ORDER IN—APPEAL FROM—RIGHT OF.

EXECUTION PROCEEDING—SEPARATE SUIT—REMEDY APPROPRIATE.

Applicability of.

—Auction purchaser interested in result—Effect.

When a question has arisen as to the execution, discharge, or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser, who is no party to the suit, is interested in the result has never been held to be a bar to the application of the section (169). (*Lord Macnaghten.*) PROSUNNO COOMAR SANYAL *v.* KASI DAS SANYAL.

(1892) 19 I. A. 166 = 19 C. 683 (688-9) = 6 Sar. 209.

—S. 244 of C. P. Code of 1882 applies to a case in which the question raised concerns the auction purchaser at

C. P. CODE (ACT V OF 1908)—(Contd.)**S. 47—Applicability of.—(Contd.)**

an auction sale as well as the parties to the suit (60). (*Sir John Edge.*) **GAṆAPATHY MUDALIAR v. KRISHNAMACHARIAR.** (1917) 45 I.A. 54 = 41 M. 403 (411) =

22 C. W. N. 553 = 20 Bom. L. R. 580 =
23 M. L. T. 198 = 27 C.L.J. 367 = (1918) M.W.N. 310 =
16 A.L.J. 353 = 4 P. L. W. 310 = 8 L.W. 427 =
44 I.C. 855 = 34 M.L.J. 463.

—Conditions.

A sold to *B* certain logs of timber, and ninety-five logs were delivered to *B* in part performance of the contract. *C* brought a suit against *A* and *B*, claiming the logs under another title. Pending this suit *C* entered into an agreement with *D* selling him the logs in the event of being successful in his suit. The judgment of the original Court was in *C*'s favour, and under such judgment *D* obtained possession of the logs in suit. This judgment was, on appeal, reversed. *B* then brought a suit, in the nature of an action of trover, against *C* and *D* for the logs and damages. The Court, without entering into the merits, dismissed the suit, on the ground that it was not maintainable as the same relief could have been obtained under the provisions of S. 2, Act XXIII, 1861. Held, reversing such judgment, that there had been a miscarriage, as that section did not apply, the suit by *B* against *C* and *D* being to recover damages for a tort alleged to have been committed by *C* and *D*, and that the latter was not a party to the original suit, or bound by the judgment in that suit.

"The object of this suit is not restitution of the 95 logs, therefore, not an execution of the decree at all; but its object is to recover damages for a tort alleged to have been done both by *C* and *D*. The section has no application against *D*, because he was no party to the original suit. It has no application further, because it cannot be said that proceeding for a tort is any method of executing the decree. (*Lord Justice Giffard.*) **AGA SYED ABDOOL HOOSAIN v. ADAM LENAINE.**

(1869) 13 M.I.A. 69 = 2 Sar. 486.

Two conditions are necessary for the applicability of S. 11 of C.P. Code of 1861. The question must be between the parties to the suit, and must relate to the execution of the decree (75). (*Sir Robert P. Collier.*) **ABEDOONISSA KHATOON v. AMEEROONISSA KHATOON.**

(1876) 4 I.A. 66 = 2 C. 327 (335) = 3 Sar. 677 = 3 Suth. 371.

S. 47—Bar under.

Joinder of utter strangers merely to get over—Effect. **S. 22 MORTGAGE—SUIT TO ENFORCE—DECREE IN—EXECUTION OF—OBJECTION TO.**

(1915) 30 M. L. J. 238.

S. 47—Construction of.**—Liberal construction—Necessity.**

Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of S. 244 of C.P. Code of 1882 (169). (*Lord Macnaghten.*) **PROSUNNO COOMAR SANYAL v. KASI DAS SANYAL.**

(1892) 19 I.A. 166 = 19 C. 663 (689) = 6 Sar. 209.

Their Lordships have been reminded of the decision of the Board in L.R. 19 I. A. 166 and of the general principle therein expressed, that a wide construction should be put upon the provisions of the Act with regard to introducing parties by devolution and of the desirability of ascertaining all possible points in execution proceedings without a fresh suit. But giving full force to these considerations, they cannot see how that which should in reality form the basis of an independent suit against a separate party, for some act done by himself, can be introduced as a question

C. P. CODE (ACT V OF 1908)—(Contd.)**S. 47—Construction of.—(Concl'd.)**

to be tried in execution proceedings in another suit. (*Lord Phillimore.*) **MANINDRA CHANDRA NANDI v. RAM LAL BHAGAT.** (1922) 49 I.A. 220(226-7) = 1 P. 581 (588) = 31 M.L.T. 131 = 27 C.W.N. 29 = 24 Bom. L.R. 1251 = 16 L.W. 905 = 20 A.L.J. 988 = 36 C.L.J. 542 = A.I.R. (1922) P.C. 304 = 68 I.C. 973 = 43 M.L.J. 589.

S. 47—Object of.

S. 11 of C. P. Code of 1861 was undoubtedly passed for the beneficial purpose of checking needless litigation, and its operation ought not to be limited. **CHOWDHURY WAHED ALI v. MUSSUMAT JUMAE.** (1872) 11 B. L. R. 149 = 18 W. R. 185 = 2 Suth. 680 = 3 Sar. 139.

S. 11 of C.P. Code of 1861 (Act XXIII of 1861) was intended to enable questions to be tried in execution cases which could not have been so tried before, and to provide, as might have been expected, an appeal from decisions in such trials (74-5). (*Sir Robert P. Collier.*) **ABEDOONISSA KHATOON v. AMEEROONISSA KHATOON.** (1876) 4 I.A. 66 = 2 C. 327 (334-5) = 3 Sar. 677 = 3 Suth. 371.

S. 47—Party to suit.

Execution of decree—Person applying for—If thereby becomes party to suit.

A person by merely applying for execution of a decree does not thereby constitute himself a party to the suit in which the decree was passed (75). (*Sir Robert P. Collier.*) **ABEDOONISSA KHATOON v. AMEEROONISSA KHATOON.** (1876) 4 I. A. 66 = 2 C. 327 (335) = 3 Sar. 677 = 3 Suth. 371.

Minor not represented by a properly appointed guardian ad litem if a.

S. 244 of C. P. Code of 1882 applies to questions arising between parties to the suit in which the decree was passed, that is to say, between parties who have been properly made parties in accordance with the provisions of the Code (175). (*Sir Andrew Scoble.*) **MUSSUMAT RASHID-UN-NISSA v. MUHAMMAD ISMAIL KHAN.** (1909) 36 I. A. 168 = 31 A. 572 (582) = 6 M. L. T. 279 = 10 C. L. J. 318 = 13 C. W. N. 1182 = 11 Bom. L. R. 1225 = 3 I. C. 864 = 19 M. L. J. 631.

Representative character—Party sued in a, if a party—Personal liability of such party for decree—Conditions.

It cannot be laid down as a general proposition that a party sued in a representative character is not a party to the suit within the meaning of S. 11 of C.P. Code of 1861. Where a decree has been properly passed and proceedings have been taken under it to obtain execution against a party in a representative character, there is no good reason for saying that he should not be considered a party to the suit within the meaning of that section, with respect to any question which might arise between him and the other parties relating to the execution of the decree.

S. 203 of C.P. Code 1859 makes it obvious that a party in a representative character is so distinctly a party to the suit, that under certain conditions his own property may be attached and sold. It is true that, to fix him with this liability, it must be shown that he has received property of the deceased, of which he has failed to prove a proper disposition. But these things are all cognizable, and proper to be ascertained in the suit in which the decree is made, during the progress of the execution proceedings founded upon such decree. It does not follow that because all the provisions relating to execution cannot be applied to a defendant sued in a representative character such a defendant cannot be regarded as a party to the suit within the meaning of such of them as

C. P. CODE (ACT V OF 1908)—(Contd.)**S. 47—Party to suit—(Concl'd.)**

may be applicable to his case. *CHOWDHURY WAHED ALI v. MUSSUMAT JUMAE.* (1872) 11 B. L. R. 149 = 18 W. R. 185 = 2 Suth. 680 = 3 Sar. 139.

S. 47—Representative of party to suit.

—Execution purchaser—Judgment-debtor's representative—If and to what extent a. *See* EXECUTION SALE—PURCHASER AT—JUDGMENT-DEBTOR.

S. 47—Execution Proceeding—Order in—Appeal from—Right of.

—C. P. Code of 1908—S. 92—Suit under—Scheme framed in—Provision in, for framing of rules by Temple Committee appointed under scheme subject to sanction of District Court—Order of District Judge sanctioning rules framed—Appeal from. *See* C. P. Code OF 1908—S. 92—SUIT UNDER—SCHEME FRAMED IN.

(1925) 49 M. L. J. 25.

—Objection to—P. C. appeal—Maintainability for first time in.

To an appeal from an order purporting to be passed in proceedings in the execution of a decree, objection was taken before their Lordships on the ground that the appellant, not being a party to the original suit, or to the decree or to the appeal to the High Court, and not being a representative of any such party, he could not appeal from the order, and his only remedy was to bring a separate suit.

The objection was not taken before the sub-Judge when he allowed the appellant to become a party to the execution proceedings; nor was it taken in the grounds of the appeal to the High Court.

Held that it was too late to take the objection before their Lordships (80). (*Sir Richard Couch.*) *PONNAMBALA TAMBIRAN v. SIVAGNANA DESIKA GNANA SAMBHANDA PANDARA SANNADHI.* (1894) 21 I. A. 71 =

17 M. 343 (354-5) = 6 Sar. 484.

—Person not party to suit or decree but made and treated as party to order appealed from—Right of.

A decree of the High Court declared the right of the appellant, as head of one Mutt, to nominate a competent Tambiran to the office of head of another mutt, and directed that the Sub-Judge should appoint the person named, if he saw no objection to his fitness, and, if he did, to appoint another himself. The appellant presented a petition to the Sub-Judge, stating that *P* was a competent person, and praying that he might be appointed to the office in question. Before the Sub-Judge could inquire into the fitness of *P*, the appellant died, and was succeeded by *S* as head of the mutt of which the appellant was the head. *S* brought himself on record in place of the deceased, and presented a petition to the Court stating that *P* was not a competent person, and praying that he might be permitted to withdraw the petition filed by the deceased, and to appoint another Tambiran to the office. *P* was described as a counter petitioner in that petition, and on its coming on for hearing before the Sub-Judge, he appeared by a *vakil*, and opposed it on the ground that *S* had no right to withdraw the nomination made by his predecessor unless and until the court decided that *P* was incompetent and directed *S* to nominate another.

The Sub-Judge held with *P*, found him on inquiry to be competent, and appointed him to the office. The High Court set aside the appointment of *P*, and directed the Sub-Judge to inquire into the fitness of the person named by *S*.

On an application by *P* for special leave to appeal against the order of the High Court; *held* that it was too late for *S* to object to *P*'s right to appeal, on the ground that he was not a party to the original suit, nor to the decree, nor to the appeal, and did not represent any such party. *Held further* that the objection was unsustainable (80).

C. P. CODE (ACT V OF 1908)—(Contd.)**S. 47 Execution Proceeding—Order in—Appeal from—Right of—(Contd.)**

The objection was not taken either before the Sub-Judge, when he allowed *P* to become a party to the proceedings, and appear by a *vakil*, or in the grounds of appeal to the High Court (80).

No suit could have been brought by *P*. The nomination could not give a right to bring a suit, and, whilst the decree of the High Court stood, he had no title upon which to bring one to set aside that decree if such a kind of suit were maintainable. If he is not allowed to appeal against the order of the High Court he will be without any mode of relief (80). (*Sir Richard Couch.*) *PONNAMBALA TAMBIRAN v. SIVAGNANA DESIKA GNANA SAMBHANDA PANDARA SANNADHI.* (1894) 21 I. A. 71 =

17 M. 343 (354-5) = 6 Sar. 434.

—Remedy to party aggrieved by order—No other, open.

S. 244 appears to be intended to prohibit a separate suit in cases where one might be brought, and to enable the question to be determined in the execution proceeding. It is not applicable to a case in which a party will be without any mode of relief if he is not allowed to appeal against the order passed against him by the Court below, to a case in which no suit could conceivably be brought by him (80-1). (*Sir Richard Couch.*) *PONNAMBALA TAMBIRAN v. SIVAGNANA DESIKA GNANA SAMBHANDA PANDARA SANNADHI.* (1894) 21 I. A. 71 = 17 M. 343 (355) = 6 Sar. 434.

S. 47—Execution Proceeding—Separate suit—Remedy Appropriate.

—Award—Properties allotted by—Recovery of—Decree passed on foot of award. *See* ARBITRATION—AWARD—DECREE IN ACCORDANCE WITH—PROPERTIES ALLOTTED BY AWARD. (1924) 52 I. A. 79 = 52 C. 314.

—Company's shares—Pledge of—Redemption of—Decree for—Accession to shares during period of pledge—Recovery of fresh shares by pledger—Mode. *See* COMPANY—SHARES IN—PLEDGE OF.

(1924) 52 I. A. 137 (142-3) = 49 B. 233.

—Decree—Relief not awarded by, and obtainable only by fresh suit. (1) Agreement by judgment-debtor to give in execution—Validity of—Enforceability of. (2) Award of in execution—Jurisdiction—Absence or irregular exercise of. *See* DECREE—RELIEF NOT AWARDED BY, AND OBTAINABLE ONLY BY FRESH SUIT. (1875) 2 I. A. 219 (233-4).

—Execution sale—Setting aside of—Mesne profits on—Recovery by judgment-debtor of—Mode of—Decreeholder purchaser. *See* EXECUTION SALE—SETTING ASIDE OF—MESNE PROFITS ON—RECOVERY BY JUDGMENT-DEBTOR OF. (1909) 36 I. A. 197 = 31 A. 551.

—Execution sale—Setting aside of—Suit for—Maintainability. *See* EXECUTION SALE—SETTING ASIDE OF—SUIT FOR—MAINTAINABILITY.

—Interest—Suit—Interest subsequent to—Decree silent as to—Recovery of—Mode of. *See* MESNE PROFITS—SUIT—PROFITS OR INTEREST SUBSEQUENT TO.

(1875) 2 I. A. 219 (228).

—Joint property—Share in—Possession of—Decree for—Partition of property prior to—Recovery of substituted share—Right of—Mode of—Execution—Separate suit. *See* DECREE—IJMALI MAHAL. (1922) 49 I. A. 139 =

1 Pat. 378.

—Mesne profits—Assessment of—Mode of—Lease *pendente lite* of suit property. *See* MESNE PROFITS—ASSESSMENT OF—MODE OF—EXECUTION PROCEEDING OR SEPARATE SUIT—LEASE OF SUIT PROPERTY *pendente lite*. (1922) 49 I. A. 220 (223-227) = 1 Pat. 581 (586-7).

C. P. CODE (ACT V OF 1908)—(Contd.)

S. 47—Execution Proceeding—Separate Suit—Remedy appropriate—(Contd.)

——Mesne profits—Decree—Profits not awarded by—Recovery of, in execution—Right of—Bond by judgment-debtor consenting to such recovery as condition of stay of execution.

(1) *See* MESNE PROFITS—DECREE—PROFITS NOT AWARDED BY—RECOVERY OF, IN EXECUTION—RIGHT OF. (1875) 2 I. A. 219 (233);

(2) Son of judgment-debtor joined as his L. R.—Binding nature of bond on. *See* HINDU LAW—JOINT FAMILY—FATHER—DECREE AGAINST—MESNE PROFITS NOT AWARDED BY. (1875) 2 I. A. 219 (232)

——Mesne profits—Execution sale—Setting aside of—Mesne profits on—Recovery of. *See* EXECUTION SALE—SETTING ASIDE OF—MESNE PROFITS ON—RECOVERY OF. (1909) 36 I. A. 197 = 31 A. 551.

——Mesne profits—Lessee *pendente lite* of suit property—Recovery from—Mode of—Execution or separate suit. *See* MESNE PROFITS—ASSESSMENT—MODE OF—EXECUTION PROCEEDING OR SEPARATE SUIT—LEASE OF ETC. (1922) 49 I. A. 220 (223-227) = 1 Pat. 581 (586-7).

——Mesne profits—Suit—Profits subsequent to—Decree silent as to—Recovery of—Mode of. *See* MESNE PROFITS—SUIT—PROFITS OR INTEREST SUBSEQUENT TO. (1875) 2 I. A. 219 (228).

——Minor—Decree and execution sale against—Suit for declaration of invalidity of—Maintainability—Guardian *ad litem* duly appointed—Non-representation by—Suit based on. *See* HINDU LAW—MINOR—DECREE AND EXECUTION SALE AGAINST. (1909) 36 I. A. 168 (175) = 31 A. 572 (582).

——Mortgage—Company's shares—Mortgage of—Redemption of—Decree for—Accession to shares during period of pledge—Recovery of fresh shares by pledger—Mode of. *See* COMPANY—SHARES IN—PLEDGE OF. (1924) 52 I. A. 137 (142-3) = 49 B. 233.

——Mortgage—Prior mortgage—Foreclosure decree on—Subsequent mortgagee discharging—Rights of—Mode of enforcing. *See* MORTGAGE—PRIOR AND SUBSEQUENT MORTGAGES—PRIOR MORTGAGE—SUIT ON—FORECLOSURE DECREE IN. (1905) 32 I. A. 123 (133) = 27 A. 325 (332-3).

——Mortgage—Redemption of—Suit for—Maintainability—Mortgagee's suit for sale prior—Decree allowing redemption in—Execution of, allowed to become barred. *See* MORTGAGE—REDEMPTION—SUIT FOR—MAINTAINABILITY—MORTGAGEE'S SUIT FOR SALE PRIOR—DECREE ALLOWING REDEMPTION IN. (1886) 13 I. A. 66 (69) = 10 B. 461 (467).

——Mortgage—Redemption of—Suit for—Maintainability—Mortgagee's suit for sale prior—Decree in, not in accordance with T. P. Act—Sale in execution of, and purchase of property by mortgagee himself. *See* MORTGAGE—REDEMPTION—SUIT FOR—MAINTAINABILITY—MORTGAGEE'S SUIT FOR SALE PRIOR—DECREE IN, NOT IN ACCORDANCE WITH T. P. ACT. (1917) 45 I. A. 54 (59-60) = 41 M. 403 (410-1).

——Mortgage—Redemption of—Suit for—Maintainability—Redemption decree prior—Execution of, rendered impossible by *vis major*. *See* MORTGAGE—REDEMPTION—SUIT FOR—MAINTAINABILITY—REDEMPTION DECREE PRIOR. (1905) 32 I. A. 229 (242-3) = 28 A. 1 (17-8).

——Mortgage—Suit to enforce—Decree in—Execution of—Objection to—Separate suit raising—Maintainability—Joinder as defendants of utter strangers for getting over bar

C. P. CODE (ACT V OF 1908)—(Contd.)

S. 47—Execution Proceeding—Separate Suit—Remedy appropriate—(Contd.)

under S. *See* MORTGAGE—SUIT TO ENFORCE—DECREE IN—EXECUTION OF—OBJECTION TO.

(1915) 30 M. L. J. 238.

——Mortgage—Suit to enforce—Decree in—Objection to, for non-conformity with T. P. Act—Maintainability of, in fresh suit for redemption. *See* MORTGAGE—SUIT TO ENFORCE—DECREE IN—OBJECTION TO, ON GROUND OF NON-CONFORMITY ETC. (1917) 45 I. A. 54 (60) = 41 M. 403 (411).

——Mortgage—Suit to enforce—Decree in—Sale in execution of, of property not included in mortgage—Suit fresh objecting to validity of—Maintainability. *See* MORTGAGE—SUIT TO ENFORCE—DECREE IN—EXECUTION OF—SALE IN—PROPERTY NOT INCLUDED IN MORTGAGE. (1921) 48 I. A. 155 = 44 M. 483.

——Question as to—Permissibility of, after merits fought out and expenses incurred—Doubtful case.

Objection to the maintainability of an application in execution will not, even in a doubtful case, be allowed when expenses have been incurred and the merits fought out in all the courts. (*Lord Macnaghten.*) PRAG NARAIN *v.* KAMAKHIA SINGH. (1909) 36 I. A. 197 (200) =

31 A. 551 (556) = 6 M. L. T. 303 = 10 C. L. J. 257 = 14 C. W. N. 55 = 11 Bom. L. R. 1200 = 3 I. C. 798 = 13 O. C. 180 = 19 M. L. J. 599.

——S. 48—Execution application—Continuation of prior one, or fresh application—Rent decree against *dar-patnidar*—First application for execution of, on footing that decree created a charge on tenure—Three subsequent applications on footing that decree was a mere money decree—Fifth application on footing that decree created a charge on tenure—Fifth if a continuation of first.

D., who had been the zemindar of Lot S but who had sold his zemindari on 27-6-1893, instituted a suit against the patnidar on 21-9-1893 for arrears of rent due to him up to 27-6-1893, and obtained a decree which became final on 10-7-1896. The question for decision was whether an application presented on 2-12-1922 for execution of that decree was a continuation of a prior execution application, dated 9-5-1908 or was a fresh application within the meaning of S. 48 of the code. The appellants were the successors in interest of *D.*, and the respondent was a *dar-patnidar*.

The application of 2-12-1922 called for process against the respondent for the sale of the patni mahal. The application of 9-5-1908 also proceeded on the footing that the decree created a charge on the tenure. There were three applications for execution between these, and in all three of them the decree-holder gave up the position that their decree created any charge on the tenure, treated it as being merely a money decree, and attempted to execute it against properties other than the patni tenure.

Held that the application of 2-12-1922 was not a continuation of that of 9-5-1908 but was a fresh application within the meaning of S. 48 of C. P. Code, and that the execution of the decree was, therefore, barred by limitation.

The three intervening applications were essentially different in character from the application of 9-5-1908, and their Lordships are inclined to the view that the decree-holder had abandoned the application of 9-5-1908, but in any event they are clearly of opinion that the combined effect of those previous applications marks such substantial departure from the original application of 9-5-1908, as to make it impossible to hold that the application of 2-12-1922 was a continuation of the application of 9-5-1908. (*Sir Binod Mitter.*) MAHARAJ BAHADUR SINGH *v.* FORBES. (1929) 33 C. W. N. 977 = A I. R. 1929 P. C. 209 =

57 M. L. J. 184

C. P. CODE (ACT V OF 1908)—(Contd.)

—S. 48 and O. 34, R. 6—Mortgage—Suit to enforce—Decree in—Combined decree—Execution against other properties of mortgagor—Limitation—Starting point. See MORTGAGE—SUIT TO ENFORCE—DECREE IN—COMBINED DECREE. (1917) 22 C. W. N. 145.

—Ss. 50 and 39. See C.P.C. OF 1908—Ss. 39, 41, 50.

—S. 60—Award—Future award—Claim under—Attachment and sale in execution of—Validity.

A claim under a future award of arbitrators, as to which it is wholly uncertain, until the award be made, to what the debtor will be entitled, is not liable to attachment and sale in execution under the above section (S. 205 of C. P. C. of 1859).

The original decree-holder attached as the property of his debtor a certain claim in a pending arbitration between the debtor, R, and one S, partner of R. The claim was accordingly sold and the appellant became purchaser for Rs. 1,350. The claim was thus described in the notice of sale. "The claim of *Ramnath v. Sheonath*, which was remanded by the Lords of the Privy Council for the settlement of accounts, and has been referred to arbitration." The sale took place, and on the following day the arbitrators made their award awarding Rs. 34,000 to R, and the outstanding debts to S. These outstandings were partnership debts due to the late firm, in respect of which neither partner, however, had incurred any special liability to the other. The appellant claimed to be entitled to the sum of Rs. 34,000 as purchaser of the same at the auction sale for the sum of Rs. 1,350.

Held that the expectant claim under an inchoate award was not property within the meaning of S. 205 of the Code of 1859, and was not saleable in execution of a decree.

In the present case the attachment is not of the antecedent share in the undivided assets. The uncertainty at the time of the attachment and sale was not limited to a mere question of *quantum*; it was wholly uncertain in what the arbitration might terminate (51). It would be a cruel wrong and injustice if under colour of an execution, a thing described as a "claim remanded by the Lords of the Privy Council for the settlement of accounts and referred to arbitrators" could be put up to judicial sale; a thing utterly incapable of being estimated or valued, as vague and uncertain and unmeaning a description as if it had been "all the claims of *Ramanath* against all his debtors." It is obvious, moreover, what a door of fraud would be opened if, pending a reference, the award of the arbitrators could be put up for sale (51). (Lord Justice James.) SYED TUFUZZOOL HOSSEIN KHAN v. RUGHONATH PERSHAD. 2 Suth. 434 = (1871) 14 M. I. A. 40 = 7 B. L. R. 186 = 2 Sar. 656 = R. & J's. No. 10 (Oudh).

—Debt subject of suit—Attachment of. See C. P. Code OF 1908, S. 60—PROPERTY—MEANING OF. (1871) 14 M. I. A. 40 (49).

—Hindu Law—Joint Family—Member of—Share of—Attachment and sale of. See HINDU LAW—JOINT FAMILY—MEMBER OF—SHARE OF—ATTACHMENT AND SALE OF. (1871) 14 M. I. A. 40 (50).

—Property—Meaning—Right of suit if included—Debt or property subject of suit—Attachment of.

S. 205 of the Code of 1859 uses the word "property," not claim or right. A mere right of suit is not property, but a title to recover future property. (49)

A debt or property, which is suitable, or may be attached, does not lose those qualities merely by being the subject of a pending suit. (Lord Justice James.) SYED TUFUZZOOL

C. P. CODE (ACT V OF 1908), S. 60—(Contd.)

ZOOL HOSSEIN KHAN v. RUGHONATH PERSHAD. (1871) 14 M. I. A. 40 = 7 B. L. R. 186 = 2 Suth. 434 = 2 Sar. 656 = R. & J's. No. 10 (Oudh).

—Religious Endowment—Idol—Property charged with expenses of worship of—Surplus bequeathed to members of testator's family—Interest of one of such members in—Attachment of. See HINDU LAW—RELIG. END.—IDOL—PROPERTY CHARGED WITH EXPENSES OF WORSHIP OF. (1879) 6 I. A. 182 (188-9) = 5 C. 438 (444).

—Religious Endowment—Property dedicated to—Attachment and sale of *corpus* of, in execution of personal decree against Shebait—Validity—Beneficial interest in surplus income—Trustee having—Effect. See TRUST—RELIGIOUS TRUSTS—PROPERTY DEVISED UPON TRUST FOR. (1887) 15 I. A. 1 (9-10) = 15 C. 329 (339-40).

—Suit—(1) Debt subject of—Attachment of—(2) Property subject of—Attachment of—(3) Right of—Attachment of. See C. P. CODE OF 1908, S. 60—PROPERTY. (1871) 14 M. I. A. 40 (49).

—Trust—Religious trusts—Property devised upon trust for—Attachment and sale of *corpus* of, in execution of personal decree against trustee—Validity—Beneficial interest in surplus income—Trustee having—Effect. See TRUST—RELIGIOUS TRUSTS—PROPERTY DEVISED UPON TRUST FOR. (1887) 15 I. A. 1 (9-10) = 15 C. 329 (339-40).

—S. 60 (1) (g)—Foreign State—Pension payable by, remitted for payment to pensioner in India.

It is probable (although the point is not one which it is necessary to determine in this case), that the enactments of S. 266 (9) of C. P. Code of 1882 were not meant to cover pensions payable by a foreign State, when remitted for payment to their pensioner in India (186). (Lord Watson.) BISHAMBHAR NATH v. NAWAB IMDAD ALI KHAN.

(1890) 17 I. A. 181 = 18 C. 216 (223) = 5 Sar. 619 = R. & J's. No. 122.

—Pensions of political nature payable directly by Government of India.

The enactments of S. 266 (9) of C. P. C. of 1882 certainly include all pensions of a political nature payable directly by the Government of India (186). (Lord Watson.) BISHAMBHAR NATH v. NAWAB IMDAD ALI KHAN.

(1890) 17 I. A. 181 = 18 C. 216 = 5 Sar. 619 = R. & J's. No. 122.

—Political pension—Grant in lieu of, of "taluka" with lands as jagir—Estate conveyed under, land revenue only or land also—Attachability of. See GRANT—CONSTRUCTION—ESTATE CONVEYED, LAND-REVENUE OR LAND ITSELF—PENSION. (1917) 22 C. W. N. 577

—Political pension—Payable by Government of India under treaty with another sovereign power if a.

A pension which the Government of India has given a guarantee that it will pay, by a treaty obligation contracted with another sovereign power, is, in the strictest sense, a political pension. The obligation to pay, as well as the actual payment of the pension, must, in such circumstances, be ascribed to reasons of State policy (186).

Held, accordingly, that a monthly allowance payable to the respondent by the Indian Government, under an arrangement made between the King of Oudh and the Governor-General of India in the year 1842, was a "political pension" within the meaning of S. 266 (9) of C. P. Code of 1882, and was not liable to be taken in execution for his debts. (Lord Watson.) BISHAMBHAR NATH v. NAWAB IMDAD ALI

C. P. CODE (ACT V OF 1908), S. 60 (1) (g)—(Contd.)

KHAN. (1890) 17 I. A. 181 = 18 C. 216 = 5 Sar. 619 =
R. & J's. No. 122.

———S. 60 (1) (m)—*Contingent remainder—Attachment of.*

A mere expectancy, or a mere right of suit, cannot be attached. The attachment must operate at the time of attachment, and not be anticipatory, so as to fasten on some future state of property in which the suit may result. Thus, if the land of A be held by A subject to an option in B to take it at a definite price or sum, the attachment must be of the land and not of the price. An existing debt, though payable at a future day, may be attached, whilst a salary, wages, or money claim accruing due, may not. (*Lord Justice James.*) SYUD TUFFUZZOOL HOSSAIN KHAN v. RUGHOONATH PERSHAD. (1871) 14 M. I. A. 40 (50) =

7 B. L. R. 186 = 2 Suth. 434 = 2 Sar. 656 =
R. & J's. No. 10 (Oudh).

———*Vested remainder—Attachment of.*

By a deed of settlement a Mahomedan granted lands to his wife on condition that if she had a child by him the grant should be taken as a perpetual mokurraree, and, in case of no child being born, as a life mokurraree with remainder to the settlor's two sons. During the lifetime of the settlor, the interest of one of the said sons in the property comprised in the deed was attached in execution of a decree obtained against that son and the same was sold in execution after the death of the settlor. *Held*, that the deed conferred upon the sons a definite interest, like what in English law is called a vested remainder, subject to be displaced by the event of there being a son of the settlor by his wife, and that that interest in remainder was not an expectancy or a merely contingent or possible right or interest within the meaning of S. 266 of C. P. Code of 1882, but was a property capable of being attached (209-10). (*Lord Hobhouse.*) UMES CHUNDER SIRCAR v. MUSSUMMAT ZAHOR FATIMA. (1890) 17 I. A. 201 = 18 C. 164 (176-7) = 5 Sar. 507.

———*Will—Residue of property bequeathed by—Life interest in—Attachment and sale of—Residue unascertained and not easily ascertainable.*

The will of a testator declared that his son, G, should be his heir and executor for the purpose of executing the intentions of his will, and thereby he became trustee for the purpose of executing the different dispositions contained in that instrument. Those dispositions were to this effect: There was first a charge by way of annuity of Rs. 1,200, in favour of the appellant, a mistress of the testator, all the debts were to be paid, there were very large legacies to be discharged, and after all those charges, debts, legacies, and annuities had been satisfied or provided for, as to the remainder of the estate, G was to be tenant for life, with remainder to his sons. He, therefore, was entitled to nothing for his own benefit but a life interest in the residue of the real and personal property of the testator after all the charges upon it had been satisfied and provided for, and after a full administration had taken place of the assets for the purpose of discharging those several dispositions.

Held that that was not an interest which could be sold under an execution issued in the Supreme Court against the property of the testator (522-3) (*Mr. Pemberton Leigh.*) BEEBEE TOKAI SHERAB v. BEGLAR.

(1856) 6 M. I. A. 510 = 1 Sar. 577 = 4 W. R. 87 =
1 Suth. 259.

———S. 60 (1) (n)—Maintenance—Grant for—Property conveyed under—Attachment of, in hands of grantee's heirs, but not in hands of grantee. See HINDU LAW—MAINTENANCE—GRANT FOR. (1917) 22 C. W. N. 577 (580).

C. P. CODE (ACT V OF 1908), S. 60 (1) (n)—(Contd.)

———Maintenance—Property allotted for, without power of transfer—Attachment of. See HINDU LAW—MAINTENANCE—PROPERTY ALLOTTED FOR, WITHOUT POWER OF TRANSFER. (1925) 52 I. A. 262 = 47 A. 385.

———S. 64—*Alienation contrary to—Effect.*

The object of S. 240 of C. P. Code of 1859 was to make the sale made in contravention of that section null and void, so far as it might be necessary to secure the execution of the decree. The section relates only to alienation which would affect the creditor who obtained the attachment. The words of the section were intended for the protection of the creditor who had obtained an execution, and not for the protection of all persons who at any future time might possibly obtain executions (549-50). (*Sir Robert P. Collier.*) ANUND LOLL DOSS v. JULLODHUR SHAW.

(1872) 14 M. I. A. 543 = 17 W. R. 313 = 10 B. L. R. 134 =
2 Suth. 559 = 3 Sar. 81.

———The prohibition against alienation avoids the conveyance only as against the execution creditor, or some person entitled to claim under him (876). PUDDOMONEE DOSSEE v. ROY MUTHOORANATH CHOWDRY.

(1872) 2 Suth. 873 = 3 Sar. 268 = 20 W. R. 133 =
12 B. L. R. 411.

———An alienation of property, subject to a valid and subsisting attachment, is null and void as against the attaching creditor and those who claim under him, unless that alienation can be shown not to fall within the provisions of S. 240 of C. P. Code of 1859 (159-60). (*Sir James Colville.*) RAM KRISHNA DAS SURROWJI v. SURFUNNISA BEGUM.

(1880) 7 I. A. 157 = 6 C. 129 (133) = 4 Sar. 151 =
3 Suth. 755.

———Attachment by A—Sale private of attached property with his consent and satisfaction of his debt out of proceeds of sale—Attachment not formerly removed—Attachment of same property by B and sale pursuant thereto—Validity of private sale against attachment by B.

A obtained an execution against his debtor in the form of an attachment against the debtor's real property. The debtor, with the consent of A, made a private sale of the property, and out of the proceeds satisfied the debt, but no application was made to the court for the removal of the attachment, and the attachment remained, at all events, formally, in force. Subsequently B, another creditor, obtained an attachment upon another judgment. He proceeded to a judicial sale, treating the former sale as void; and the question was, whether the purchaser under the second sale had a good title, and was entitled to say, that the prior sale was to all intents and purposes void as against him.

Held, that the first sale was valid under S. 240 of C. P. Code of 1859 as against A, and was not affected by the subsequent attachment and sale thereunder by B. (*Sir Robert P. Collier.*) ANUND LOLL DOSS v. JULLODHUR SHAW.

(1872) 14 M. I. A. 543 = 17 W. R. 313 =
10 B. L. R. 134 = 2 Suth. 559 = 3 Sar. 81.

———Attachment permanently struck off and new attachment become necessary—Alienation between.

If an attachment has been permanently struck off and a new attachment has become necessary, a conveyance which is executed by the judgment-debtor between the two attachments will be valid (876). PUDDOMONEE DOSSEE v. ROY MUTHOORANATH CHOWDRY.

(1872) 2 Suth. 873 = 3 Sar. 268 = 20 W. R. 133 =
12 B. L. R. 411.

———Attachment subsequently struck off—Alienation pending.

It may be argued that, although a conveyance executed between the striking off of the first attachment and the issu-

C. P. CODE (ACT V OF 1908), S. 64—(Contd.)

ing of the second may be valid, it does not follow that one executed whilst the first attachment was subsisting becomes valid by relation, or ceases to be void as against the execution creditor and those who claim under him (877). *PUDDOMONEE DOSSEE v. ROY MUTHOORANATH CHOWDRY.*

(1872) 2 *Suth.* 873 = 20 *W.R.* 133 = 12 *B.L.R.* 411 = 3 *Sar.* 268.

—Debt—Attachment of—Payment of debt pending.

The effect of S. 240 of C.P.C. of 1859 is not to render the payment of a debt which has been attached in execution absolutely void, under all circumstances and against every one, but merely to make it void so far as may be necessary to secure the execution of the decree (75). (*Sir Barnes Peacock.*) *DINENDRONATH SANNYAL v. RAMCOOMAR GHOSE.*

(1881) 8 *I.A.* 65 = 7 *C.* 107 (118) = 10 *C.L.R.* 281 = 4 *Sar.* 213.

—Debt—Attachment of—Payment of debt pending—Claim of attaching decree-holder otherwise satisfied—Effect.

Payment of a debt which has been attached in execution is not absolutely void. It is void only to the extent to which it is necessary to secure the execution of the decree under which it was made. Such a payment is therefore good where the decree of the attaching decree-holder is satisfied by a private arrangement between him and his judgment-debtor (75). (*Sir Barnes Peacock.*) *DINENDRONATH SANNYAL v. RAMCOOMAR GHOSE.*

(1881) 8 *I.A.* 65 = 7 *C.* 107 (117-8) = 10 *C.L.R.* 281 = 4 *Sar.* 213.

—Decree for money — Attachment of, in execution — Adjustment subsequent to, between parties to attached decree — Attaching decree-holder not party to — Binding character of adjustment on—Abandonment of execution by him and private purchase of decree by him—Effect.

In May, 1863, in execution of a decree for money which the respondent had obtained against *B*, he attached a decree for mesne profits which *B* had obtained in 1860 against *S*. In May, 1865, an order was made under the respondent's execution for the sale of the decree for mesne profits. Without proceeding to sell the decree for mesne profits in execution, the respondent purchased, in 1866, the whole of the mesne profits due under the decree, by private sale from *B*. Meanwhile, in September, 1865, an order had been made by consent of *B* and *S*, whereby *B*'s decree for mesne profits against *S* was set off *pro tanto* against a decree for a larger amount which *S* held against *B*. The respondent was, however, not a party to the said order.

Held, that the private sale to the respondent was not tantamount to and had not the same effect as a sale in execution of his (respondent's) decree, under which the mesne profits had been attached, and that the respondent, by virtue of his purchase, acquired no greater interest than *B* had in the decree for mesne profits, and that he was consequently bound by the consent order of set off (74). (*Sir Barnes Peacock.*) *DINENDRONATH SANNYAL v. RAMCOOMAR GHOSE.*

(1881) 8 *I.A.* 65 = 7 *C.* 107 (118) = 10 *C.L.R.* 281 = 4 *Sar.* 213.

—Decree for money held by *B* against *S*—Attachment by respondent of, pending proceedings between *B* and *S* in execution of a decree for money held by *S* against *B* in which *S* claimed to set off *B*'s decree against his own decree against *B*—Consent order of set off between *B* and *S* subsequent to—Binding character of, against respondent not a party thereto. See TRANSFER OF PROPERTY ACT, S. 52 —DECREE FOR MONEY HELD BY *B* AGAINST *S*.

(1881) 8 *I.A.* 65 (74) = 7 *C.* 107 (117-8).

—Money attached—Payment and receipt of, pending attachment—What amounts to—Decree for mesne profits—

C. P. CODE (ACT V OF 1908), S. 64—(Contd.)

—Attachment of—Consent order subsequent to, setting off amount of that decree against amount of a decree against holder thereof—Effect.

Subsequent to the attachment in execution of a decree for mesne profits held by *B* against *S*, *B* consented to an order by which the amount of the decree for mesne profits was set off against a decree for money held by *S* against *B*.

Quære whether that consent order amounted to a payment of the mesne profits by *S* to *B*, and a receipt thereof by *B* within the meaning of S. 240 of C.P.C. of 1859 (74-5). (*Sir Barnes Peacock.*) *DINENDRONATH SANNYAL v. RAMCOOMAR GHOSE.*

(1881) 8 *I.A.* 65 = 7 *C.* 107 (117-8) = 10 *C.L.R.* 281 = 4 *Sar.* 213.

—Mortgage—Property subject to—Attachment of—Mortgage pending, to pay off old mortgage—Validity of, as against attaching decree-holder.

Property subject to a mortgage was attached in execution of a money-decree obtained against the mortgagor by a third party. Pending the attachment the mortgagor executed a mortgage to *M* for a sum of Rs. 40,000. The said sum of Rs. 40,000 was utilised by the mortgagor, under an arrangement with *M* to that effect to pay off the old mortgage, and for other purposes. Part of the property was subsequently sold in pursuance of the said attachment, and was purchased by the appellant.

Held, that S. 276 of C. P. C. of 1882 had not the effect of making the mortgage to *M* wholly void as against the appellant.

So to construe S. 276 would be quite wrong. So far as the mortgage for Rs. 40,000 prejudiced the execution creditor, it is void as against him; but the section does not render void transactions which in no way prejudice him; and to hold the mortgage void so as to confer upon him a benefit, which no one ever intended he should have, is entirely to ignore the object of the section and to pervert its obvious meaning. It is impossible to hold that the effect of that section is to give an execution creditor an unencumbered fee simple instead of an equity of redemption against the intention of the parties. (*Lord Lindley.*) *DINOBUNDHU SHAW CHOWDHRY v. JOGMAYA DAS.*

(1901) 29 *I. A.* 9 (16-7) = 29 *C.* 154 (166) = 6 *C. W. N.* 209 = 4 *Bom. L. R.* 238 = 8 *Sar.* 217 = 12 *M. L. J.* 73.

—S. 64, Explanation—Claims enforceable under attachment—What are—Claim for rateable distribution under S. 73 of C. P. C.

On 19-8-1911, property of a judgment-debtor was attached in execution of a decree obtained by *A*, and was in June, 1912 put up for sale after being attached. On 9th August, 1912, the judgment-debtor, the 1st defendant, paid in the whole of the decretal amount and costs, and therefore the sale was not confirmed, and the execution proceedings were struck off on 1-10-1912. Before the payment of the decretal amount, namely, on 9-8-1912, another execution application was filed by *B*, another creditor of the same judgment-debtor, and on 10-8-1912 the property was attached under that execution application. On 12-8-1912, an application for rateable distribution filed by *B* was refused on the ground that the money which had been lodged in court was not money realised in execution. Thereupon *B* applied for sale of the attached property, which was accordingly sold on 25-4-1913 and purchased by the 2nd defendant. Meanwhile, on 17-7-1912, the judgment-debtor entered into a contract with the plaintiff for the sale of the same property.

In a suit by the plaintiff for specific performance of the contract in his favour against the judgment-debtor, the 1st

C. P. CODE (ACT V OF 1908), S. 64, Expl.—(Contd.)

defendant, and the 2nd defendant, *Quacre*, whether the suit contract was made unavailable in respect of S. 64 of C.P.C. of 1908, or whether being only a contract to sell, and not a transfer with delivery of any property or interest, S. 64 had no application.

In particular, it would have to be considered whether what was said in L. R. 44 I. A. 72 (78) has any bearing on the question, or whether that case is rendered inapplicable owing to the difference of phraseology of S. 64 of C. P. C. of 1908 from S. 276 of C.P.C. of 1882, under which that case was determined. It would also have to be considered whether at any given moment the plaintiff was able to get specific performance. (*Lord Dunedin*.) *NUR MAHOMED PEERBHOY v. DINSHAW HORMASJI MOTIWALLA*.

33 M. L. T. 241 (P. C.) = (1922) P. C. 393 =
71 I. C. 625 = 28 C. W. N. 522 =
(1922) 45 M. L. J. 770 (774-5).

—**Ss. 64 and 73.—Attachment in execution—Alienation pending—Subsequent attachment by same creditor in execution of another decree—Sale under—Purchaser at—Private purchaser—Rights of—Priority.**

Respondent obtained a decree against *A* in 1901, and, in execution thereof, attached *A's* property on 16th July, 1907. On 15th July, 1907, *A* had sold the property privately to appellant. Respondent also purchased the very same property, with leave of court, in execution of his decree. He was also the holder of a decree of 1896 against *A* and in execution of that decree had also attached the same property in 1902, but the execution had not been proceeded with. On a question arising as to the rights of appellant and respondent to the property, *held* that the sale to the appellant, being prior to the attachment of 1907 on which respondent's title rested, was not invalid under S. 276 of the Code of 1882.

Held, further, that, assuming the earlier attachment of 1902 was subsisting, all that it could do was to entitle the respondent to the benefit of the later attachment but he could not claim to be in a better position than the decree-holder in the later case and his position was not strengthened by the fact that it was the same person who was the decree-holder in both cases.

Meaning of Attachment in S. 276 of C. P. C. of 1882. (*Sir Lawrence Jenkins*.) *MINA KUMARI BIBI v. BIJOY SINGH DUDHURIA*.

(1916) 44 I. A. 72 =
44 C. 662 = 25 C. L. J. 508 = 19 Bom. L. R. 424 =
5 L. W. 111 = 15 A. L. J. 383 = 21 C. W. N. 585 =
1 Pat. L. W. 425 = 21 M. L. T. 544 = 40 I. C. 242 =
32 M. L. J. 425.

—**S. 66—Construction of—Strict construction.**

S. 260 of C.P.C. of 1859 should be construed strictly and literally (155). (*Sir Montague E. Smith*). *LOKHEE NARAIN ROY CHOWDHRY v. KALYPUDDO BANDOPADHYA*. (1875) 2 I. A. 154 = 23 W. R. 358 = 3 Sar. 472 = 3 Suth. 122.

—**Effect of—Benami purchases not made illegal.**

S. 260 of C.P.C. of 1859 did not make benami purchases illegal (155). (*Sir Montague E. Smith*). *LOKHEE NARAIN ROY CHOWDHRY v. KALYPUDDO BANDOPADHYA*.

(1875) 2 I. A. 154 = 23 W. R. 358 = 3 Suth. 122 =
3 Sar. 472.

—**Object of—Judgment-debtors—Benami purchases for—Practice of—Checking of.**

The object which the framers of the Code of Civil Procedure, 1859, probably had in view, in enacting S. 260 thereof, was, to prevent judgment-debtors becoming secret purchasers at the judicial sales of their property, and to

C. P. CODE (ACT V OF 1908), S. 66—(Contd.)

empower the court selling under a decree to give effect to its own sale, without contention on the ground of *benami* purchase, by placing the ostensible purchaser in possession of what it had sold, and of insuring respect to that possession by enacting that any suit brought against him on the ground of *benami* shall be dismissed (525). (*Sir Montague E. Smith*). *MUSSUMAT BUHUNS KOWAR v. LALLA BUHOOREE LALL*.

(1872) 14 M. I. A. 496 = 3 Sar. 69 =
18 W. R. 157 = 10 B. L. R. 159 = 2 Suth. 575.

The provisions of S. 260 of C. P. C. of 1859 were designed to check the practice of making what are known as *benami* purchases at execution sales, *i.e.*, transactions in which *A* secretly purchases on his own account in the name of *B* (843). (*Sir James Colville*). *BODH SING DOODHOORIA v. GUNESCHUNDER SEN*.

(1873) 2 Suth. 840 = 19 W. R. 356 =
12 B. L. R. 317 = 3 Sar. 253.

The provisions of S. 317 of C.P.C. of 1882 were designed to create some check on the practice of making what are called *benami* purchases at execution sales for the benefit of judgment-debtors, and in no way affect the title of persons otherwise beneficially interested in the purchase (182). (*Mr. Ameer Ali*). *GANGA SAHAI v. KESBI*.

(1915) 42 I. A. 177 = 37 A. 545 (554-5) =
13 A. L. J. 999 = 18 M. L. T. 203 =
19 C. W. N. 1175 = 22 C. L. J. 508 =
(1915) M. W. N. 713 = 2 L. W. 837 =
17 Bom. L. R. 998 = 30 I. C. 265 = 29 M. L. J. 329.

—**Certified purchaser—Agreement by, to convey property purchased—Suit to enforce—Maintainability.**

In a suit for specific performance of a contract brought against a purchaser at an execution sale, the plaintiffs' case was that the certified purchaser was not merely a *benamidar*, but was a real purchaser, but that he agreed to convey to the plaintiffs or to their predecessors in title such portions of the property purchased for which they had already paid or had to pay under that agreement the balance of the purchase money. *Held* that S. 66 of C. P. C. of 1908 was no bar to the suit.

The object of S. 66 was to put an end to purchases by one person in the name of another; and the distinction between a purchase on behalf of another, and a purchase coupled with an undertaking to convey to another at the price of purchase, is somewhat narrow. An agreement subsequent to a purchase is not affected by the section. In the present case agreements were entered into after the sale by which the defendant—appellant bound himself to carry out the original contract with the plaintiffs—respondents. These subsequent agreements are unaffected by the section and are therefore enforceable against the appellant (115). (*Viscount Cave*). *RAMATHAI VADIVELU MUDALIAR v. PERIA MANICKA MUDALIAR*.

(1920) 47 I. A. 108 = 43 M. 643 =
18 A. L. J. 584 = 28 M. L. T. 13 = 12 L. W. 1 =
24 C. W. N. 699 = (1920) M. W. N. 389 = 56 I. C. 395 =
39 M. L. J. 11.

—**Certified purchaser—Suit against real owner by—Plea of benami purchase by latter—Maintainability.**

B was mortgagee in possession of certain property. Whilst he was so in possession the interest of the mortgagor therein was sold in execution of a decree obtained against him by a creditor. The respondent became the ostensible purchaser at such sale, and the certificate of sale was granted to him in his own name as the purchaser. *B* remained in possession until his death, and after it the respondent instituted the suit out of which the appeal arose

C. P. CODE (ACT V OF 1908), S. 66—(Contd.)

against the appellant, the heir of B, for the redemption of the property and possession of it, alleging that the mortgage debt had been paid off by the receipt of the profits, and, if not, that he was ready to pay what might remain due. The defence was that the purchase was made by the respondent, in his own name, as a *benamtee* purchaser for B, and with his money; and that the attempt by the respondent to set up title in himself was a fraud. The question was whether, in view of S. 260 of C. P. C. of 1859, the defence was available.

Held that S. 260 was no bar to the maintainability of the defence set up. (*Sir Montague Smith*). MUSSUMAT BUHUNS KOWAR v. LALLA BUHOOREE LALL.

(1872) 14 M. I. A. 496 = 18 W. R. 157 =
10 B. L. R. 159 = 2 Suth. 575 = 3 Sar. 69.

S. 260 of C. P. C. of 1859 is applicable only to a suit brought against the certified purchaser to assert the *benamtee* title against him. The real owner for whom the purchase was made, if in possession, and if that possession had been honestly obtained, might defend a suit brought by the holder of the certificate and show that he was the apparent owner only and a mere trustee (155-6). (*Sir Montague E. Smith*). LOKHU NARAIN ROY CHOWDHRY v. KALYPUDDO BANDOPADHYA. (1875) 2 I. A. 154 = 23 W. R. 358 = 3 Suth. 122 = 3 Sar. 472.

While S. 66 protects the certified purchaser, so long as he retains the possession given him by the Court, from a suit by the true owner, if he allows the real purchaser "being the true owner" to get possession, the section does not enable him to sue for possession, because possession has come into the hands of the true owner, who is entitled to it. (*Sir John Wallis*). KUNWAR MD. ABDUL JALIL KHAN v. KHAN BAHADUR MD. OBAID ULLAH KHAN.

(1929) 33 C.W.N. 1061 = 6 O.W.N. 637 =
A.I.R. 1929 P.C. 228 = 57 M. L. J. 177.

—Certified purchaser—Suit by real owner against—
Plea of benami purchase—Suit based on—Maintainability.

The defendant purchased certain properties in an auction in execution of a rent decree, obtained his sale certificates, and entered into possession. The sale was on 28-10-1907. On 27-10-1913, the plaintiff filed a suit for the recovery of the properties purchased by the defendant alleging that he was the real purchaser who provided the money, that the defendant, his brother-in-law, was his agent in the matter of the purchase, and had, contrary to instructions, purchased the property in his own name, and that, subsequent to the purchase, the defendant had promised to convey the property to the plaintiff whenever required to do so.

Held that the plaintiff was precluded by S. 66, C. P. C. from claiming the property on the basis that the real purchaser at the execution sale was himself and not the defendant.

Held further that the plaintiff could not claim specific performance as the promise to convey was not supported by consideration. (*Lord Sinha*). BALARAM v. NAKTU.

(1928) 54 M. L. J. 462 = 47 C. L. J. 418 = 108 I. C. 11 =
24 N. L. R. 59 = 30 Bom. L. R. 821 = 27 L. W. 807 =
A. I. R. (1928) P. C. 75.

—Certified purchaser—Suit for possession against—
Maintainability—Agreement between him and plaintiff that
purchase should be benami for latter—Suit based upon.

The suit was by the mohunt of an *asthal* to recover possession of property purchased by the appellant in execution of a decree obtained against a third party. The appellant was the manager of the *asthal* under the former mohunt.

Held that even if the property had been purchased by the appellant *benamtee* under an agreement with the former

C. P. CODE (ACT V OF 1908), S. 66—(Contd.)

mohunt that it should be purchased by him *benamtee* for that mohunt, it would be a question whether S. 260 of C. P. C. of 1859 would not prevent the plaintiff from suing to recover it (145). (*Sir Barnes Peacock*). MUNGAL DAS v. MOHUNT BAWAN DAS. (1877) Bald 140 = 1 I. J. 706.

—Certified purchaser—Suit by real owner for possession against—Maintainability—Real owner in adverse possession for statutory period and subsequently dispossessed by certified purchaser.

Where the real purchasers have been allowed by the certified purchaser to remain in adverse possession for more than 12 years and are subsequently dispossessed by him, they are entitled to sue for possession on the title so acquired under the Limitation Act. To such a case the provisions of S. 66 of the present code and the corresponding sections of the earlier codes have no application.

A suit based on dispossession after 12 years' adverse possession is clearly not a suit "on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims" within the meaning of the section, and does not become so merely because the plaintiff as part of an alternative cause of action sets up and proves that the purchases were, in fact, *benami*. (*Sir John Wallis*). KUNWAR MAHOMED ABDUL JALIL KHAN v. KHAN BAHADUR MAHOMED OBAID ULLAH KHAN.

(1929) 33 C.W.N. 1061 = 6 O.W.N. 637 =
A.I.R. 1929 P.C. 228 = 57 M. L. J. 177.

—Certified purchaser—Suit by real owner for possession against—Maintainability—Real owner in adverse possession for less than statutory period and dispossessed by certified purchaser within that period.

Quaere whether the provisions of S. 66 and the corresponding sections of the earlier codes apply to a suit for possession by the real purchasers who have been in adverse possession for less than the statutory period and are dispossessed by the certified purchaser within that period.

That must depend upon the question whether the real purchaser is to be regarded as suing "on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims" within the meaning of the section. In a case in which the true owner has been in possession for less than 12 years, he will no doubt have to aver and prove as part of his cause of action that the auction-purchase was made on his behalf. (*Sir John Wallis*). KUNWAR MAHOMED ABDUL JALIL KHAN v. KHAN BAHADUR MAHOMED OBAID ULLAH KHAN.

(1929) 33 C.W.N. 1061 = 6 O.W.N. 637 =
A.I.R. 1929 P.C. 228 = 57 M. L. J. 177.

—Certified purchaser—Transfer of title to real owner by—Acknowledgment of benami nature of purchase—Transfer of possession to real owner—Effect.

In 11 W.R.F.B., p. 20 it was stated in the judgment of the High Court that if the certified purchaser was really *benamidar*, or a trustee for another person, and after the certificate of sale did some fresh act to put the real purchaser into possession, that might operate as a transfer of the property to him. They say:—"If a person who has gained a title by limitation, waives that title in favour of the real owner, and gives up possession to him as the rightful owner, such act would probably be held to amount to a waiver of the right which he had gained by limitation, and to confer it upon the real owner. In like manner, if a *benamidar* should acknowledge the purchase to have been made *benamtee*, and waive the right conferred upon him by Ss. 259 and 260 of C. P. C. of 1859, and give up possession to the real purchaser as the rightful owner, such act would probably amount to a transfer of the title as well as of the possession to the real pur-

C. P. CODE (ACT V OF 1908), S. 66—(Contd.)

chaser." (156) (*Sir Montague E. Smith.*) LOKHEE NARAIN ROY CHOWDHRY v. KALYPUDDO BANDOPADHYA.

(1875) 2 I. A. 154 = 23 W. R. 358 = 3 Suth. 122 = 3 Sar. 472.

—Certified purchaser—Transfer of title to real owner by—Possession by real owner—Certified purchaser permitting—Effect.

The mere permission to hold possession cannot alone give or transfer a title from the benamidar to the real owner (527). (*Sir Montague Smith.*) MUSSUMAT BUHUNS KOWUR v. LALLA BUHOOREE LALL.

(1872) 14 M. I. A. 496 = 18 W. R. 157 = 10 B. L. R. 159 = 3 Sar. 69 = 2 Suth. 575.

—Certified purchaser—Transferee from—Suit against—Maintainability—Rule as to—C. P. C. of 1882, S. 317—Rule under—Distinction—Reason for change effected by present section.

S. 66 of the present code says that "no suit shall be maintained against any person claiming title under a purchase certified by the Court," whereas the wording of the corresponding S. 317 of C. P. C. of 1882 was "no suit shall be maintained against the certified purchaser"; and the alteration was admittedly made because it had been held by the Calcutta, Madras, and Allahabad Courts that the section only prohibited suits of this nature instituted against the certified purchaser himself and did not prohibit them when instituted against transferees from him, whereas in Bombay it was held that it did. (*Sir John Wallis.*) KUNWAR MAHOMED ABDUL JALIL KHAN v. KHAN BAHADUR MAHOMED OBAID ULLAH KHAN. (1929) 33 C. W. N. 1061 = 6 O. W. N. 637 = A. I. R. 1929 P. C. 228 = 57 M. L. J. 177.

—Certified purchaser—Transferee from, under transfer made while code of 1882 in force—Suit against—Applicability of section to.

Quære whether the provisions of S. 66, in so far as they prohibit suits on the ground specified in the section, apply to suits against transferees from benamidars made when S. 317 of C. P. C. of 1882 was in force. (*Sir John Wallis.*) KONWAR MAHOMED ABDUL JALIL KHAN v. KHAN BAHADUR MAHOMED OBAID ULLAH KHAN.

(1929) 33 C. W. N. 1061 = 6 O. W. N. 637 = A. I. R. 1929 P. C. 228 = 57 M. L. J. 177.

—Co-decree-holders — Purchase by one of—Suit by other to recover his share of property purchased—Maintainability.

The provisions of S. 317 of C. P. C. of 1882 are not intended to allow a decree-holder to perpetrate a fraud upon his co-decree-holders under cover of the section (182).

Where two persons A and B jointly advanced money on a mortgage and obtained a decree for sale but only one of them B applied for execution (expressly reserving, however, the right of A) and purchased the property in his own name, held, in a suit by A for the recovery of his share of the property purchased on the ground that the purchase was for his (A's) benefit also, that S. 317 did not bar the suit (182-3).

B's application for execution was under S. 231 of C. P. C. of 1882, and it was made subject to the rights of A. Had he not embodied this reservation in his petition, the Court executing the decree would have of its own motion protected the interests of A. (*Mr. Ameer Ali.*) GANGA SAHAI v. KESRI. (1915) 42 I. A. 177 = 37 A. 545 (554-5) = 13 A. L. J. 999 = 18 M. L. T. 203 = 19 C. W. N. 1175 = 22 C. L. J. 508 = (1915) M. W. N. 713 = 2 L. W. 837 = 17 Bom. L. R. 998 = 30 I. C. 265 = 29 M. L. J. 329.

—Hindu Law—Joint family—Manager—Purchase by—Suit by other members to enforce their rights under the—

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Maintainability. See SALES OF LAND FOR REVENUE ARREARS ACT I OF 1845, S. 21—HINDU LAW.

(1874) 1 I. A. 342 (345).

—Hindu Law—Joint family—Member of—Property purchased by, at execution sale—Claim of other members to share in—Section not a bar to.

The provisions of S. 260 of C. P. C. of 1859 cannot be taken to affect the rights of members of a joint Hindu family, who, by the operation of law, and not by virtue of any private agreement or understanding, are entitled to treat as part of their common property an acquisition, howsoever made, by a member of the family in his sole name, if made by the use of the family funds (843). (*Sir James Colville.*) BODH SING DOODHOORIA v. GUNESCHUNDER SEN.

(1873) 2 Suth. 840 = 19 W. R. 356 = 12 B. L. R. 317 = 3 Sar. 253.

—Hindu law—Joint family—Member deceased of—Son-in-law of—Purchase by—Benami for joint family—Plea by surviving members of—Maintainability.

In a suit by the surviving members of a joint Hindu family for a declaration that properties of which the defendant (the son-in-law of the deceased member) was declared a certified purchaser at an execution sale really belonged to the family, the defendant being only a benamidar, held that S. 317 of the Code of 1882 was a bar to the suit. (*Lord Buckmaster, L. C.*) SURAJ NARAIN v. RATAN LAL.

(1917) 44 I. A. 201 (211) = 40 A. 159 =

21 C. W. N. 1065 = 2 Pat. L. W. 160 =

15 A. L. J. 684 = 19 Bom. L. R. 737 =

22 M. L. T. 121 = 26 C. L. J. 267 =

6 L. W. 509 = (1917) M. W. N. 477 =

40 I. C. 988 = 20 O. C. 211 = 33 M. L. J. 180.

—S. 73—Applicability—Private sale—Case of,

S. 271 of C. P. C. of 1859, which enacts "If after the claim of the person on whose application the property was attached has been satisfied in full from the proceeds of the sale, any surplus remain, such surplus shall be distributed rateably amongst any other persons who, prior to the order for such distribution, may have taken out execution of decrees against the same defendant and not obtained satisfaction thereof", only applies where there has been a judicial sale, and has no application to a case in which the question is as to the validity of a private sale (550). (*Sir Robert P. Collier.*) ANUND LOLL DOSS v. JULLODHUR SHAW.

(1872) 14 M. I. A. 543 = 17 W. R. 313 = 2 Suth. 559 = 10 B. L. R. 134 = 3 Sar. 81.

—Scheme of—Order for distribution—Nature and effect—Not conclusive in suit sanctioned by section itself.

The scheme of S. 295 of C. P. C. of 1882 is to enable the judge as a matter of administration to distribute the price according to what seem at the time to be the rights of parties, without this distribution importing a conclusive adjudication on those rights, which may be subsequently re-adjusted by the suit provided for by the section itself. The order for distribution is a step in an execution proceeding, and is made in the suit in which the decree was made which was in process of execution (209). (*Lord Robertson.*) SHANKAR SARUP v. MEJO MAL. (1901) 28 I. A. 203 =

23 A. 313 (322-3) = 5 C. W. N. 649 =

3 Bom. L. R. 713 = 8 Sar. 72.

—Distribution of sale proceeds—Order for—Nature and effect of. See C. P. C. OF 1908, S. 73—SCHEME OF. (1901) 28 I. A. 203 (209) = 23 A. 313 (322-3).

C. P. CODE (ACT V OF 1908), S. 73—(Contd.)

—**S. 73, Sub-S. (2)**—Refund of assets wrongly paid—Suit for—Limitation. See **LIMITATION ACT OF 1908, ART. 13—APPLICABILITY—C. P. C. OF 1908, S. 73 (2).**
(1901) 28 I. A. 208 (209) = 23 A. 313 (322-3).

—**Ss. 73 and 64**—Attachment in execution—Alienation pending—Subsequent attachment by same creditor in execution of another decree—Sale under — Purchaser at—Private purchaser—Rights of—Priority. See **C. P. C. OF 1908, Ss. 64 AND 73.** (1916) 44 I. A. 72 = 44 C. 662.

—**S. 80**—*Applicability and Effect—Injunction—Suit in whole or in part for—Notice of suit in case of—Essential—Suit brought within 2 months of notice — Maintainability.*

S. 80 of C.P.C. applies to all officers of Government and to all their officials acts, and imposes a statutory and unqualified obligation upon the court. It provides for a fixed and obligatory interval of two months between the required notice and the commencement of any suit in respect of the officials' action. The Act must be read in accordance with the natural meaning of its words. The section is express, explicit and mandatory, and it admits of no implications or exceptions. A suit in which *inter alia* an injunction is prayed is still "a suit" within the words of the section, and to read any qualification into it is an encroachment on the function of legislation.

In the case of suits against officials for acts purporting to be done in discharge of their duties, S. 80 must be strictly complied with. It is applicable to all forms of action and all kinds of relief. The mere circumstance that part or whole of the relief claimed is an injunction does not oust the application of the section.

The view of the Bombay High Court that "in the case of suits to restrain by injunction the commission of some official act prejudicial to the plaintiff, if the immediate result of the act would be to inflict hardship or irremedial harm, S. 80 does not compel the plaintiff to wait two months before bringing his suit" over-ruled. (*Viscount Sumner.*) **BHAGCHAND DAGADUSA v. SECRETARY OF STATE FOR INDIA.** (1927) 54 I.A. 338 = 51 B. 725 =

32 C. W. N. 61 = 104 I. C. 257 = 26 L. W. 809 =

25 A. L. J. 641 = 29 Bom. L. R. 1227 = (1927)

M. W. N. 561 = 46 C. L. J. 76 = 1 Luck. 291 =

A. I. R. 1927 P. C. 176 = 53 M. L. J. 81.

—*Not ultra vires—Government of India Act, 1858—S. 65—Civil procedure—Regulation for — Not subject to section.*

The view that S. 80 of C.P.C. is *ultra vires* arises from a misapprehension of the decision in *Moment's case* (L. R. 40 I.A. 48). The regulation for civil procedure has nothing to do with the obligations formerly vesting in the East India Co. as a trading corporation, for it is incidental to the duties of the ruling power, and cannot be said to be subject to the Government of India Act, 1858, S. 65 (357-8.) (*Viscount Sumner.*) **BHAGCHAND DAGADUSA v. SECRETARY OF STATE FOR INDIA.** (1927) 54 I.A. 338 = 51 B. 725 =

32 C. W. N. 61 = 104 I. C. 257 = 26 L. W. 809 =

25 A. L. J. 641 = 29 Bom. L. R. 1227 =

(1927) M. W. N. 561 = 46 C. L. J. 76 = 1 Luck. 291 =

A. I. R. 1927 P. C. 176 = 53 M. L. J. 81.

S. 92.

INTEREST IN THE TRUST.

LAW PRIOR TO ENACTMENT OF.

SANCTION UNDER.

SCOPE OF, AS COMPARED WITH OLD, S. 539,

C. P. CODE (ACT V OF 1908)—(Contd.)

SUIT UNDER—

ABATEMENT OF.

COSTS OF, TO COME OUT OF ENDOWMENT FUNDS.

DECREE IN—RES JUDICATA AGAINST PUBLIC.

SCHEME IN—FRAMING OF.

SCHEME FRAMED IN.

MOSQUE.

MUTT.

RELIGIOUS ENDOWMENT—ASTHAL.

TEMPLE—SCHEME FOR.

S. 92—Interest in the trust.

—*Condition as to—Object of.*

The object with which the Legislature inserted the words "having an interest in the trust" in S. 92 of C.P.C. of 1908 was to prevent people interfering by virtue of the section (S. 92) in the administration of charitable trusts merely in the interests of others and without any real interests of their own. (*Sir John Edge.*) **VAIDYANATHA AYYAR v. SWAMINATHA AYYAR.** (1924) 51 I.A. 282 (288-9) =

47 M. 884 = 35 M. L. T. 189 =

A. I. R. (1924) P. C. 221 (2) = 22 A. L. J. 983 =

26 Bom. L. R. 1121 = 40 C. L. J. 454 = 29 C. W. N. 154 =

20 L. W. 803 = (1924) M. W. N. 749 = 26 P. L. R. 1 = 10

O. and A. L. R. 1076 = 82 I. C. 804 = 47 M. L. J. 361.

—*Direct interest—Provision in S. 539 of C. P. C. of 1877 as to—Omission of word "direct"—Reason for.*

It may be that the dictum of Lord Eldon in the Bedford Charity case that "an interest in the charity" means "a direct interest in the charity" caused those who were responsible for the drafting of S. 539 of C. P. C. of 1877 to draft that section as giving a right in cases of a breach of a trust created for public charitable purposes to "two or more persons having a direct interest in the trust," and who had obtained the consent of the Advocate-General, to institute a suit under that section. It must, however, have subsequently appeared to the Governor-General of India in Council that the limitation of a "direct" interest was not expedient in India, and it was enacted by S. 44 of C. P. Amendment Act, 1888, which amended the procedure then in force, "that in S. 539, for the words 'having a direct interest' the words 'having an interest' shall be substituted." It may be that *Coutts-Trotter, J.*, was correct in stating, in I. L. R. 42 M. 360 (363), that it was in consequence of the decision in I. L. R. 8 C. 32 that the change in the law was made by omitting the word "direct". (*Sir John Edge.*) **VAIDYANATHA AYYAR v. SWAMINATHA AYYAR.**

(1924) 51 I.A. 282 (288) = 47 M. 884 =

35 M. L. T. 189 = A. I. R. 1924 P. C. 221 (2) =

22 A. L. J. 983 = 26 Bom. L. R. 1121 = 40 C. L. J. 454 =

29 C. W. N. 154 = 20 L. W. 803 = (1924) M. W. N. 749 =

26 P. L. R. 1 = 10 O. and A. L. R. 1076 = 82 I. C. 804 =

47 M. L. J. 361.

—*Hindu temple—Interest in—Bare possibility of desire to resort to temple if gives.*

Public Hindu temples are *prima facie* to be taken, as *Sir John Wallis, C. J.*, said in I. L. R. 42 M. 360 (363), to be dedicated for the use of all Hindus resorting to them. Their Lordships agree with *Sir John Wallis* that the bare possibility, however remote, that a Hindu might desire to resort to a particular temple gives him an interest in the trust appears to defeat the object with which the Legislature inserted the words 'having an interest' in S. 92 of C.P.C. of 1908. (*Sir John Edge.*) **VAIDYANATHA AYYAR v. SWAMINATHA AYYAR.** (1924) 51 I.A. 282 (288) = 47 M. 884 =

35 M. L. T. 189 = A. I. R. (1924) P. C. 221 (2) =

22 A. L. J. 983 = 26 Bom. L. R. 1121 = 40 C. L. J. 454 =

C. P. CODE (ACT V OF 1908)—(Contd.)

S. 92—Interest in the trust—(Contd.)

29 C.W.N. 154=20 L.W. 803=(1924) M.W.N. 749=
26 P.L.R. 1=10 O. and A.L.R. 1076=82 I.C. 804=
47 M.L.J. 361.

—Mosque—Direct interest in—Regular worshippers if have.

Their Lordships would have considered that Mahomedans who worshipped regularly in the mosque of a village had a direct interest in the trust relating to the mosque. (*Sir John Edge.*) VAIDYANATHA AYYAR v. SWAMINATHA AYYAR. (1924) 51 I.A. 282 (288)=47 M. 884=35 M.L.T. 189=A.I.R. 1924 P.C. 221 (2)=22 A.L.J. 983=26 Bom. L. R. 1121=40 C.L.J. 454=29 C.W.N. 154=20 L.W. 803=(1924) M.W.N. 749=26 P.L.R. 1=10 O. and A. L. R. 1076=82 I.C. 804=47 M. L. J. 361.

—Persons having—Founder's descendants in female line if—Descendants never availing themselves of benefit of trust—Effect.

In a suit brought by the plaintiffs under S. 92 of C. P. C. of 1908, with the consent of the Advocate-General, for a declaration that the defendants-appellants were not rightly appointed trustees of a chattiram, and that in any case they should be removed from being trustees, the question was whether the plaintiffs had an interest in the trust within the meaning of S. 92. It appeared that they were descendants in female lines of R and his son K, one of whom, probably the former, founded and dedicated to the public the chattiram as a charitable institution, and were of the founder's kin.

Held, that the fact that the plaintiffs were descendants although only in female lines of the founder of the chattiram gave them an interest in the proper administration of the trust sufficient to enable them to maintain the suit, although they themselves might never find it necessary to use the chattiram as a rest-house or to obtain food there. (*Sir John Edge.*) VAIDYANATHA AYYAR v. SWAMINATHA AYYAR. (1924) 51 I.A. 282 (289)=47 M. 884=35 M.L.T. 189=A.I.R. (1924) P.C. 221 (2)=22 A.L.J. 983=26 Bom. L. R. 1121=40 C.L.J. 454=29 C.W.N. 154=20 L.W. 803=(1924) M.W.N. 749=26 P.L.R. 1=10 O. and A. L. R. 1076=82 I.C. 804=47 M. L. J. 361.

—Persons without — Right of — Sanction of A.G. — Effect.

A suit relating to a trust created for public purposes of a charitable nature would not lie if the plaintiffs had not within the meaning of S. 92 of C. P. C. of 1908, an interest in the trust. The consent in writing of the Advocate-General to the institution of the suit by the plaintiffs would not bring the suit within the meaning of S. 92 of C. P. C., unless the plaintiffs had an interest in the trust. (*Sir John Edge.*) VAIDYANATHA AYYAR v. SWAMINATHA AYYAR. (1924) 51 I. A. 282 (286-7)=47 M. 884=35 M.L.T. 189=A.I.R. (1924) P.C. 221 (2)=22 A.L.J. 983=26 Bom. L.R. 1121=40 C.L.J. 454=29 C.W.N. 154=20 L.W. 803=(1924) M.W.N. 749=26 P.L.R. 1=10 O. and A.L.R. 1076=82 I.C. 804=47 M. L. J. 361.

S. 92—Law prior to enactment of.

—Changes made by. (*Lord Sinha.*) ABDUR RAHIM v. SYED ABU MAHOMED BARKAT ALI SHAH.

(1927) 55 I. A. 96=55 C. 519=I.L.T. 40 C. 19=9 P. L. T. 65=27 L. W. 339=32 C. W. N. 482=26 A. L. J. 464=108 I. C. 361=30 Bom. L. R. 744=48 C. L. J. 55=(1928) M. W. N. 926=A. I. R. (1928) P. C. 16=54 M. L. J. 609.

C. P. CODE (ACT V OF 1908)—(Contd.)

S. 92—Sanction under.

—Effect—Interest in trust—Absence in plaintiffs of—Sanction if will cure. See UNDER THIS SECTION—INTEREST IN TRUST—PERSONS WITHOUT.

(1924) 51 I. A. 282 (286-7)=47 M. 884.

—Necessity—Suit not claiming any of the reliefs mentioned in Sub-S. 1 of Section.

It was contended that all suits founded upon any breach of trust for public purposes of a charitable or religious nature, irrespective of the relief sought, must be brought in accordance with the provisions of S. 92, C. P. C. Held, over-ruling the contention, that only suits claiming any of the reliefs specified in Sub-S. (1) of the Section had to be instituted in conformity with the provisions of S. 92, Sub-S. (1), and that, as the suit out of which the appeal before their Lordships arose did not claim any such relief as was specified in Sub-S. (1) of S. 92, that section was no bar to the maintainability of the suit without the sanction of the Advocate-General and in the Sub-Court. (*Lord Sinha.*) ABDUR RAHIM v. SYED ABU MAHOMED BARKAT ALI SHAH. (1927) 55 I. A. 96=55 C. 519=

I. L. T. 40 C. 19=9 P. L. T. 65=27 L. W. 339=32 C. W. N. 482=26 A. L. J. 464=108 I. C. 361=30 Bom. L. R. 744=48 C. L. J. 55=(1928) M. W. N. 926=A. I. R. (1928) P. C. 16=54 M. L. J. 609.

—Scope—Settlement of scheme—Prayer for—If included.

Where the sanction granted under S. 539 of the Code of 1882 said, "I grant them permission to institute a suit under S. 539," and it was urged that it did not mean any suit which might be raised under S. 539, but was confined merely to one of the species of suits that could be so raised—namely, the appointment of new trustees, held that no such narrow reading could be put upon the sanction as given, and that in a suit brought in pursuance of the sanction, and praying for the settlement of a scheme, the Court had jurisdiction to order the settlement of a scheme (16). (*Lord Dunedin.*) ANAND RAO v. RAMDAS DADURAM.

(1920) 48 I. A. 12=48 C. 493 (497)= (1921) M. W. N. 24=13 L. W. 318=25 C. W. N. 794=17 N. L. R. 37=62 I. C. 737=30 M. L. T. 194.

—Suit instituted with—Amendment of plaint in, by addition of strangers to trust as parties and by prayer for relief not covered by S. 92—Effect.

Held that by reason of the said amendments the nature of the suit was changed, and the suit ceased to be one of a representative character. (*Lord Sinha.*) ABDUR RAHIM v. SYED ABU MAHOMED BARKAT ALI SHAH.

(1927) 55 I. A. 96=55 C. 519=I. L. T. 40 C. 19=9 P. L. T. 65=27 L. W. 339=32 C. W. N. 482=26 A. L. J. 464=108 I. C. 361=30 Bom. L. R. 744=48 C. L. J. 55=(1928) M. W. N. 926=A. I. R. (1928) P. C. 16=54 M. L. J. 609.

—Validity—Application for sanction—Order granting sanction—Difference between scopes of—When not fatal.

In a case in which the application for sanction under S. 539 of the Code of 1882 was for the appointment of new trustees, and the removal of the existing trustee, the sanction was in these terms: "As, for the purposes of this application applicants do not insist on the removal of the trustee, I grant them permission to institute a suit under S. 539." On a plea being raised that the permission to institute a suit under S. 539 did not square with the application, which was an application conceived merely for the appointment of new trustees, held that, although the application as framed might have been for the appointment of new trustees, yet when the applicants came before the Deputy Commissioner (the officer who granted the sanction) and explained the matter,

C. P. CODE (ACT V OF 1908)—(Contd.)**S. 92—Sanction under—(Contd.)**

it was quite within his power to grant the sanction as he had granted it (15-6.) (*Lord Dunedin.*) **ANAND RAO v. RAMDAS DADURAM.** (1920) 48 I. A. 12 =

48 C. 493 (497) = (1921) M. W. N. 24 =
13 L. W. 318 = 25 C. W. N. 794 = 17 N. L. R. 37 =
62 I. C. 737 = 30 M. L. T. 194.

S. 92—Scope of, as compared with old S. 539.

—*Strangers to trust—Relief or Remedy against—If can be had under section—Sub-S. (1) (h)—Effect.*

S. 92 of C. P. C. of 1908 was not intended to enlarge the scope of S. 539 by the addition of any relief or remedy against third parties, that is, strangers to the trust. The Courts in India have no doubt differed considerably on the question whether third parties could or should be made parties to a suit under S. 539, but the general current of decisions was to the effect that even if such third parties could properly be made parties under S. 539, no relief could be granted as against them. The Legislature did not intend to include relief against third parties in cl. (h) under the general words "further or other relief." (*Lord Sinha.*) **ABDUR RAHIM v. SYED ABU MAHOMED BARKAT ALI SHAH.** (1927) 55 I. A. 96 = 55 C. 519 =

I. L. T. 40 C. 19 = 9 P. L. T. 65 = 27 L. W. 339 =
32 C. W. N. 482 = 26 A. L. J. 464 = 108 I. C. 361 =
30 Bom. L. R. 744 = 48 C. L. J. 55 =
(1928) M. W. N. 926 = A. I. R. (1928) P. C. 16 =
54 M. L. J. 609.

S. 92—Suit under.**ABATEMENT OF.**

—*Death of one of plaintiffs—Effect of—Suit with sanction of Advocate-General.*

A suit instituted with the sanction of the Advocate-General under S. 92 of the Code of 1908 is not prosecuted by the individuals who originally raised the suit and got the sanction for their own interests, but as representatives of the general public. Such a suit therefore does not abate by reason of the death of the said persons (16). (*Lord Dunedin.*) **ANAND RAO v. RAMDAS DADURAM.**

(1920) 48 I. A. 12 = 48 C. 493 (497-8) =
(1921) M. W. N. 24 = 13 L. W. 318 = 25 C. W. N. 794 =
17 N. L. R. 37 = 62 I. C. 737 = 30 M. L. T. 194.

—*Hereditary trustee—Suit for removal of, and for settlement of scheme—Death of defendant pending.*

Pending a suit instituted under S. 539 of the Code of 1882 for the removal of the then hereditary trustee of a shrine on the ground of mismanagement, and for the settlement of a proper scheme of management, the defendant-trustee died. *Held* that, though by reason of the death of the defendant there was no more question of removing him, yet, for the purpose of determining on a scheme, the suit was properly revived against his successor (16). (*Lord Dunedin.*) **ANAND RAO v. RAMDAS DADURAM.**

(1920) 48 I. A. 12 = 48 C. 493 (498) = (1921) M. W. N. 24 =
13 L. W. 318 = 25 C. W. N. 794 = 17 N. L. R. 37 =
62 I. C. 737 = 30 M. L. T. 194.

COSTS OF, TO COME OUT OF ENDOWMENT FUNDS.**—Order for.**

In a suit for the settlement of a scheme for the management of a temple, and the protection of its funds, the P. C. directed, in the circumstances of the case, that the costs of all parties to the suit, including the charges and expenses of the trustee of the temple properly incurred, the costs of appeal to the High Court, and the costs of the trustees' appeal to the Privy Council, should be submitted to the District Court and should as approved by the court be paid and

C. P. CODE (ACT V OF 1908)—(Contd.)**S. 92—Suit under—(Contd.)****COSTS OF, TO COME OUT OF ENDOWMENT FUNDS—(Contd.)**

retained out of the funds of the temple. (*Lord Macnaghten.*) **PRAYAGA DOSS JEE VARU v. TIRUMALA SRIRANGACHARYULU VARU.** (1907) 34 I. A. 78 (86) = 30 M. 138 =
11 C. W. N. 442 = 9 Bom. L. R. 588 = 9 Sar. 213 =
18 M. L. J. 236.

In a suit under S. 539 of C. P. C. of 1882 for the settlement of a scheme for a temple, their Lordships directed that all the costs of the appeal to the Privy Council should come out of the temple funds, but that the appellants should, in the first instance, pay the costs of the respondents and should recoup themselves as regards those costs and their own costs out of the temple funds. (*Lord Macnaghten.*) **KIRPASHANKAR v. MANOHAR TAMBEKAR.**

12 M. L. T. 448 = (1912) M. W. N. 1106 =
16 C. L. J. 640 = 15 Bom. L. R. 13 = 17 I. C. 441 =
(1912) 24 M. L. J. 199 (204).

In an appeal in a suit brought under S. 92 of C. P. C., for the settlement of a scheme in respect of a spiritual institution, their Lordships directed that the costs of the appeals should come out of the estate. (*Lord Shaw.*) **ACHARYA-SHRI SRIPATI PRASADJI v. LAXMIDAS.**

(1928) 29 L. W. 113 = A. I. R. (1928) P. C. 27.

DECREE IN—RES JUDICATA AGAINST PUBLIC.

—*Amendment of plaint by addition of strangers to suit as parties and by prayer for relief not covered by S. 92—Compromise of suit by some of plaintiffs only in case of—Decree on foot of—Effect.*

In a suit instituted under S. 92 of C. P. C., with the sanction of the Advocate-General, the plaint was amended by the addition of strangers to the trust as defendants and by prayers for relief not covered by S. 92. A decree was passed in that suit based on a compromise by six only out of the seven plaintiffs in the suit.

Held, that by reason of the said amendments the nature of the suit was changed, the suit ceased to be one of a representative character, and the compromise decree therein, however binding as against the consenting parties, could not bind the rest of the public.

S. 11, Expl. vi has no application to such a case. (*Lord Sinha.*) **ABDUR RAHIM v. SYED ABU MAHOMED BARKAT ALI SHAH.** (1927) 55 I. A. 96 =

55 C. 519 = 1 L. T. 40 C. 19 = 9 P. L. T. 65 =
27 L. W. 339 = 32 C. W. N. 482 = 26 A. L. J. 464 =
108 I. C. 361 = 30 Bom. L. R. 744 = 48 C. L. J. 55 =
(1928) M. W. N. 926 = A. I. R. (1928) P. C. 16 =
54 M. L. J. 609.

—*Compromise decree—Decree based on contest—Distinction. See C. P. C. OF 1908, S. 11—REPRESENTATIVE SUIT—DECREE IN.* (1927) 55 I. A. 96 = 55 C. 519.

SCHEME IN—FRAMING OF.

—*Accounts of trust property—Taking of—Condition precedent.*

In a suit brought under S. 539, C. P. C. of 1882 for the administration of a trust for religious purposes in connection with a temple, the High Court made a decree directing an account to be taken of the property and of the receipts and disbursements of the temple and a scheme to be drawn up for the future management of the temple and its funds due consideration being given to the established practice of the institution, and to the position of the Shevaks, and of other persons connected with it. In an appeal from that decree based on the ground that certain questions should be determined before entering upon the consideration of the scheme, *Held*, that the decree was perfectly right inas-

C. P. CODE (ACT V OF 1908)—(Contd.)

S. 92—Suit under—(Contd.)

SCHEME IN—FRAMING OF—(Contd.)

much as, before any scheme should be settled, it was necessary to take an account of the trust property to know what it was.

Until the trust funds are ascertained it seems impossible that any scheme can be settled. The decree does not pre-judge any thing. (*Lord Macnaghton.*) CHOTALAL LAKHMI-RAM v. MANOHAR GANESH TAMBEKAR.

(1899) 26 I. A. 199 = 24 B. 50 = 4 C. W. N. 23 =
2 Bom. L. R. 516 = 7 Sar. 559.

—Discretion of Court below as to—P. C.'s, interference with.

The Settlement of a proper scheme under S. 539 of C. P. C. of 1882 is largely a matter of discretion, and, unless the discretion has been improperly exercised or the Court has failed to give due consideration to matters which it was bound to take into consideration, the same will not be interfered with in appeal. (*Lord Macnaghton.*) KIRPA-SHANKAR v. MANOHAR TAMBEKAR.

(1912) 24 M. L. J. 199 = 12 M. L. T. 448 =

(1912) M. W. N. 1106 = 16 C. L. J. 640 =
15 Bom. L. R. 13 = 17 I. C. 441.

Where the scheme as settled by the Court below in respect of a spiritual institution in no way interfered with the institution as a spiritual institution, or with the duties of the adherents thereof, whether ritual, ceremonial or ethical and it did not presume to modify in any degree the worship paid by the members of the sect to the occupant of the *gaddi* as the representative of the god, held that it would be highly undesirable and unsettling for the Board to interfere with the action of the court below. (*Lord Shaw.*) ACHARYASHRI SRIPATI PRASADJI v. LAXMIDAS.

(1928) 29 L. W. 113 = A. I. R. (1929) P. C. 27 =

33 C. W. N. 352 = I. D. (1929) P. C. 50 =

31 Bom. L. R. 243 = 114 I. C. 10 = 27 A. L. J. 401.

SCHEME FRAMED IN.

—Provision in, for framing of rules by Temple Committee appointed under Scheme subject to sanction of District Court—Order of District Judge sanctioning rules framed—Nature of—Appeal from.

A scheme framed by the Privy Council for the management of a public Hindu temple provided for the appointment of a Temple Committee, and empowered the Committee to take the Temple property into their custody and to make rules for the guidance of their business and for the management of the Temple and for other purposes. The scheme provided that the rules, when sanctioned by the District Court of Ahmedabad, should have the same force as if they were part of the scheme. Clause 20 of the scheme provided that "the provisions of this scheme may be altered, modified, or added to, by an application to His Majesty's High Court of Judicature at Bombay."

The Temple Committee duly appointed under the scheme framed certain rules which with certain alterations, were sanctioned by the District Judge of Ahmedabad. Subsequently certain persons, who had exercised certain rights in the temple in question, or were otherwise interested in the management of the temple, presented an application to the High Court of Bombay under clause 20 of the scheme for modification of the rules sanctioned by the District Judge. Appeals were also presented to the High Court against the sanction given by the District Judge to the rules, the same being treated as an order made under S. 47 of C. P. C. of 1908. The learned Judge of the High Court held that it was unnecessary to deal with the application made under clause 20 of the scheme, dealt with the appeals presented against the sanction of the District Judge

C. P. CODE (ACT V OF 1908)—(Contd.)

S. 92—Suit under—(Contd.)

SCHEME FRAMED IN—(Contd.)

as appeals from orders in execution, and passed a Judgment expressing his views on the rules sanctioned by the District Judge.

Held, that the appeals to the High Court should have been rejected as incompetent and that the appeal to the Privy Council from the order of the High Court should not have been admitted. (*Sir Lawrence Jenkins.*) SEVAK JERANCHOD BHOGILAL v. THE DAKORE TEMPLE COMMITTEE. (1925) 22 L. W. 246 = 30 C. W. N. 459 =

A. I. R. (1925) P. C. 155 = 23 A. L. J. 555 =

27 Bom. L. R. 872 = 2 O. W. N. 535 = 87 I. C. 313 =

L. R. 6 P. C. 117 = 41 C. L. J. 628 =

(1925) M. W. N. 474 = 49 M. L. J. 25.

Mosque.

—Scheme for—Settlement of—Trustees—Appointment of—Factors to be considered as regards—Founder's wishes—Past history of institution—Management all along—Discretion of Court.

S. 539 of C. P. C. of 1882 vests a very wide discretion in the Court. In giving effect to the provisions of the section and in appointing new trustees and settling a scheme the Court is entitled to take into consideration not merely the wishes of the founder, so far as they can be ascertained but also the past history of the institution, and the way in which the management has been carried on heretofore, in conjunction with other existing conditions that may have grown up since its foundation. It has also the power of giving any directions and laying down any rules which might facilitate the work of management, and, if necessary, the appointment of trustees in the future (135). (*Mr. Ameer Ali.*) MAHOMED ISMAIL ARIFF v. AHMED MOOLLA DAWOOD. (1916) 43 I. A. 127 = 43 C. 1085 =

20 C. W. N. 1118 = 24 C. L. J. 198 = 20 M. L. T. 110 =

(1916) 1 M. W. N. 460 = 9 Bur. L. T. 141 =

14 A. L. J. 741 = 18 Bom. L. R. 611 = 4 L. W. 269 =

35 I. C. 30 = 31 M. L. J. 290.

—Scheme suit in respect of—Management of mosque—Preferential right to—Mosque dedicated to public worship by all Sunnis—Management of, for a long period by a sect thereof—Preferential right of that sect—Recognition of—Court's duty—No breach of trust by them alleged. See C. P. C. OF 1908, S. 92—RELIGIOUS ENDOWMENT—MOSQUE—SUIT FOR SETTLEMENT OF ETC.

(1916) 43 I. A. 127 (135-6) = 43 C. 1085.

—Suit for settlement of scheme and appointment of trustees in respect of—Question for decision in—Conflicting rights of parties—Best method for fully and effectively carrying out purpose for which trust was created—Determination of—Court's duty.

The suit was brought under the provisions of S. 539 of C. P. C. of 1882, for the appointment of trustees, and the settlement of a Scheme of management in respect of a mosque situated in the city of Rangoon. The mosque in question was a public mosque dedicated to the performance of religious worship by all Sunni Mahomedans without restriction as to place of origin. The plaintiffs, however, claimed, it as a Randheria mosque, the Randherians being a sect of Sunni Mahomedans.

The mosque in question was originally founded by a Randherian in 1857. He and his Randheria fellow townsmen held the mutwallehsip until 1871. Since that date also the management had been carried on by people belonging to Randher. In 1862 certain additional lands were purchased with money supplied by them; and in 1871 the bulk of the money required for purchasing lands for the purposes of

C. P. CODE (ACT V OF 1908)—(Contd.)**Mosque—(Contd.)**

the mosque and for erecting a pacca masonry building on it came from the same source. It was not alleged that the Randherians had mismanaged the trust or committed any dereliction of duty, or tried to introduce innovations in the services, or otherwise interfered with the rights of the general body of worshippers.

Held that, in those circumstances, in the exercise of the discretion which the Musulman law vested in the kazi, the Randheria section of the worshippers, all other conditions being equal, were preferably entitled to the mutwalleeship of the mosque (136).

The real point in issue in the case, owing probably to the nature of the pleadings, has to some extent been missed by the courts in India. It has been treated as question involving the determination of conflicting rights rather than a consideration of the best method for fully and effectively carrying out the purpose for which the trust was created. The suit is brought under S. 539 of the Code of 1882, which vests a very wide discretion in the Court. In giving effect to the provisions of the section and in appointing new trustees and settling a scheme, the Court is entitled to take into consideration not merely the wishes of the founder, so far as they can be ascertained, but also the past history of the institution, and the way in which the management has been carried on heretofore, in conjunction with other existing conditions that may have grown up since its foundation. It has also the power of giving any directions and laying down any rules which might facilitate the work of management, and, if necessary, the appointment of trustees in the future (135). (*Mr. Ameer Ali*.) MAHOMED ISMAIL ARIFF *v.* AHMED MOOLLA DAWOOD.

(1916) 43 I.A. 127 = 43 C. 1085 = 20 C.W.N. 1118 = 24 C.L.J. 198 = 20 M.L.T. 110 = (1916) 1 M.W.N. 460 = 9 Bur. L.T. 141 = 14 A.L.J. 741 = 18 Bom. L.R. 611 = 4 L. W. 269 = 35 I.C. 30 = 31 M.L.J. 290.

—*Trustees of—Appointment or election of—Indeterminate and fluctuating body—Power of appointment or election in—Mischief of leaving—Mode of appointment—Direction proper to be given as regards.*

In a suit brought, under the provisions of S.539 of C.P.C. of 1882, by 5 Mahomedan worshippers at a mosque for the appointment of trustees and the settlement of a scheme of management in respect of the mosque, their Lordships observed that the case illustrated the mischief of leaving the power of appointing or electing trustees in the hands of an indeterminate and necessarily fluctuating body of people, whether they called themselves Panchayat or jamat, and held that, in the interests of the institution which formed the primary matter for consideration, the appointment of future trustees should be entrusted to a Committee of the worshippers the composition of which should be in the discretion of the Judge, with due regard to local conditions and needs; and that in settling the scheme the Judge should lay down rules for the guidance of the Committee in the discharge of any supervisory functions that it might appear necessary to confide to them and for filling up vacancies on their body subject to his control (136). (*Mr. Ameer Ali*.) MAHOMED ISMAIL ARIFF *v.* AHMED MOOLLA DAWOOD. (1916) 43 I.A. 127 = 43 C. 1085 (1102-3) = 20 C. W. N. 1118 = 24 C.L.J. 198 = 20 M.L.T. 110 = (1916) 1 M.W.N. 460 = 14 A.L.J. 741 = 4 L. W. 269 = 18 Bom. L.R. 611 = 9 Bur. L. T. 141 = 35 I. C. 30 = 31 M.L.J. 290.

Mutt.

—*Head of—Trusteeship of devastanams and their endowments vested in—Misconduct of head—Suit for removal of—Section if applicable to.*

C. P CODE (ACT V OF 1908)—(Contd.)**Mutt—(Contd.)**

The devasthanams and their endowments were not property of the mutt, but admittedly they are held as trust property by the person who is for the time lawfully the Pandara Sannidhi or head of the mutt, and the Pandara Sannidhi holds them as a trustee of religious and charitable trust properties, to which S. 539 of C. P. C. of 1882, would apply. (*Sir John Edge*.) NATARAJA THAMBIRAN *v.* KAILASAM PILLAI. (1920) 48 I.A. 1 (7) =

44 M. 283 (288) = (1920) M.W.N. 371 = 13 L.W. 301 = L.R. 2 P.C. 5 = 18 A.L.J. 1041 = 25 C.W.N. 145 = 57 I.C. 564 = 39 M.L.J. 98.

Religious Endowment—Asthali.

—*Scheme as to property of—Settlement of—Principles applicable to.*

As to the property of the (spiritual) institution the scheme settled by the Court below is in accord with the principles laid down by this Board in L.R. 43 I.A. at p. 73. The institutional trust must be respected; but the sect and the body of worshippers for whose benefit it was set up have the protection of the Court against their property being the subject of abuse, speculation and waste. (*Lord Shaw*.) ACHARYASHRI SRIPATI PRASADJI *v.* LAXMIDAS.

(1928) 29 L. W. 113 = A.I.R. (1928) P.C. 27 = 33 C. W. N. 352 = I. D. (1929) P.C. 50 = 31 Bom. L.R. 243 = 114 I.C. 10 = 27 A.L.J. 401.

Temple—Scheme for.

—*Manager duly constituted of institution—Authority of—Scheme calculated to impair—Propriety.*

The scheme framed by the High Court for the management of the Tirupati Devasthanam directed the appointment of an additional paid trustee to take part in the management with the Mahant, and provided that in the case of difference of opinion arising between the Mahant and the additional trustee the matter should be referred to the Padma Jeyangar, whose opinion should be followed. Either of the trustees, according to the scheme, should be liable to summary removal by the District Court on good cause shown, subject to appeal to the High Court.

The Mahant appealed to the P.C. complaining that the effect of the scheme framed by the High Court would be to lower the position of the Mahant and weaken his authority.

Their Lordships settled a scheme which would meet the exigencies of the case without impairing the authority of the Mahant as the duly constituted manager of the institution. (*Lord Macnaghten*.) PRAYAGA DOSS JEE VARU *v.* TIRUMALA SRIRANGA CHARYULU VARU.

(1907) 34 I.A. 78 = 30 M. 138 = 18 M.L.T. 236 = 11 C.W.N. 442 = 9 Bom. L.R. 588 = 9 Sar. 213.

—*Surplus income—Application of, to objects foreign to purposes of institution—Propriety.*

The scheme framed by the High Court for the management of the Tirupati Devasthanam directed, on the cypres principle, that the surplus revenue of the temple should be devoted to objects admirable perhaps in themselves, but somewhat foreign to the purposes of the institution.

Their Lordships modified the scheme by directing all surplus income to be invested for the benefit of the temple. (*Lord Macnaghten*.) PRAYAGA DOSS JEE VARU *v.* TIRUMALA SRIRANGA CHARYULU VARU.

(1907) 34 I.A. 78 = 30 M. 138 = 11 C.W.N. 442 = 9 Bom. L.R. 588 = 9 Sar. 213 = 18 M.L.J. 236.

—*Tirupati temple—Scheme settled by P.C. for management of. See HINDU LAW—RELIGIOUS ENDOWMENT—TEMPLE—TIRUPATI TEMPLE.*

(1907) 34 I. A. 78 = 30 M. 138.

—*Trustee of—Appointment or election of—Power of—*

C. P. CODE (ACT V OF 1908)—(Contd.)**Temple—Scheme for.**

Vesting of, in indeterminate and fluctuating body—Mischiefs of. *See* UNDER THIS SECTION—MOSQUE—TRUSTEES OF.

—S. 92 (1) (a) and (b)—Object of.

There had been some divergence of opinion as to whether S. 539 of C. P. C. of 1882 authorized the removal of a trustee or the directing of accounts and inquiries. Most of the High Courts held that the power to appoint a new trustee necessarily involved the power to remove an old trustee. But the Madras High Court held to the contrary. The Legislature in 1908 adopted the former view, and inserted clause (a) expressly giving power to remove a trustee, in addition to the power to appoint new trustees [now clause (b)]. (*Lord Sinha*). *ABDUR RAHIM v. SYED ABU MAHOMED BARKAT ALI SHAH*.

(1927) 55 I.A. 96 = 55 C. 519 = I.L.T. 40 C. 19 =

9 P.L.T. 65 = 27 L.W. 339 = 32 C.W.N. 482 =

26 A.L.J. 464 = 108 I.C. 361 = 30 Bom. L.R. 744 =

48 C.L.J. 55 = (1928) M.W.N. 926 =

A.I.R. (1928) P.C. 16 = 54 M.L.J. 609 (615)

—S. 92 (1) (d)—Object of.

Accounts and inquiries, though not expressly mentioned in the relief clauses of S. 539 of the old Code, had been held by some of the Courts to be necessarily incidental to the power to remove an old trustee and appoint a new one. That power was expressly inserted by the present cl. (d). (*Lord Sinha*). *ABDUR RAHIM v. SYED ABU MAHOMED BARKAT ALI SHAH*. (1927) 55 I.A. 96 = 55 C. 519 =

1 L.T. 40 C. 19 = 9 P.L.T. 65 = 27 L.W. 339 =

32 C.W.N. 482 = 26 A.L.J. 464 = 108 I.C. 361 =

30 Bom. L.R. 744 = 48 C.L.J. 55 = (1928) M.W.N. 926 =

A.I.R. (1928) P.C. 16 = 54 M.L.J. 609.

—S. 92 (1) (h)—Words “Further or other relief”—

Meaning—Relief against third parties if included.

The words “further or other relief” must on general principles of construction be taken to mean relief of the same nature as clauses (a) to (g). In view of the state of the previous law, the Legislature could not have intended to include relief against third parties in cl. (h) under the general words “further or other relief” (*Lord Sinha*). *ABDUR RAHIM v. SYED ABU MAHOMED BARKAT ALI SHAH*. (1927) 55 I.A. 96 = 55 C. 519 =

I.L.T. 40 C. 19 = 9 P.L.T. 65 = 27 L.W. 339 =

32 C.W.N. 482 = 26 A.L.J. 464 = 108 I.C. 361 =

30 Bom. L.R. 744 = 48 C.L.J. 55 = (1928) M.W.N. 926 =

A.I.R. (1928) P.C. 16 = 54 M.L.J. 609.

—S. 92 (2)—Object and effect of.

Under the Code of 1877, as well as the Code of 1882, the question had arisen whether S. 539 was mandatory and therefore all suits claiming any relief mentioned in S. 539 should be brought as required by that section or whether the remedy provided by S. 539 was in addition to any other remedy that existed under the law for the redress of any wrongful action in connection with a public trust of a charitable or religious nature. Such rights, when claimed on behalf of the public or any section thereof, had been held to be capable of enforcement by a suit under S. 30 of those Codes; and it had also been held that private persons who had individual rights under such trusts could bring suits to enforce such individual rights by an ordinary suit without being obliged to bring a suit of a representative nature, as above-mentioned. Great divergence of opinion had arisen in India in this connection, not merely as between the different High Courts, but between different Benches of the same Court. The resulting uncertainty could only be removed by legislative enactment, and Sub-S. 2 of S. 92 was enacted to put an end to this difference of opinion. It accepted and enacted the view which had been taken by the Bombay High Court, as opposed to the view taken by the other High Courts generally, viz., that a suit which prayed

C. P. CODE (ACT V OF 1908) S. 92 (2)—(Contd.)

for any of the reliefs mentioned in S. 92 could only be instituted in accordance with the provisions of that section. (*Lord Sinha*). *ABDUR RAHIM v. SYED ABU MD. BARKAT ALI SHAH*. (1927) 55 I.A. 96 = 55 C. 519 =

I.L.T. 40 C. 19 = 9 P.L.T. 65 = 27 L.W. 339 =

32 C.W.N. 482 = 26 A.L.J. 464 =

108 I.C. 361 = 30 Bom. L.R. 744 =

48 C.L.J. 55 = (1928) M.W.N. 926 =

A.I.R. (1928) P.C. 16 = 54 M.L.J. 609 (616).

—S. 97—Preliminary decree not appealed from—Validity of, if can be questioned in appeal from final decree.

A party who omits to appeal from a decree which is a preliminary decree within S. 97 of C. P. C. of 1908 cannot question its correctness in an appeal preferred by him from the final decree in the suit (94-5). (*Lord Sumner*). *AHMAD MUSAJI SALEJI v. HASIM EBRAHIM SALEJI*.

(1915) 42 I.A. 91 = 42 C. 914 (924-5) =

19 C.W.N. 449 = (1915) M.W.N. 485 =

17 M.L.T. 312 = 21 C.L.J. 419 = 2 L.W. 377 =

13 A.L.J. 540 = 17 Bom. L.R. 432 =

28 I.C. 710 = 29 M.L.J. 70.

—The respondent, a shareholder in a company, brought a suit against, *inter alia*, the appellant (chairman of the Board of Directors and the manager of the company) for an account of the funds belonging to the company used by the appellant for his own purposes. In that suit, the Sub-Judge passed a preliminary decree holding the appellant accountable for his dealings with the company's funds and directing accounts, and that decree was affirmed by the High Court on appeal and was allowed to become final.

The appellant preferred an appeal to His Majesty in Council from the final decree passed in the suit by the High Court, and on that appeal contended that he was entitled to question the preliminary decree. The certificate granted by the High Court to enable the appellant to come to His Majesty in Council did not, however, cover any appeal from the preliminary decree.

Quare whether it was open to the appellant to question in the appeal from the final decree the findings arrived at by the Indian Courts on the account ability of the appellant relative to his dealings with the company's funds. (*Md. Amcer Ali*). *SETH KEVALDAS TRIBHOVANDAS v. SAKERAL BULAKHIDAS*. (1923) 33 M.L.T. 424 (P.C.)

= 28 C.W.N. 930 = (1923) P.C. 178 =

79 I.C. 452 = (1923) 45 M.L.J. 763 (766).

—S. 98—Original Side Appeal—Judges hearing—Difference of opinion between—Letters Patent—cl. 36—Procedure under—Applicability.

In an original side appeal, the two judges, who heard the appeal, were equally divided in opinion, the Senior Judge being for allowing the appeal, the junior being for dismissing the appeal. Acting under S. 98 of C. P. C. of 1908 the Judges referred the matter to two other judges who concurred with the junior judge.

Held that a wrong course was taken when the case was referred to two other judges for decision, and that there ought to have been a decree in accordance with the judgment of the senior Judge.

S. 98 of C. P. C. of 1908 does not control S. 36 of the Letters Patent. There is no other provision in S. 98 within the meaning of S. 4 of C. P. C. and there is a special form of procedure already prescribed by S. 36 of the Letters Patent. That form of procedure S. 98 of C. P. C. does not affect (184-5). (*Lord Buckmaster*). *BHAIDAS SHIVDAS v. BAI GULAB*. (1921) 48 I.A. 181 =

45 B. 718 (722-3) = 19 A.L.J. 409 = 33 C.L.J. 488 =

(1921) M.W.N. 408 = 23 Bom. L.R. 623 = 14 L.W. 7 =

29 M.L.T. 351 = 3 U.P.L.R. (P.C.) 22 =

25 C.W.N. 605 = 60 I.C. 822 = 40 M.L.J. 519.

C. P. CODE (ACT V OF 1908), S. 98—(Contd.)

—Reference to third judge under—Scope of—Jurisdiction of third judge.

When two Judges had differed on a point of law and the matter was referred to a third judge who had not confined his opinion to that specific point.

Held, that he ought to have given his opinion on the point referred to alone as required by S. 98 of the Civil Procedure Code (1908). (*Sir John Edge*). PARTAB SINGH v. BHABUTI SINGH. (1913) 40 I. A. 182 (192) = 35 A. 487 (498) = 21 I. C. 288 = 11 A. L. J. 901 = 17 C. W. N. 1165 = (1913) M. W. N. 785 = 14 M. L. T. 299 = 18 C. L. J. 384 = 15 Bom. L. R. 1001 = 25 M. L. J. 492.

—S. 99—Commission to examine party—Omission to issue—Reversal of decree on ground of—Conditions.

Where, in an appeal to the Privy Council arising out of a suit upon a mortgage bond executed by a Purdanashin lady, one of the grounds taken was that the first court had committed a material error in refusing to allow the evidence of the lady to be taken on commission but it appeared from the judgments of the courts below that, even if the lady had been examined and had given evidence in support of her written statement it would not have been believed and it could not reasonably have prevailed against the plaintiff's evidence, *held* that the want of the defendant's evidence had not affected the merits of the case within the meaning of S. 578 of C. P. C. of 1882, and that the decree appealed against ought not to be reversed on the ground urged. (*Sir Richard Couch*). SRIMATI AKIKUNNISSA BIBI v. RUP LAL DAS. (1898) 25 I. A. 117 = 25 C. 807 = 2 C. W. N. 566 = 7 Sar. 358.

—Minor—Suit on behalf of—Next friend's authority to sue—Objection to—Appeal—Permissibility for first time in.

An objection raised for the first time in the appeal to the P.C. that the manager of the Court of Wards who instituted the suit on behalf of the infant plaintiff, who had admittedly a right to sue, had no authority to represent the plaintiff in the suit, was held to be only a formal one, and was not allowed to be raised at that stage (27-8) (*Sir Barnes Peacock*). BABOO HURDEY NARAIN SAHU v. BABOO ROODER PERKASH MISSER. (1883) 11 I. A. 26 = 10 C. 626 (634) = 4 Sar. 510.

—Misjoinder of causes of action—Interference in appeal on ground of—Putting plaintiff to his election to proceed against one of the defendants—Propriety.

A reversioner sued for a declaration of the invalidity of several alienations by a Hindu widow, making the widow and the several alienees defendants to the suit. The first Court decreed the suit. On appeal, the Chief Court held that there was misjoinder of causes of action, and thought that the proper course was to allow the plaintiff to make his election which suit he would pursue without prejudice to his rights to bring fresh suits against the other defendants separately. The plaintiff elected to proceed against the 5th defendant.

Held that, assuming there was any such misjoinder, S. 578 of C. P. C. of 1882 had the effect of preventing such a defect from being made a ground of appeal and from being dealt with on appeal as it was dealt with by the Chief Court (113). (*Sir Arthur Wilson*). RUP NARAIN v. GOPAL DEVI. (1909) 36 I. A. 103 = 36 C. 780 (798) = 10 C. L. J. 58 = 13 C. W. N. 920 = 5 M. L. T. 423 = 11 Bom. L. R. 833 = 6 A. L. J. 567 = 3 I. C. 382 = 93 P. R. 1909 = 146 P. W. R. 1909 = 68 P. L. R. 1910 = 19 M. L. J. 548.

C. P. CODE (ACT V OF 1908), S. 100—(Contd.)

(N. B. Cases under the heading—Privy Council—Practice—Question of fact—Concurrent findings—Interference with—Cases under head of—May also be usefully consulted)

—Adverse-possession—Question as to—Fact or Law.

Possession may be adverse or not, according to circumstances; and the question of adverse or non-adverse possession is mainly a question of fact (56). (*Lord Hobhouse*). BABU RAM SINGH v. DEPUTY COMMISSIONER OF BARA BANKI. (1889) 17 I. A. 54 = 17 C. 444 = 5 Sar. 486 = R. & J.'s No. 116.

The question whether possession is adverse or not is often one of simple fact, but it may also be a conclusion of law, or a mixed question. Their Lordships have no wish to restrict the range of a rule which is designed to lessen the expense of litigation in cases of small value commenced in the Munsif's Court (56).

Where the first appellate Court itself treated the question of adverse possession apart from its findings on simple fact, and as the proper legal conclusion to be drawn from those findings, *held*, that the question was not one of simple fact and that the High Court were at liberty in second appeal to come to conclusions different from those of the first appellate Court on that point (56). (*Lord Hobhouse*). MAHARAJAH SIR LUCHMESWAR SINGH BAHADUR v. SHEIK MANGWAR HOSSAIN. (1891) 19 I. A. 48 = 19 C. 253 (262-3) = 6 Sar. 133.

—Agent—Notice to, notice to principal or not—Finding as to—Reversal of, on application of legal principles to facts found—Jurisdiction.

Where, notwithstanding evidence that in a previous mutation proceeding between the plaintiff and the defendant the plaintiff's agent who conducted the said litigation as his agent had knowledge of an adverse title set up by the defendant under a particular deed, the Court of First Instance and the first appellate Court found that the plaintiff came to know of the adverse title set up by the defendant much later, but the Judicial Commissioner in Second Appeal reversed the Courts below and held that the plaintiff had notice through his agent, *held* that the Judicial Commissioner did not reverse any finding of fact by the courts below, but merely applied a well-known and universal rule of law to the facts before him (211-2). (*Lord Davey*). RAJA RAMPAL SINGH v. BALABHADAR SINGH. (1902) 29 I. A. 203 = 25 A. 1 (16-7) = 6 C. W. N. 849 = 4 Bom. L. R. 832 = 8 Sar. 340.

—Bill of Exchange—Presentment for acceptance of—Time of—Reasonableness of—Question as to—Mixed law and fact. See NEGOTIABLE INSTRUMENT—PRESENTMENT FOR ACCEPTANCE OF—TIME OF—REASONABLENESS OF—QUESTION AS TO. (1854) 9 Moo. P.C. 46 (66).

—Boundary dispute—Agreement of parties to accept certain boundary—Decision ignoring—Error of law. See BOUNDARY DISPUTE—AGREEMENT OF PARTIES, ETC.

(1893) 21 I. A. 39 (46) = 21 C. 504 (513-4). —Boundary dispute—Ameens appointed in suit and in appeal in—Reports of—Conflict between—Appellate decision on foot of report of Ameen appointed in suit—Legality of. See BOUNDARY DISPUTE—AMEEN'S REPORT IN—SUIT AND APPEAL.

(1893) 21 I. A. 39 (44) = 21 C. 504 (511-2).

—Custom—Proof of—Question as to—Fact or Law.

The question whether a custom set up has been established is strictly speaking a pure question of fact determinable upon the evidence given in the case. (*Sir Arthur Wilson*). RUP CHAND v. JAMBU PARSHAD.

(1910) 37 I. A. 93 (104) = 7 A. L. J. 349 = 14 C. W. N. 545 = 12 Bom. L. R. 452 = 11 C. L. J. 454 = 6 I. C. 272.

C. P. CODE (ACT V OF 1908), S. 100—(Contd.)

—Documents—Construction of—Question as to—Fact or Law—Documents forming root of title or basis of suit—Documents forming part of evidence—Cases of—Distinction

The question is not one of construction of one or more deeds which would be a question of law, but is a question as to the effect to be given to decrees, leases, and other documents as evidence of the fact of adoption and its consequence (58). (*Lord Shand*). LUCHMUN LAL CHOWDHRY v. KANHYA LAL MOWAR.

(1894) 22 I. A. 511 = 22 C. 609 (617-8) = 6 Sar. 558.

The right construction of documents is a question of law which judges in Second Appeals are not by Ss. 584 and 585 of the Code of Civil Procedure precluded from considering by any finding of a lower appellate Court based upon such documents. The Subordinate Judge arrived at his finding by inferences drawn upon an incorrect construction of the *wajib-ul-arz*, and the Judges in Second Appeal consequently were not bound by his finding that the plaintiffs were the proprietors of the lands (255-6). (*Sir John Edge*). FATEH CHAND v. KISHEN KUNWAR.

(1912) 39 I. A. 247 = 34 A. 579 (585-6) = 12 M. L. T. 413 = (1912) M. W. N. 1065 = 14 Bom. L. R. 1090 = 16 C. W. N. 1033 = 17 C. L. J. 1 = 10 A. L. J. 335 = 16 I. C. 67 = 23 M. L. J. 330.

Where, in a suit under S. 9 of the Madras Rent Recovery Act, the sole question for determination was whether an arrangement entered into by the tenants with their landlord in fasli 1283, and confirmed by the former in fasli 1292, was permanent and, in Second Appeal, the High Court upset the finding of fact of the Courts below that it was permanent because that conclusion was against what, according to the High Court, was the proper construction of certain *muchilikkas* filed in the case, *Held* that the said *muchilikkas* being only part of the evidence on which the courts below had acted, the High Court had no jurisdiction to interfere with their finding of fact, even if the said *muchilikkas* had been erroneously construed by the courts below (265). (*Mr. Ameer Ali*). RAVI VEERARAGHAVULU v. BOMMA DEVARA VENKATA NARASIMHA.

(1914) 41 I. A. 258 = 37 M. 443 (454) = (1914) M. W. N. 695 = 16 M. L. T. 262 = 20 C. L. J. 375 = 16 Bom. L. R. 853 = 19 C. W. N. 97 = 25 I. C. 305 = 1 L. W. 779 = 27 M. L. J. 451.

To ascertain the date, at which a particular holding first began to be held as a definite holding, is essentially a question of fact, and must depend upon evidence. That evidence may be, and naturally is, documentary. But where the documents admitted in evidence upon that question are really historical materials, although they have to be construed, and if possible understood, they are not to be treated as involving issues of law merely because they have to be construed. It is not as though they were being construed as instruments of title, or even contracts or statutes, or otherwise the direct foundation of rights. Unless, therefore, it can be shown that the first appellate court has misdirected itself in point of law in dealing with the question when an under-tenure first began upon such documentary evidence, there is no ground for appealing from its decision upon that question. The decision cannot be interfered with on the ground that a different conclusion of fact might have been drawn from those documents. (*Lord Sumner*). MID-NAPORE ZEMINDARY CO., LTD. v. UMA CHARAN MANDAL. (1923) 21 A. L. J. 723 = (1923) P. C. 187 = 4 P. L. J. 627 = 33 M. L. T. 291 (P. C.) = (1923) M. W. N. 832 = 25 Bom. L. R. 1287 = L. R. 4 P. C. 184 = 40 C. L. J. 16 = 29 C. W. N. 131 = 74 I. C. 482 = 45 M. L. J. 663.

C. P. CODE (ACT V OF 1908), S. 100—(Contd.)

See C.P.C. OF 1908, S. 110—SUBSTANTIAL QUESTION OF LAW—DOCUMENTS.

(1928) 55 I. A. 380 = 56 M. L. J. 1.

—Evidence—Consideration of—Jurisdiction.

RAM CHUNDER DUTT v. JUGHESH CHUNDER DUTT.

(1873) 19 W. R. 353 = 12 B. L. R. 229 = 2 Suth. 836 (839) = 3 Sar. 249.

—The case was before the High Court upon special appeal, and therefore in strictness they had nothing to do with the evidence in the cause (6). (*Sir Barnes Peacock*). MEER MAHOMED HOSSEIN v. FORBES.

(1874) 2 I. A. 1 = 22 W. R. 316 = 3 Sar. 402 = 3 Suth. 32.

Questions of law and of fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is essentially a question of law, so also is the question of admissibility of evidence and the question of whether any evidence has been offered on one side or the other; but the question whether the fact has been proved, when evidence for and against has been properly admitted, is necessarily a pure question of fact (187).

Where the question for determination was as to the character of certain lands, and as to what was the measurement properly applicable, and the real ground on which the High Court in second appeal reversed the decree of the lower appellate court was that upon the documents and evidence placed before the court below the High Court would have come to a different conclusion, *held* that the High Court had exceeded their jurisdiction, because it was precisely that revision of evidence which was excluded by the limited character of the appeal (189).

It may well be that before different tribunals the witnesses summoned and the documents used would have created an opinion upon the merits of the controversy different from that which was formed by the District Judge (the lower appellate court). But upon this the High Court was not competent to enter; their functions were completely circumscribed by the provisions of the statute passed for the express purpose of securing some measure of finality in cases where the balance of evidence, verbal and documentary, arose for decision (189). (*Lord Buckmaster*). NAFAR CHANDRA PAL v. SHUKUR.

(1918) 45 I. A. 183 = 46 C. 189 (195, 197-8) = 23 C. W. N. 345 = 9 L. W. 552 = 51 I. C. 760.

—Evidence—Inferences from, contrary to those drawn by Courts below—Drawing of—Jurisdiction—Result of doing so being to review findings of facts of Courts below—Effect.

A court cannot be said to act strictly within its power upon a special appeal, if its judgment proceeds upon inferences drawn from the evidence, which are contrary to the inferences drawn by the two courts below, as it so far involves a review of their decision upon matters of fact. (*Sir James Colvile*). ASAD ALI BEG v. ZAFFER ALI BEG.

(1879) 3 Suth. 623 (625) = Bald. 262 = 3 I. J. 387.

—Fact—Law—Questions of—Decision as to—Difficulty in regard to.

It is not always an easy matter to separate a finding of fact from a question of law. It may often be open to argument that the materials which have been accepted by one Court as establishing a certain conclusion were not in themselves sufficient for its support, if their legal weight had been properly measured and ascertained. (*Lord Buckmaster*). SHYAMANANDA DAS v. RAMKANTA DAS. (1917) 42 I. C. 258 = 21 C. W. N. 1142 = (1917) M. W. N. 642.

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—Questions of law and of fact are often difficult to disentangle (185). (*Lord Blanesburgh*). DHANNA MAL v. MOTE SAGAR. (1927) 54 I. A. 178 =

8 Lah. 573 = 52 M. L. J. 663 =
39 M. L. T. 161 = 26 L. W. 634 =
28 Punj. L. R. 658 = 25 A. L. J. 959 =
29 Bom. L. R. 870 = 31 C. W. N. 677 =
101 I. C. 355 = A. I. R. (1927) P. C. 102.

—Fact—True question of, not considered by Court below—Evidence showing that it should have been decided in appellant's favour—Fraud—Finding of—No evidence to support—Interference in case of—Jurisdiction.

Upon a second appeal the decree of a Subordinate Judge in favour of the plaintiffs affirmed on the facts by the District Judge, was set aside by the High Court on the grounds that the evidence taken showed that the true question of fact, which had not been considered and as to which no issue had been framed, should have been answered in favour of the defendant, and that there was no evidence to support a finding of fraud arrived at by the lower courts:

Held that there was jurisdiction under S. 100 of the Code of Civil Procedure, 1908, to set aside the decree upon the grounds above stated, and that upon the evidence, it had been rightly set aside. (*Viscount Haldane*) DANUSA v. ABDUL SAMAD. (1919) 46 I. A. 140 =

47 C. 107 (113) = 37 M. L. J. 36 =
24 C. W. N. 81 = 21 Bom. L. R. 920 =
15 N. L. R. 97 = 10 L. W. 310 =
(1919) M. W. N. 505 = 17 A. L. J. 700 =
51 I. C. 177.

—Facts found by Court below—Binding nature of, in S. A.—Assumed case inconsistent with findings of Court below—Conclusion founded on—Propriety.

In second appeal, the High Court is bound to accept the facts found established by the judgment of the lower appellate court, and is not at liberty to collect facts anew (22). It should not depart altogether from the case made by the plaint, and should not found its conclusion upon an assumed case wholly inconsistent with the findings of the courts below (23). (*Lord Westbury*). ESHENCHUNDER SINGH v. SHAMACHURN BHUTTS. (1866) 11 M. I. A. 7 =
6 W. R. P. C. 57 = 2 I. J. N. S. 87 =
1 Suth. 649 = 2 Sar. 209.

—Facts found by Court below—Conclusion proper from—Question as to—Law, not fact.

Where the facts found by the first appellate Court need not be questioned, and it is the soundness of the conclusions from their that is alone in question, that is a matter of law on which the second appellate court can entertain an appeal (232-3). (*Sir Richard Couch*). RAM GOPAL v. SHAMSKHATOR. (1892) 19 I. A. 228 =

20 C. 93 (98-9) = 6 Sar. 247.

—See UNDER THIS SECTION—AGENT—NOTICE TO ETC. (1902) 29 I. A. 203 (211-2) = 25 A. 1 (16-7).

—The proper effect of a proved fact is a question of law (185). (*Lord Blanesburgh*). DHANNA MAL v. MOTI SAGAR. (1927) 54 I. A. 178 = 8 Lah. 573 =

52 M. L. J. 663 = 39 M. L. T. 161 = 26 L. W. 634 =
28 Punj. L. R. 658 = 25 A. L. J. 959 =
29 Bom. L. R. 870 = 31 C. W. N. 677 =
101 I. C. 355 = A. I. R. (1927) P. C. 102.

—Finding of fact—Binding nature of—Rule strict as to—Weakening of—Improperly.

Their Lordships would be the last to seek to abridge the effect of Ss. 100 and 101 of C. P. C. of 1908, or weaken the strict rule that on second appeal the appellate court is bound

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by the findings of fact of the Court below (185). (*Lord Blanesburgh*). DHANNA MAL v. MOTI SAGAR. (1927) 54 I. A. 178 = 8 Lah. 573 =

39 M. L. T. 161 = 26 L. W. 634 =
28 Punj. L. R. 658 = 25 A. L. J. 959 =
29 Bom. L. R. 870 = 31 C. W. N. 677 =
101 I. C. 355 = A. I. R. (1927) P. C. 102 =
52 M. L. J. 663.

—Finding of fact—Conclusion of law—Decision as to whether a particular conclusion is the one or the other—Difficulty in regard to. See C. P. C. OF 1908, S. 100—FACT—LAW.

—Finding of fact—Interference with—Jurisdiction.

The judgment of the first appellate Court upon any issue of fact is final, and can only be brought before the High Court, by special appeal, on some alleged error upon a point law or procedure (214). (*Sir James W. Colville*). MUTHUSAWMY JAGAVERA YETTAPPA NAICKER v. VENCATESWARA YETTAYA. (1868) 12 M. I. A. 203 =
11 W. R. 6 = 2 B. L. R. P. C. 15 = 2 Suth. 175 =
2 Sar. 395.

—According to the practice of the Courts of India, these two decisions of the trial Court and of the first appellate Court were final in India on questions of fact, though on questions of law or procedure there lay a special appeal to the Sudder Court (304). (*Sir James W. Colville*). RAJA SAHIB PERHLAD SEIN v. BABOO BUDHOO SINGH. (1869) 12 M. I. A. 275 = 12 W. R. P. C. 6 =
2 B. L. R. P. C. 111 = 2 Suth. 225 = 2 Sar. 430.

—The decisions of the Sudder Court were made on special appeals. In such appeals that Court could not decide on questions of fact (196). (*Sir James W. Colville*). RAM CHUNDER DUTT v. CHUNDER COOMAR MUNDUL. (1869) 13 M. I. A. 181 = 2 Sar. 507.

—On special appeal the Sudder Court had no jurisdiction to determine any question of fact (566). (*Lord Chelmsford*). PATTABHIRAMIER v. VENCATAROW NAICKEN. (1870) 13 M. I. A. 560 = 15 W. R. 35 =

7 B. L. R. 136 = 2 Suth. 410 = 2 Sar. 623.

—On special appeal, the Court hearing the appeal is bound by the findings of fact of the Court below, and has only jurisdiction to disturb the judgment of the Court below upon some ground which can be lawfully made a ground of special appeal. SHEO BUKSH SINGH v. KALKA BUKSH. (1872) 8 M. J. 183.

—On what was formerly called a special appeal, but which is now called a second appeal, the Court has no jurisdiction to deal with any findings of fact. The facts as found by the lower appellate Court would have to be taken as being the real facts of the case (68). (*Sir Richard Couch*). RANI BHAGOTI v. RANI CHANDAN. (1885) 12 I. A. 67 = 11 C. 386 (389-90) = 4 Sar. 624.

—The limitations to the power of the Court by Ss. 584 and 585 of the Code of 1882, in a second appeal, ought to be attended to and the appellant ought not to be allowed to question the finding of the first appellate Court upon a matter of fact (238-9). (*Sir Richard Couch*). PERTAB CHUNDER GHOSE v. MOHENDRA PURKAIT. (1889) 16 I. A. 233 = 17 C. 291 (298) = 5 Sar. 444.

—In second appeal, the High Court is precluded by the provisions of Ss. 584 and 585 of the Civil Procedure Code, 1882, from reviewing the judgment of the first appellate Court on the facts which it held to be established, and can only entertain a question of law (206). (*Lord Shand*). SARAT CHUNDER DEY v. GOPAL CHUNDER LAHA. (1892) 19 I. A. 203 = 20 C. 296 (301-2) = 6 Sar. 224.

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—In a second appeal, the High Court has no power to entertain the case except as an appeal from an appellate decree, and that only upon the grounds specified in S. 584 of C.P.C. of 1882, which deprives the High Court of the right to review findings of facts by the first appellate Court, unless these are tainted with one or other of the errors or defects specified in its sub-sections (45). (*Lord Watson.*) LUKHI NARAIN JAGADEB *v.* MAHARAJA JODU NATH DEO. (1893) 21 I.A. 39 = 21 C. 504 (512) = 6 Sar. 408.

—In second appeal the High Court has no jurisdiction to interfere with any finding of fact of the first appellate Court; its only power to determine issues of fact is that created by S. 103 of C.P.C. of 1908 (82). (*Sir Lawrence Jenkins.*) SETURATNAM AYYAR *v.* VENKATACHALA GOUNDAN. (1919) 47 I.A. 76 = 43 M. 567 (573) = 18 A.L.J. 707 = 27 M.L.T. 102 = 11 L.W. 399 = 22 Bom. L. R. 578 = (1920) M.W.N. 61 = 56 I.C. 117 = 25 C. W. N. 485 = 38 M.L.J. 476.

—In second appeal, findings of fact of the Courts below, properly and regularly arrived at, are conclusive. (*Mr. Ameer Ali*) KODOTH AMBU NAIR *v.* SECRETARY OF STATE FOR INDIA. (1924) 51 I.A. 257 (266) = 47 M. 572 = 26 Bom. L.R. 639 = 20 L.W. 49 = (1924) M. W. N. 572 = 35 M.L. T. 128 = A. I. R. 1924 P.C. 150 = 29 C.W.N. 365 = 80 I. C. 835 = 47 M.L.J. 35.

—(*Lord Philimore.*) BASIRAM SAHA ROW *v.* RAM RATAN ROY. (1927) 54 I.A. 196 = 54 C. 586 = (1927) M.W.N. 437 = 31 C.W.N. 885 = 39 M.L.T. 170 = 26 L.W. 642 = 101 I.C. 359 (2) = A.I.R. 1927 P.C. 117 = 53 M.L.J. 117.

—Finding of fact—Interference with—Jurisdiction—Evidence—Inadmissibility in part of—Other evidence sufficient to support finding. (1867) 11 M.I.A. 369 (385); 52 I.A. 379 (384) = 6 Lah. 502 = 50 M. L. J. 637.

—Finding of fact—Interference with—Jurisdiction—Evidence—Misconstruction of piece of—Other evidence sufficient to support finding. (1876) Bald. 24.

—Finding of fact—Interference with—Jurisdiction—Evidence to support finding—Absence of—Effect.

It is not open to a second appellate Court to disturb the findings of fact by the lower Courts, in a case in which it cannot be said that there was no evidence to support those findings. (*Sir James W. Colville.*) THAKUR DURRIAO SINGH *v.* THAKUR DAVI SINGH. (1873) 1 I. A. 1 (8) = 13 B.L.R. 165 = 3 Sar. 301 = R. & J.'s No. 25. (Oudh).

—The appeal to the High Court was a special appeal, and on that appeal the High Court could not have disturbed the finding of the lower appellate Court on a question of fact, unless there was no evidence at all to support it (251) (*Sir James W. Colville*) DEENDAYAL LAL *v.* JUGDEEP NARAIN SINGH. (1877) 4 I.A. 247 = 3 C. 198 (204) = 1 C.L.R. 49 = 3 Sar. 730 = 3 Suth. 468.

—The decree appealed from to the High Court on this occasion being a decree after remand, on a second or special appeal, the learned Judges had not, and accordingly they did not profess to have, jurisdiction to deal with it on its merits. But it was, in the opinion of their Lordships, within their jurisdiction to dismiss the case, if they were satisfied that there was, as an English lawyer would express it, no evidence to go to the jury, because that would not raise a question of fact such as arises upon the issue itself, but a question of law for the consideration of the Judge (109-10). (*Lord Watson.*) ANANGAMANJARI CHOWDHURI *v.* TRIPURA SOONDARI CHOWDHURI. (1887) 14 I.A. 101 = 14 C. 740 (747) = 5 Sar. 45.

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—In a case in which the first Court held that a compromise on which the defendants relied in bar of the suit was binding on the plaintiff, the District Judge, on appeal, held that it was not binding. When his judgment came to be looked at, it appeared that there was no evidence whatever, certainly none upon which he might reasonably come to the conclusion that the compromise was not binding upon the plaintiff.

Held, that there was a substantial error or defect in the procedure of the District Judge, and that the High Court were right in reversing him and in restoring the first Court (69). (*Sir Richard Couch.*) RANI HEMANTA KUMARI DEBI *v.* BROJENDRO KISHORE ROY. (1890) 17 I.A. 65 = 17 C. 875 (882) = 5 Sar. 542.

—The High Court has under S. 584 of C.P.C. of 1882, jurisdiction to interfere with the decision of the lower appellate Court where its decision on a question of fact is without evidence to support its finding. (*Sir Arthur Wilson.*) SHIVABASAVA *kom* AMINGAVDA *v.* SANGAPPA *bin* AMINGAVDA. (1904) 31 I.A. 154 (158-9) = 29 B. 1 (11-2) = 6 Bom. L.R. 770 = 8 C.W.N. 865 = 1 A. L. J. 637 = 8 Sar. 720.

—See C.P.C. OF 1908, S. 100—FACT—TRUE QUESTION OF, ETC. (1919) 46 I.A. 140 = 47 C. 107.

—Findings of fact of the first appellate Court are binding upon the High Court in second appeal unless it can be said that there was no evidence to support the findings, (*Sir Lancelot Sanderson.*) KRISHNA REDDI *v.* RAGHAVA REDDI. A.I.R. 1927 P.C. 257 (260) = I. L. T. 40 M. 1 = 107 I.C. 449.

—Finding of fact based on oral evidence—Interference with—Jurisdiction.

In second appeal the High Court is not entitled to go behind the findings of fact of the first appellate Court when the findings do not result from the misconstruction of a document or the misapplication of law or procedure, but from the oral evidence in the case. (*Sir John Edge.*) THE MIDNAPUR ZEMINDARI COMPANY LIMITED *v.* ULMA CHARAN MUNDAL. (1919) 17 A. L. J. 1004 = (1919) M. W. N. 817 = 26 M. L. T. 489 = 22 Bom. L. R. 7 = 24 C. W. N. 201 = 52 I. C. 497 = 11 L. W. 371 = 37 M. L. J. 199.

—Finding of fact erroneous—Interference with—Jurisdiction—Evidence to support finding—Existence of—Effect.

An erroneous finding of fact is a different thing from an error or defect in procedure, and there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may be. Where there is no error or defect in the procedure, the finding of the First Appellate Court upon a question of fact is final, if that court had before it evidence proper for its consideration in support of the finding (127). (*Lord Macnaghten.*) MUSSUMAT DURGA CHOUDRAIN *v.* JAWA-HIR SINGH CHOUDHRI. (1890) 17 I. A. 122 = 18 C. 23 (30) = 5 Sar. 560.

—It has now been conclusively settled that the third court, which was in this case the court of the Judicial Commissioner, cannot entertain an appeal upon any question as to the soundness of findings of fact by the second court; if there is evidence to be considered, the decision of the second court, however unsatisfactory it might be if examined, must stand final (3). (*Lord Watson.*) RAMRATAN SUKAL *v.* MUSSUMAT NANDU. (1891) 19 I. A. 1 = 19 C. 249.

—A second appellate Court cannot entertain an appeal upon any question as to the soundness of findings of fact by the first appellate Court; if there is evidence to be considered, the decision of the first appellate Court, however unsatisfac-

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tory it might be if examined, must stand final (232). (Sir Richard Couch.) **RAM GOPAL v. SHAMSKHATON.** (1892) 19 I. A. 228 = 20 C. 93 (98-9) = 6 Sar. 247.

—No second appeal will lie except on the grounds specified in S. 100, C.P.C. The High Court has no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. (Lord Tomlin.) **RAJAH OF PITTAPUR v. SECRETARY OF STATE FOR INDIA IN COUNCIL.**

(1929) 56 I.A. 223 = 52 M. 538 = 27 A.L.J. 702 =

31 Bom. L.R. 866 = 6 O.W.N. 503 = 30 L.W. 9 =

1929 M.W.N. 442 = 50 C.L.J. 30 = 117 I.C. 481 =

33 C.W.N. 725 = A.I.R. 1929 P.C. 152 = 57 M.L.J. 64.

—An erroneous finding of fact is a different thing from an error or defect in procedure, and there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be, provided the first appellate Court had before it evidence proper for its consideration in support of the finding.

In a suit for the specific performance of an agreement by the defendant to sell to the plaintiff a portion of the property which was the subject-matter of a then pending P. C. appeal by the defendant in the event of his succeeding in the appeal in consideration of a sum of money advanced to him by the plaintiff for the purposes of the said appeal, the first appellate Court found (1) that the value of the property at the time of the agreement was not more than was admitted by the plaintiff, viz., Rs. 9,000; (2) that the bargain was not extortionate, that it was not even harsh, but that it was fair; and (3) that compensation in money was an adequate relief to the plaintiff. And there was ample evidence in support of the findings of the first appellate Court which was proper for its consideration.

Held, that the findings of the first appellate Court were binding and conclusive and could not be interfered with in second appeal. (Sir Lancelot Sanderson.) **RAMJI PATEL v. RAO KISHORE SINGH.** (1929) 56 I.A. 280 =

31 Bom. L.R. 883 = 33 C.W.N. 893 = 27 A.L.J. 780 =

1929 M.W.N. 452 = 117 I.C. 1 = I.R. (1929) P.C. 233 =

A.I.R. 1929 P.C. 190 = 57 M.L.J. 205.

—Finding of fact of appellate court affirming that of court below—Interference with—Grounds—Reason for finding—Omission of appellate Court to give, not a ground.

By S. 584 of C.P.C. of 1882, the High Court as a Second Court of Appeal is bound by the findings of fact of the lower appellate Court. The High Court is not at liberty to disregard the finding of fact given by the lower appellate Court on the ground that that Court gave no reasons for coming to the finding when it had considered the evidence and saw no reason for differing from the conclusion at which the Court of first instance had arrived (177.) (Lord Parker.) **RAM CHANDRA BHANJ DEO v. SECRETARY OF STATE FOR INDIA.** (1916) 43 I. A. 172 = 43 C. 1104 (1114-5) =

20 C. W. N. 1245 = (1916) 2 M.W.N. 175 =

20 M. L. T. 235 = 4 L.W. 251 = 14 A. L. J. 1009 =

18 Bom. L.R. 838 = 24 C.L.J. 296 = 31 M.L.J. 745.

—Grounds of second appeal under.

In its anxiety to prevent the High Court from being inundated with second appeals in trifling matters, the Indian Legislature has provided in S. 100 of C. P. C. of 1908 that such appeals shall lie to the High Court only on the grounds there stated, which are, briefly, error in law, failure to determine a material issue of law or usage, and a substantial error in procedure. (Mr. Ameer Ali.) **CHIDAMBARA SIVA-PRAKASA v. VEERAMA REDDI.**

(1922) 49 I.A. 286 (295) = 45 M. 586 (597) =

27 C.W.N. 245 = 37 C.L.J. 199 = 16 L.W. 102 =

31 M.L.T. 54 = (1922) M.W.N. 749 =

A.I.R. 1922 P. C. 292 = 68 I.C. 538 = 43 M.L.J. 640.

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—Grounds specified in—Addition to or enlargement of—Power of.

The Civil Procedure Code of 1882 contains a declaration that no second appeal will lie except on the grounds specified in S. 584. No Court in India or elsewhere has power to add to or enlarge those grounds (127). (Lord Macnaghten.) **MUSSUMMAT DURGA CHOWDHRAIN v. JAWAHIR SINGH CHOUDHRI.** (1890) 17 I.A. 122 = 18 C. 23 (30) =

5 Sar. 560.

—Hindu Law—Joint family—Members of—Exclusion from joint family property of—Finding as to—Fact or Law. See LIMITATION ACT OF 1908, ART. 127—EXCLUSION FROM JOINT FAMILY PROPERTY—FINDING AS TO.

(1917) 21 C. W. N. 1142.

—Hindu Law—Joint family—Partition—Finding as to—Fact or Law. See HINDU LAW—JOINT FAMILY—PARTITION—FINDING AS TO.

—Hindu Law—Widow—Bond by, binding estate—Execution of—Proof of—Question as to. See HINDU LAW—WIDOW BOND BY, BINDING ESTATE.

(1891) 19 I. A. 1 (3) = 19 C. 249.

—Impartible or partible estate—Question as to—Mixed law and fact. See HINDU LAW—IMPARTIBLE OR PARTIBLE ESTATE—QUESTION AS TO.

(1881) 8 I. A. 99 (110) = 3 M. 290 (302).

—Jurisdiction—Plea of—Maintainability—Plea held against in first Court and not raised before first appellate Court—Defendant's liability depending upon it. See JURISDICTION—ABSENCE OF—PLEA OF—SECOND APPEAL.

(1925) 53 I. A. 58 = 53 C. 88.

—Landlord and tenant—Agricultural holding—Rendering by tenant of land in, unfit for agricultural purposes—Question as to—Finding on—Interference with—Jurisdiction. See BENGAL ACTS—TENANCY ACT OF 1885, S. 23.

(1907) 34 I. A. 133 (136-7) = 34 C. 718 (722-3).

—Law—Conclusion of—Finding of—fact—Decision as to whether a particular conclusion is the one or the other—Difficulty in regard to. See C. P. C. of 1908, S. 100—FACT—LAW.

—Legal principles well-known—Application of, to facts found by Courts below—Question as to—Law, not fact. See C. P. C. OF 1908, S. 100—FACTS FOUND—CONCLUSION PROPER FROM.

—Malicious prosecution—Action for—Malice and reasonable and probable cause—Question as to—Fact or law. See MALICIOUS PROSECUTION—ACTION FOR—MALICE AND REASONABLE, ETC. (1900) 25 B. 332 (336-7).

—Mortgage—Proof of—Finding as to—Interference with.

The suit was by the appellant the reversionary heir of one V, for redemption of a usufructuary mortgage alleged to have been made by V's widow in favour of an ancestor of the respondent. The respondent denied the alleged mortgage, and also set up a sale of the suit property by V to P, an ancestor of the respondent. Mr. Scott, the first appellate Judge did not find, as a fact, that the plaintiff had proved the mortgage he alleged. On the contrary, he stated the inclination of his opinion to be, that the evidence proved a sale. But, because he found that the bill of sale set up by the respondent was forged, he was of opinion that the respondent was not at liberty to rely on the evidence proving a sale. Being further of opinion that, if the property was not sold, it must have been mortgaged, he passed a decree for redemption in favour of the plaintiff.

Held, that the finding of the first appellate Judge, Mr. Scott, was a conclusion of law, and that a special appeal

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was rightly allowed against his judgment under the proviso in paragraph 4 of the 4th clause of Act XVI of 1853 (163-4).

Mr. Scott's words are these: The appellant (defendant) has failed to show that the village was sold to P, and if it was not sold, it must have been mortgaged, as contended by the plaintiff. This is not a finding of fact, but an inference of law. By way of testing the accuracy of it, it may be supposed that the case had been tried before a jury in this country, and that the Judge had directed the jury in the words of Mr. Scott, namely: "The defendant has failed to show that the village was sold to P, and if it was not sold, it must have been mortgaged, as contended by the plaintiff. It is your duty, therefore, to find that the village was mortgaged." Their Lordships entertain no doubt that a bill of exception or misdirection to the jury would have been sustained if such direction had been given. That is, that such a statement would have constituted a misdirection in point of law, upon the reliance of which, the jury found the fact of the mortgage (164). (*Sir John Romilly.*) SEVVAJI VIJAYA RAGHUNADHA v. CHINNA NAYANA CHETTI.

(1864) 10 M. I. A. 151 = 2 Sar. 88.

—Onus of proof—Objection to—Maintainability. See ONUS OF PROOF—OBJECTION TO—SECOND APPEAL; ONUS OF PROOF—OBJECTION TO—P. C. APPEAL; AND ONUS OF PROOF—QUESTION AS TO—MATERIAL WHEN.

—Oudh—Revenue Settlement in—Completion of—Finding as to.

It was contended that the revenue settlement with Rajah D was never completed, and, indeed, it was so held by the Financial Commissioner. But their Lordships are of opinion that the first two lower Courts, having substantially found that a revenue settlement was made with the infant D, it was not open to the Financial Commissioner on special appeal to overrule those findings (240). RANEE OF CHIL-LAREE v. THE GOVERNMENT OF INDIA.

(1873) Sup. I. A. 237 = 3 Sar. 298 = 3 Suth. 12 = R & J's No. 24.

—Oudh Estates Act of 1869, S. 22 (4)—Daughter's son—Treatment by talukdar of, in all respects as son—Question as to—Law or fact. See OUDH ESTATES ACT OF 1869, S. 22 (4)—DAUGHTER'S SON—TREATMENT BY TALUKDAR OF, IN ALL RESPECTS AS SON—QUESTION AS TO.

(1894) 21 I. A. 163 (166) = 21 C. 997 (1002).

—Partition of estate under Bengal Estates Partition Act of 1897—Estate held in common tenancy prior to—Finding as to—Fact or law.

A finding by the lower appellate Court that an estate had, prior to its partition under the Bengal Estates Partition Act, 1907, been held in common tenancy, is a finding of fact which according to law is conclusive, and which the High Court in second appeal and their Lordships on further appeal are bound to accept without further inquiry (201). (*Lord Phillimore.*) BASIRAM SAHA ROY v. RAM RATAN ROY.

(1927) 54 I. A. 196 = 54 Cal. 586 = 1927 M. W. N. 437 = 31 C. W. N. 885 = 39 M. L. T. 170 = 26 L. W. 642 = 101 I. C. 359 (2) = A. I. R. 1927 P. C. 117 = 53 M. L. J. 117.

—Permanent Settlement of 1793—Land whether included in, or not—Question as to—Fact or law. See BENGAL ACTS—ALLUVION AND DILUVION ACT OF 1847—PERMANENT SETTLEMENT OF 1793.

(1902) 30 I. A. 44 (52) = 30 C. 291 (300).

—Pleadings—Amendment of—Second Appeal—Permissibility in. See PRACTICE—PLEADINGS—AMENDMENT OF—SECOND APPEAL.

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—Possession of tract of land—Question as to—Fact or law.

Whether there has been a persistent claim of right to a tract of land is a question of fact. Such assertion being proved, all questions as to the amount of use and enjoyment of the tract by the claimants, and as to the sufficiency of such use and enjoyment to constitute possession of the whole extent claimed, are also pure questions of fact (155). (*Lord Watson.*) SECRETARY OF STATE FOR INDIA IN COUNCIL v. NELLAKUTTI SIVA SUBRAMANYA TEVAR.

(1891) 18 I. A. 149 = 15 M. 101 (108) = 6 Sar. 74

—Practice long-standing allowing second appeals under—P. C's interference with. See STATUTE—INTERPRETATION—PRACTICE LONG STANDING AS TO.

(1914) 41 I. A. 258 (264-5) = 37 M. 443 (453).

—Principal and Agent. See C. P. C. OF 1908, S. 100—AGENT.

—Ratification—Inference of, from facts found—Soundness of—Question as to.

The question whether upon certain facts found the defendant must be held to have ratified a deed executed by his mother is one of law and a second appellate Court can entertain an appeal upon that question (232-3). (*Sir Richard Couch.*) RAM GOPAL v. SHAMSKHATON.

(1892) 19 I. A. 228 = 20 C. 93 (98-9) = 6 Sar. 247.

—Ratification—Question as to—Fact or law.

(1878) 6 I. A. 54 (62) = 3 B. 186 (193).

—Religious Endowment—Mosque—Dedication of, to particular sect or to all Mahomedans—Imam in Mosque—Qualifications for being—Findings as to.

The question whether (1) a mosque was intended for Hanafis only, and not for all Sunnis or for all Mahomedans, and (2) an Amit-bil Hadis is prohibited by its constitution from being its Imam is a pure question of fact, and it is not competent for the High Court in second appeal to interfere with the findings of the first Appellate Court on that question. The question is none the less one of pure fact because its decision rests entirely on the peculiar constitution or trusts of the mosque in question, at any rate where no written evidence is forthcoming (67). (*Lord Hobhouse.*) FUZUL KASIM v. HAJI MOWLA BUKSH.

(1891) 18 I. A. 59 = 18 C. 448 (457) = 6 Sar. 19.

—Revenue arrear—Existence of—Question as to—Fact or law—Jama-wasil-bakis—Evidence consisting of—Effect. See C. P. C. OF 1908—S. 110, SUBSTANTIAL QUESTION OF LAW—DOCUMENTS.

(1928) 55 I. A. 380 = 56 M. L. J. 1.

—Second appeal—Treatment and hearing of, as first appeal—Legality—Jurisdiction.

In a second appeal the High Court observed that "the District Judge's judgment is very unsatisfactory as to the *ratio decidendi* that the Civil Court Amin fell into error. We are not satisfied that there was evidence before him which justified his finding. We think that the proper course is to call up the case as a regular appeal before ourselves, and go through the evidence and come to the best decision we can." They accordingly ordered the case to be taken up as a regular appeal, and to be decided on the evidence. Held that, in adopting that course, the High Court exceeded the statutory limits of their jurisdiction (45).

They (the learned Judges) had no power to entertain the case except as an appeal from an appellate decree, and that only upon the grounds specified in S. 584 of C. P. C. of 1882, which deprives them of the right to review findings of fact by the first appellate Judge, unless those are tainted with one or other of the errors or defects specified in its

C. P. CODE (ACT V OF 1908), S. 100—(Contd.)

sub-sections. (*Lord Watson.*) LUKHI NARAIN JAGADEB
v. JODU NATH DEO. (1893) 21 I. A. 39 =
21 C. 504 (512) = 6 Sar. 408.

—Tenancy—Nature of—Finding as to.

Quære, whether the question whether a person is a tenant from year to year or whether he has a permanent right of occupancy in the lands in dispute is a question of fact (84). (*Sir Lawrence Jenkins*) SETHURATNAM AYYAR v. VENKATACHALA GOUNDAN. (1919) 47 I. A. 76 = 43 M. 567 (575-6) = 18 A. L. J. 707 = 27 M. L. T. 102 = 11 L. W. 399 = 22 Bom. L. R. 578 = (1920) M. W. N. 61 = 56 I. C. 117 = 25 C. W. N. 485 = 38 M. L. J. 476.

—Held that, in the circumstances of the case, the question whether a tenancy was permanent or precarious was a legal inference from facts and not itself a question of fact, and that it was competent to the High Court to entertain a second appeal on the question and to interfere with the finding of the first appellate Court thereon (185). (*Lord Blanesburgh.*) DHANNA MAL v. MOTI SAGAR.

(1927) 54 I. A. 178 = 8 Lah. 573 = 39 M. L. T. 161 = 26 L. W. 634 = 28 Punj. L. R. 658 = 25 A. L. J. 959 = 29 Bom. L. R. 870 = 31 C. W. N. 677 = 101 I. C. 355 = A. I. R. 1927 P. C. 102 = 52 M. L. J. 663.

—Tenure—Commencement of—Date of—Question as to—Fact or law—Documents tendered in evidence being historical records—Question turning upon construction of. See C. P. C. OF 1908, S. 100—DOCUMENTS—CONSTRUCTION—QUESTION OF—FACT OR LAW.

(1923) 45 M. L. J. 663.

—Valuation of property—Question as to—Fact or law.

The value to be placed at a given moment on a plot of land, which is not in the market or the subject of bargain and sale, but owes a large part of any value it possesses to the prospective results of development work, to be undertaken thereafter at an uncertain time and at an estimated cost, is not only in its essence a question of fact, but is one upon which, almost above any other, opinions will differ, without its being possible to give irrefragable reasons for any particular conclusion. (*Lord Sumner.*) NOWROJI RUSTOMJI WADIA v. GOVERNMENT OF BOMBAY.

(1925) 52 I. A. 367 (368-9) = 49 B. 700 = 23 A. L. J. 803 = 2 O. W. N. 691 = 42 C. L. J. 143 = 27 Bom. L. R. 1140 = 6 L. R. P. C. 154 = 23 L. W. 46 = 30 C. W. N. 386 = A. I. R. 1925 P. C. 211 = 90 I. C. 48 = 49 M. L. J. 233.

—S. 100 (c)—Error or defect in procedure—Point not raised and to which evidence not directed—Decision on.

There is a substantial error or defect in procedure within the meaning of cl. (c) of S. 584 of the Code of 1882 where the lower appellate court disposes of the suit upon a case not raised by the parties, and to which the evidence had not been directed; and in such a case, the High Court has jurisdiction in second appeal to interfere and to reverse the decree of the lower appellate Court. (*Sir Arthur Wilson.*) SHIVABASAVA Kom AMINGAVDA v. SANGAPPA Bin AMINGAVDA.

(1904) 31 I. A. 154 (158-9) = 29 B. 1 (11-2) = 6 Bom. L. R. 770 = 8 C. W. N. 865 = 1 A. L. J. 637 = 8 Sar. 720.

—S. 103—Issue of fact—Decision in second appeal of—Jurisdiction—Issue not determined or not satisfactorily determined by Court below.

The High Court was wrong in holding on special appeal that there had been no actual giving and actual receiving of

C. P. CODE (ACT V OF 1908), S. 103—(Contd.)

the child when the first appellate Court had not tried that issue (158-9). (*Sir Barnes Peacock.*) SREE NARAIN MITTER v. SREEMUTTY KISHEN SOONDORY DASSEE.

(1873) Sup. I. A. 149 = 11 B. L. R. 171 = 19 W. R. 133 = 3 Sar. 203 = 2 Suth. 774.

—A Court of Second Appeal is within its rights, in cases where the appropriate issue has not been framed by the Court below, but in which there is sufficient evidence on the record for deciding that issue, in raising and deciding such issue itself. (*Viscount Haldane.*) DAMUSA v. ABDUL SAMAD.

(1919) 46 I. A. 140 = 47 C. 107 (114) = 24 C. W. N. 81 = 21 Bom. L. R. 920 = 15 N. L. R. 97 = 10 L. W. 310 = (1919) M. W. N. 505 = 17 A. L. J. 700 = 51 I. C. 177 = 37 M. L. J. 36 (39).

—In a case in which the question was whether the defendants were tenants from year to year or they had a permanent right of occupancy in the lands in dispute, and the High Court in second appeal, not satisfied with the findings of the District Judge, had framed issues and asked for revised findings thereon, the District Judge submitted revised findings. The High Court were again dissatisfied with the findings, and, instead of a further reference, the High Court itself determined the issue. Held, that the High Court had power to deal with the issue under S. 103 of C. P. C. of 1908 (84). (*Sir Lawrence Jenkins.*) SETURATNAM AIYAR v. VENKATACHALA GOUNDAN.

(1919) 47 I. A. 76 = 43 M. 567 (575-6) = 18 A. L. J. 707 = 27 M. L. T. 102 = 11 L. W. 399 = 22 Bom. L. R. 578 = (1920) M. W. N. 61 = 56 I. C. 117 = 25 C. W. N. 485 = 38 M. L. J. 476.

—In order to avoid gross miscarriage of justice resulting from the omission by the lower appellate Court to determine any issue of fact or to come to a definite conclusion on a set of facts, the Code has made two distinct provisions. By S. 103 the High Court itself is vested with the power when the evidence on the record is sufficient, to determine any issue of fact necessary for the disposal of the appeal, but not determined by the lower appellate Court. By R. 25 of O. 41, it is further provided that, in the circumstances above stated, the appellate Court may frame issues for trial by the lower Court, and direct further evidence to be taken (295). (*Mr. Ameer Ali.*) CHIDAMBARA SIVAPRAKASA v. VEERAMA REDDI. (1922) 49 I. A. 286 = 45 M. 586 (598) = 27 C. W. N. 245 = 37 C. L. J. 199 = 16 L. W. 102 = 31 M. L. T. 54 = (1922) M. W. N. 749 = A. I. R. (1922) P. C. 292 = 68 I. C. 538 = 43 M. L. J. 640.

—S. 104—Applicability—L. P. Appeals.

S. 588 of C. P. C. of 1877, which has the effect of restricting certain appeals, does not apply to such a case as this, where the appeal is from one of the Judges of the High Court to the full Court (17). (*Sir Robert P. Collier.*) HURRISH CHUNDER CHOWDHRY v. KALISUNDARI DEBIA. (1882) 10 I. A. 4 = 9 C. 482 (494) = 12 C. L. R. 511 = 4 Sar. 407.

—See LETTERS PATENT—CALCUTTA (1865), S. 15—APPEAL UNDER.

(1921) 48 I. A. 76 = 48 C. 481 (488).

—Applicability—P. C. appeals.

The provision at the end of S. 588 of C. P. C. of 1882, providing that orders passed in appeal under that section shall be final, cannot restrict the provision that appeals may be brought to the King in Council from them (148-9). (*Lord Moulton.*) TEKAIT KRISHAN PRASAD SINGH v. MOTICHAND. (1913) 40 I. A. 140 = 40 C. 635 (648) = 17 C. W. N. 637 = 17 C. L. J. 573 = (1913) M. W. N. 487 = 11 A. L. J. 517 = 15 Bom. L. R. 515 = 14 M. L. T. 37 = 19 I. C. 296 = 25 M. L. J. 140.

C. P. CODE (ACT V OF 1908), S. 104—(Contd.)

—S. 104, Sub-S. (2) of C.P.C. of 1908, deals with final appeals within the limits of British India. There is nothing in S. 104 to take away the general right of appealing to the Crown given by S. 109, C. P. C. (*Lord Phillimore.*) **RAM LAL HARGOPAL v. KISHANCHAND.**

(1923) 51 I. A. 72 (79 80) = 51 C. 361 =
A. I. R. (1924) P. C. 95 = (1924) M. W. N. 79 =
7 N. L. J. 62 = 19 L. W. 549 = 34 M. L. T. 62 =
20 N. L. R. 33 = 22 A. L. J. 386 = 26 Bom. L. R. 586 =
28 C. W. N. 977 = 83 I. C. 531 = 46 M. L. J. 628.

—S. 107 (d)—Additional evidence—Admission by appellate Court of—Conditions.

An appellate Court has, under S. 107 of C. P. C. of 1908, power to take additional evidence. But that is a power which should be exercised by a Court of appeal with much caution and only in suits where it is satisfied that in the interests of justice it should be exercised, and that such additional evidence when admitted will be evidence which, if produced at the trial, would have been admissible (88) (*Sir John Edge.*) **MAHOMED KHALEEF SHIRAZI v. LA TANNERIES LYONNAISES.**

(1926) 53 I. A. 84 = 49 M. 435 =
3 O. W. N. 568 = (1926) M. W. N. 495 =
24 L. W. 115 = 44 C. L. J. 67 = 28 Bom. L. R. 1391 =
31 C. W. N. 1 = A. I. R. (1926) P. C. 34 = 94 I. C. 767 =
51 M. L. J. 570.

—S. 109—Appeal under—Right of—C. P. C. of 1908, S. 104—Effect. See C. P. C. OF 1908, S. 104—APPLICABILITY—P. C. APPEALS.

—S. 109 (a)—Accounts—Suit for—Decree or order in—Final if and when. See DECREE—ACCOUNTS—SUIT FOR.

—Arbitration Act of 1899, S. 19—Stay of proceedings under—Order refusing—Appeal from—S. 109 (c)—Certificate under—Necessity.

In a suit for damages for breach of a contract which contained an arbitration clause, the defendant applied under S. 19 of the Arbitration Act, 1899, for a stay of proceedings. The appellate Court refused a stay, reversing the Court below which granted a stay.

Held, that the order of the appellate Court was not a final order under S. 109 (a) of C. P. C. of 1908, and that an appeal to the Privy Council from it was not competent, in the absence of a certificate under S. 109 (c) of the Code.

The order does not finally dispose of the rights of the parties, but leaves them to be determined by the Courts in the ordinary way. (*Viscount Cave.*) **RAMCHAND MANJIMAL v. GOVERDHANDAS VISHINDAS RATANCHAND.**

(1920) 47 I. A. 124 = 47 C. 918 =
12 L. W. 15 = 24 C. W. N. 721 = 18 A. L. J. 591 =
22 Bom. L. R. 606 = 2 U. P. L. R. (P. C.) 94 =
(1920) M. W. N. 407 = 28 M. L. T. 87 = 56 I. C. 302 =
39 M. L. J. 27.

—Award—Order refusing to file—Order on appeal from—Appeal from—Right of.

An appeal lies to His Majesty in Council from an order passed in appeal from an order refusing to file an award.

S. 104, sub-S. (2) of C. P. C. of 1908 deals with internal appeals within the limits of British India. There is nothing in S. 104 to take away the general right of appealing to the Crown given by S. 109 of C. P. C. (*Lord Phillimore.*) **RAMLAL HARGOPAL v. KISHANCHAND.**

(1923) 51 I. A. 72 (79-80) = 51 C. 361 =
A. I. R. (1924) P. C. 95 = (1924) M. W. N. 79 =
7 N. L. J. 62 = 19 L. W. 549 = 34 M. L. T. 62 =
20 N. L. R. 33 = 22 A. L. J. 386 = 26 Bom. L. R. 586 =
28 C. W. N. 977 = 83 I. C. 531 = 46 M. L. J. 628.

—C. P. C. of 1908, O. 21, Rr. 90, 92—Orders under—Appeal from.

An appeal lies to the King in Council from an order confirming or setting aside a sale made under Ss. 311 and 312 of

C. P. CODE (ACT V OF 1908), S. 109 (a)—(Contd.)

C.P.C. of 1882 (148). (*Lord Moulton.*) **TEKAIT KRISHAN PRASAD SINGH v. MOTICHAND.** (1913) 40 I. A. 140 = 40 C. 635 (647-8) = 17 C. W. N. 637 = 17 C. L. J. 573 = (1913) M. W. N. 487 = 11 A. L. J. 517 = 15 Bom. L. R. 515 = 14 M. L. T. 37 = 19 I. C. 296 = 25 M. L. J. 140.

—C. P. C. of 1908, O. 41, R. 23—Remand order under, after deciding cardinal point in suit—Appeal from.

The plaintiff sued, alleging that one A by his will gave the suit property to some of the defendants who conveyed it to the plaintiff. Another defendant, who was the principal defendant, contested the suit, on the grounds that there was a misjoinder, and that A never made any valid gift to the grantors of the plaintiff. The other defences raised by him were all of a subordinate character.

The trial Judge took the evidence, decided against the plaintiff on the question of A's will, and did not give judgment on the other issues. The High Court, on appeal, held, reversing the trial Judge, that A had made a valid gift, and remanded the case under S. 562 of C. P. C. of 1882, to be disposed of on the other issues according to law.

Held, that the decree of the High Court was final, and that leave to appeal from it ought to have been granted by the High Court.

The will of A is the cardinal point of the suit, and as after the decision of the High Court that can never be disputed again, their order is final, notwithstanding that there may be subordinate inquiries to make. (*Lord Hobhouse.*) **SYED MUZHAR HUSEIN v. BODHA BIBI.**

(1894) 22 I. A. 1 = 17 A. 112 = 6 Sar. 580 = 5 M. L. J. 20.

—Decree in—Meaning of—Definition of word in S. 2 of Code—Applicability of.

The Code of 1882 in express terms adopts for the purposes of Ch. 45 a definition of "decree," which is special and differs from the meaning that it bears elsewhere in the Act. The definition of "decree" in S. 2 is therefore not applicable, and the word "decree" in this Chapter must be read as equivalent to "decree, judgment or order" (148-9). (*Lord Moulton.*) **TEKAIT KRISHAN PRASAD SINGH v. MOTICHAND.**

(1913) 40 I. A. 140 = 40 C. 635 (648) = 17 C. W. N. 637 = 17 C. L. J. 573 = (1913) M. W. N. 487 = 11 A. L. J. 517 = 15 Bom. L. R. 515 = 14 M. L. T. 37 = 19 I. C. 296 = 25 M. L. J. 140.

—Ex parte decree—Application to set aside—Order rejecting—Appellate order setting aside and remanding application.

In a case in which the Court below rejected an application under S. 108 of C. P. C. of 1882 to set aside an *ex parte* decree, without investigating whether the defendant-applicant had not sufficient cause for his non-appearance, the High Court, on appeal, set aside the order below and remanded the application under S. 562 of C. P. C. of 1882 to the Court below to be disposed of after such investigation.

Held, that the order of the High Court was in no sense a final order in the sense of S. 595 (a) as modified by S. 594 of C. P. C. of 1882.

It is a purely interlocutory order, directing procedure. (*Lord Robertson.*) **RAI RADHA KISHAN v. COLLECTOR OF JAUNPORE.**

(1900) 28 I. A. 28 (34) = 23 A. 220 (226-7) = 5 C. W. N. 153 = 3 Bom. L. R. 78 = 7 Sar. 800 = 11 M. L. J. 65.

—Final order—Accounts—Suit for—Order in—Final if and when. See DECREE—ACCOUNTS—SUIT FOR.

—Final order—Appeal to Privy Council from—Right of—S. 104—Effect. See C. P. C. OF 1908, S. 104—APPLICABILITY—PRIVY COUNCIL APPEALS.

—Final order—Arbitration Act of 1899, S. 19—Stay of proceedings under—Order refusing, if a final order. See C. P. C. OF 1908, S. 109, CL. (a)—ARBITRATION ACT

C. P. CODE (ACT V OF 1908), S. 109 (a)—(Contd.)

—Final order—C. P. C., O. 41, R. 23—Remand order under, if a final order. *See* C. P. C. OF 1908, S. 109 (a)—C. P. C. OF 1908, O. 41, R. 23. (1984) 22 I.A. 1 = 17 A. 112.

—Final order—*Ex parte* decree—Application to set aside—Order rejecting—Appellate order setting aside, and remanding application, if a final order. *See* C. P. C. OF 1908, S. 109 (a)—*Ex parte* DECREE.

(1900) 28 I. A. 28 (34) = 23 A. 220 (226-7).

—Final order—Meaning of.

An order is final only if it finally disposes of the rights of the parties. (*Viscount Cave.*) RAMCHAND MANJIMAL v. GOVERDHANDAS VISHINDAS RATANCHAND.

(1920) 47 I. A. 124 = 47 C. 918 = 12 L. W. 15 = 24 C. W. N. 721 = 18 A. L. J. 591 = 22 Bom. L. R. 606 =

2 U. P. L. R. (P. C.) 94 = (1920) M. W. N. 407 =

28 M. L. T. 87 = 56 I. C. 302 = 39 M. L. J. 27.

—S. 109 (c)—Cases contemplated by—Nature of.

The provision in Ss. 595 and 600 of C. P. C. of 1882 that an appeal may be granted if the High Court certifies that the case is fit for appeal "otherwise," i.e., when not meeting the conditions of S. 596 of C. P. C. of 1882 is clearly intended to meet special cases; such, for example, as those in which the point in dispute is not measurable by money, though it may be of great public or private importance. (*Lord Hobhouse.*) BANARSI PARSHAD v. KASI KRISHNA NARAIN.

(1900) 28 I. A. 11 = 23 A. 227 = 5 C. W. N. 193 =

3 Bom. L. R. 154 = 7 Sar. 825 = 11 M. L. J. 56.

—S. 109 (c) of the Code of 1908 contemplates cases in which it is impossible to define in money value the exact character of the dispute. There are questions, as for example, those relating to religious rights and ceremonies to caste and family rights, or such matters as the reduction of the capital of companies as well as questions of wide public importance in which the subject-matter in dispute cannot be reduced into actual terms of money. S. 109 (c) contemplates that such a state of things exists, and R. 3 of O. 45 regulates the procedure (33). (*Lord Buckmaster.*) RADHA-KRISHNA AIYAR v. SWAMINATHA AIYAR.

(1920) 48 I. A. 31 = (1921) M. W. N. 119 =

13 L. W. 321 = 19 A. L. J. 161 = 33 C. L. J. 277 =

25 C. W. N. 630 = 23 Bom. L. R. 718 =

29 M. L. T. 418 = 60 I. C. 85 = 40 M. L. J. 229.

S. 109 (c)—Certificate under.

—Certificate under S. 110 invalid—If can be treated as one under this clause. *See* C. P. C. of 1908, S. 110—CERTIFICATE UNDER—INVALIDITY OF.

(1901) 28 I. A. 182 (185) = 23 A. 415 (419-20).

—Discretion in granting—Exercise of—Must appear clearly on face of certificate.

The grant of a certificate that a case is a fit one for appeal to His Majesty in Council under S. 109 (c) of C. P. C., of 1908 involves the exercise of a judicial discretion. And a certificate will not be treated by their Lordships as such a certificate unless they are satisfied that the High Court was either asked or did direct its mind judicially to that question. (*Lord Davey.*) RADHAKRISHNA DAS v. RAI KRISHNA CHAND.

(1901) 28 I. A. 182 (185) =

23 A. 415 (419-20) = 5 C. W. N. 689 =

3 Bom. L. R. 469 = 8 Sar. 114.

—Their Lordships think it is of the utmost importance that certificates for leave to appeal to the Privy Council, when it is suggested that they are made in exercise of the discretion conferred, should make plain upon their face that the discretion has in fact been exercised. (*Lord Buckmaster.*) MAHARAJ BAHADUR SINGH v. BALCHAND CHOWDHURY.

(1920) 13 L. W. 365 =

25 C. W. N. 770 = (1921) M. W. N. 87 =

6 Pat. L. J. 163 = 29 M. L. T. 156 = 62 I. C. 320.

C. P. CODE (ACT V OF 1908), S. 109 (c)—(Contd.)

—*See also* C. P. C. of 1908, S. 109 (c)—CERTIFICATE UNDER—VALIDITY OF—GROUND ON WHICH, ETC.

(1920) 48 I. A. 31 = 40 M. L. J. 229.

—Discretion in granting—Exercise of—Necessity.

To certify, under Ss. 595 and 600 of C. P. C. of 1882 that a case is "otherwise" fit for appeal, though it is left entirely in the discretion of the Court, is a judicial process which could not be performed without special exercise of that discretion, evinced by the fitting certificate. (*Lord Hobhouse.*) BANARSI PARSHAD v. KASI KRISHNA NARAIN.

(1900) 28 I. A. 11 = 23 A. 227 = 5 C. W. N. 193 =

3 Bom. L. R. 154 = 7 Sar. 825 = 11 M. L. J. 56.

—Grant of, when no question of law in opinion of High Court—Propriety.

In a case in which the learned Judges of the High Court, who granted their certificate that the case was a fit one for appeal under S. 109 (c) of C. P. C. of 1908, said that they could not see what the question of law was, their Lordships observed that the certificate was somewhat unusual in their experience. (*Lord Sumner.*) BAI MONGHIBAI v. PRAGJI DAYAL HARIANI.

(1925) 89 I. C. 88 =

A. I. R. 1925 P.C. 198.

—Ground of—Indication with certainty of, on face of certificate itself—Necessity.

Where any certificate is granted under O. 45, R. 3 of C. P. C., it is of the utmost importance that the certificate should show clearly upon which ground it is based. As these certificates are of great importance, and as they seriously affect the rights of litigant parties, they ought to be given in such a form that it is impossible to mistake their meaning upon their face. (*Lord Buckmaster.*) RADHA-KRISHNA AIYAR v. SWAMINATHA AIYAR.

(1920) 48 I. A. 31 = (1921) M. W. N. 119 =

13 L. W. 321 = 19 A. L. J. 161 = 33 C. L. J. 277 =

25 C. W. N. 630 = 23 Bom. L. R. 718 =

29 M. L. T. 418 = 60 I. C. 85 = 40 M. L. J. 229.

—Invalidity of—Competency of appeal—Effect on—Objection to grant of certificate—Respondent's failure to raise.

Non-appearance of the respondent and omission on his part to oppose an invalid certificate for leave to appeal to the Privy Council granted by the High Court cannot give the appellant a right of appeal which the Code does not allow, or sustain a certificate which is erroneous. (*Lord Hobhouse.*) BANARSI PARSHAD v. KASI KRISHNA NARAIN.

(1900) 28 I. A. 11 = 23 A. 227 =

5 C. W. N. 193 = 3 Bom. L. R. 154 = 7 Sar. 825 =

11 M. L. J. 56.

—Order therefor—Conflict between—Competency of appeal—Test true of, in such a case.

Where objection is taken to the competency of an appeal to His Majesty in Council on the ground that there is no proper certificate accompanying the leave to appeal, or forming a proper foundation for the leave to appeal, the certificate, and not the order for the certificate, is the document which their Lordships are bound to consider and act upon; and unless the certificate upon which the leave to appeal is based is in such a form as to justify that leave, they ought to hold that leave has not properly been given (183). Their Lordships are not entitled to disregard the language of the certificate, and to look at the order directing the certificate to be made (185). (*Lord Davey.*) RADHAKRISHNADAS v. RAI KRISHNA CHAND.

(1901) 28 I. A. 182 = 23 A. 415 (419-20) =

5 C. W. N. 689 = 3 Bom. L. R. 469 = 8 Sar. 114.

—Refusal of—Grounds for—Statement of—Necessity.

Their Lordships observed that it would be convenient if the High Court, in refusing a certificate for leave to appeal,

C. P. CODE (ACT V OF 1908), S. 109 (c)—(Contd.)

stated the grounds on which they rejected it. (*Lord Davey.*)
VENGANAT SIVAROOPATHIL VALIA NAMBIDI v. CHERALLUNNATH NAMBIYATHAN. (1906) 33 I. A. 67 = 29 M. 194 = 10 C. W. N. 545 = 8 Bom. L. R. 374 = 4 C. L. J. 305 = 16 M. L. J. 160.

———*Validity of—Affirming decision—Certificate in case of.*

In a case in which the amount or value of the suit and of the matter in appeal to the Privy Council was more than Rs. 10,000, and the decree of the High Court affirmed the decision of the Court immediately below it, the certificate granting leave to appeal to the Privy Council was that the case was a fit one for appeal to His Majesty in Council.

Held, that the certificate was given pursuant to S. 595 (c) and the latter alternative of S. 600 of C. P. C. of 1882, and that it properly followed the words of the Act and was correct in form (247-8). (*Lord Davey.*) **WEBB v. MACPHERSON.** (1903) 30 I. A. 238 = 31 C. 57 (74) = 8 C. W. N. 41 = 5 Bom. L. R. 838 = 8 Sar. 554 = 13 M. L. J. 389.

———Where in a case in which the appellant stated in his petition of appeal to His Majesty in Council that the total net income of the property in suit was about Rs. 1,611-12-0 and valued his appeal at twenty times that amount as being the ordinary market value of the property, and also alleged that, besides being over the appealable value of Rs. 10,000, the appeal involved some substantial questions of law and the case fulfilled the requirements of S. 596 of the Code, and was a fit case for appeal to His Majesty in Council, the order of the High Court was 'We think on the whole that this is a case in which a certificate for leave to appeal to His Majesty in Council ought to be granted.' *Held*, that the case fell within the decision in *Webb v. Macpherson*, and that the certificate was therefore sufficient. (*Sir Andrew Scoble.*) **AMARCHAND KUNDU v. SHOSHI BHUSHU ROY.** (1903) 31 I. A. 24 = 31 C. 305 (309-10) = 8 C. W. N. 225 = 8 Sar. 603.

———*Validity of—Appealable value—Error as to—Effect.*

Their Lordships are not satisfied in this case as to the form in which the certificate for leave to appeal is framed. It is alleged to be based on two different grounds, the one is a question of fact as to amount, and the other a question of opinion as to whether or not discretion should be exercised. So far as it relates to the question of fact, it appears to be faulty, for the amount in dispute is not sufficient. So far as it relates to a question of opinion, the matter is not made plain, as it ought to be, upon the certificate that the discretion was invoked and the discretion was exercised. (*Lord Buckmaster.*) **MAHARAJ BAHADUR SINGH v. BALCHAND CHOWDHURY.** (1920) 13 L. W. 365 = 25 C. W. N. 770 = (1921) M. W. N. 87 = 6 Pat. L. J. 163 = 29 M. L. T. 156 = 62 I. C. 320.

———*Validity of—Fact—Case depending entirely upon question of.*

Their Lordships express regret that the Judicial Commissioner, having rightly treated the case as one depending entirely on issues of fact which he had no jurisdiction to review, should yet have felt himself constrained by authority to give a certificate to the effect that a substantial question of law was involved in the appeal (128). (*Lord Macnaghten.*) **MUSSUMMAT DURGA CHOWDHRAIN v. JAWAHIR SINGH CHOWDHRI.** (1890) 17 I. A. 122 = 18 C. 23 (30) = 5 Sar. 560.

———*Validity of—Grounds basis of certificate not appearing clearly on its face.*

Where a certificate granted under O. 45, R. 3 ran in these terms:—"It is hereby certified that, as regards the value of the subject-matter and the nature of the question involved, the case fulfils the requirements of Ss. 109 and 110,

C. P. CODE (ACT V OF 1908), S. 109 (c)—(Contd.)

C. P. C., and that the case is a fit one for appeal to His Majesty in Council" *held*, that the certificate was insufficient, as there was no indication in it of what the nature of the question was that it was thought was involved in the hearing of the appeal to the Privy Council, nor was there anything to show that the discretion conferred by S. 109 (c) was invoked or was exercised. (*Lord Buckmaster.*) **RADHA-KRISHNA AIYAR v. SWAMINATHA AIYAR.**

(1920) 48 I. A. 31 = (1921) M. W. N. 119 = 13 L. W. 321 = 19 A. L. J. 161 = 33 C. L. J. 277 = 25 C. W. N. 630 = 23 Bom. L. R. 718 = 29 M. L. T. 418 = 60 I. C. 85 = 40 M. L. J. 229.
S. 110—Certificate under.

———*Invalidity of—Certificate if can be treated as one under S. 109 (c).*

A petition for leave to appeal asked for the grant of a certificate under S. 596 of C. P. C. of 1882, treating it as part of the ordinary ministerial jurisdiction of the Court, and the Court passed an order "Let certificate issue, that the case is a fit one for appeal to His Majesty in Council." The certificate was invalid under S. 596, because the valuation of the case was below the appealable amount. Their Lordships declined to treat it as one under S. 595 (c) of C. P. C. of 1882.

No reasons are given, and no grounds are stated by the learned Judges, for holding that, although the case did not comply with S. 596, it was still a fit case to appeal to His Majesty in Council. Their Lordships, therefore, are not satisfied that the judicial mind of the Court has ever been applied to that question (185). (*Lord Davey.*) **RADHA-KRISHNA DAS v. RAI KRISHNA CHAND.**

(1901) 28 I. A. 182 = 23 A. 415 (419-20) = 5 C. W. N. 689 = 3 Bom. L. R. 469 = 8 Sar. 114.

———*Refusal of—Propriety—Case fit for appeal—Refusal on ground that grounds of appeal might have been relied upon in prior appeal.*

The amount in question being above the appealable value, and the order of the High Court being final in its nature as regards the defendant's liability to account, the defendant applied for leave to appeal, as in ordinary course, to Her Majesty in Council. The High Court refused leave on the main ground that the defendant's grounds for appeal were the same as he might have raised in a prior appeal. That is not a valid reason for refusing a certificate for appeal in a case which in other respects is fit for appeal in ordinary course. (*Lord Hobhouse.*) **MAULVI MUHAMMAD ABDUL MAJID v. MUHAMMAD ABDUL AZZI.**

(1896) 24 I. A. 22 = 19 A. 155 (164) = 7 Sar. 111.

———*Right to. See also UNDER C. P. C. OF 1908, S. 110—CERTIFICATE UNDER—VALIDITY OF.*

———*Right to—Amount actually in dispute small—Title to whole village involved.*

In this case though the sum in dispute was small, the High Court granted leave to appeal to the Privy Council on the ground that the title to that sum was the same as the title to a whole village. (*Lord Hobhouse.*) **SRI BRAJA KISORA DEVU GARU v. SRI KUNDANA DEVI PATTI MAHADEVI.** (1899) 26 I. A. 66 (67) = 22 M. 431 (433) = 1 Bom. L. R. 287 = 7 Sar. 528 = 3 C. W. N. 378 = 9 M. L. J. 157.

———*Right to—Subject-matter of suit below appealable value—Subject-matter of appeal of that value.*

Under S. 596 of C.P.C. of 1882, the amount, or value, of the subject-matter of the suit in the Court of first instance must be Rs. 10,000 or upwards, and the amount or value of the matter in dispute on appeal to Her Majesty in Council must be the same sum, or upwards. The word "and" in the section means "and", and not "or".

When the amount or value of the subject-matter of the suit in the Court of first instance was at the outside only

C. P. CODE (ACT V OF 1908), S. 110—(Contd.)

about Rs. 9,500, and the High Court on that ground refused to certify that the case came within the requirements of S. 596, *held*, that the High Court took a correct view of the section.

For a case to come within S. 596, it must fulfil both conditions. (*Lord Davey*.) **MOTI CHAND v. GANGA PARSHAD SINGH.** (1901) 29 I.A. 40 (41) = 24 A. 174 (177) = 6 C.W.N. 362 = 4 Bom. L. R. 159 = 8 Sar. 247.

—*Validity of—Affirming judgment—No substantial question of law.*

Where the only question at issue between the parties was simply a question of fact, and both the Courts below decided against the appellant, both Courts believing the evidence on the part of the respondent, who was the plaintiff, and disbelieving that on the part of the appellant, who was the defendant, *held*, that no appeal was open to the appellant under S. 596 of C.P.C. of 1882, and that the High Court ought not to have granted leave to appeal. (*Lord Macnaghten*.) **KUAR NIRBHAI DAS v. RANI KUAR.** (1894) 16 A. 274 = 6 Sar. 433.

—In this case, in which the question involved was one of fact and there were two concurrent findings by the High Court and by the Court below, the High Court granted leave to appeal in the following terms: "There seems to be a point of law, which, however, does not appear to have been argued here; and it is therefore hereby certified that, as regards the value of the subject-matter and the nature of the questions involved, the case fulfils the requirements of S. 596 of C.P.C. of 1882."

Held, that the High Court acted contrary to the provisions of the Code, and that it ought not to have granted leave.

Their Lordships dismissed the appeal on that ground without hearing it. (*Lord Macnaghten*.) **KARUPANAN SERVAI v. SRINIVASAN CHETTI.** (1901) 29 I.A. 38 = 25 M. 215 = 6 C.W.N. 241 = 4 Bom. L.R. 248 = 8 Sar. 250.

—Where, in a case in which the High Court had affirmed the Court below, and there was no substantial question of law, *held*, that the High Court had erred in certifying that the case "fulfils the requirements of S. 110 of C. P. C. of 1908" and that the appeal was incompetent. (*Lord Shaw*.) **TILAKDHARI SINGH v. MAHARAJA KESHO PRASAD SINGH.** 26 P.L.R. 257 = 6 Pat. L. T. 349 = 3 Pat. L. R. 114 = 41 C.L.J. 386 = 27 Bom. L.R. 819 = A. I. R. 1925 P. C. 122 = (1925) M. W. N. 403 = 88 I.C. 103 = (1925) 48 M. L. J. 611 (615).

—*Validity of—Affirming judgment—Assumption erroneous that judgment is not an—Certificate based on.*

In this case the certificate granting leave to appeal to the Privy Council was in these terms: "Certified that the above case fulfils the requirements of S. 596 of C. P. C. of 1882, as regards value and nature, inasmuch as the value of the subject-matter of the suit in the Court of first instance was upwards of Rs. 10,000, and the value of the matter in dispute on appeal to Her Majesty's Privy Council also exceeds that amount, and as the decree appealed from does not affirm the Court immediately below."

The statement in the certificate that the decree appealed from did not affirm the decision of the court immediately below was in fact erroneous, and the certificate did not find that the appeal involved any substantial question of law.

On a preliminary objection taken to the maintainability of the appeal to the Privy Council on the ground that the order giving leave to appeal was not in accordance with C.P.C., *held*, that the objection ought to be sustained, and the appeal dismissed with costs (40). (*Lord Davey*.) **RAJAH TASADDUQ RASUL KHAN v. MANICK CHAND.** (1902) 30 I.A. 35 = 25 A. 109 (114) = 7 C.W.N. 177 = 5 Bom. L.R. 100 = 8 Sar. 337.

C. P. CODE (ACT V OF 1908), S. 110—(Contd.)

—*Validity of—Appealable value—Subject-matter below.*

Where the certificate for leave to appeal granted by the High Court ran, "That as regards the nature of the case it fulfils the requirements of S. 596 of C.P.C. of 1882;" but it did not fulfil them on account of its small value, *held*, that the certificate was invalid and the appeal incompetent' (*Lord Hobhouse*.) **BANARSI PARSHAD v. KASI KRISHNA NARAIN.** (1900) 28 I. A. 11 = 23 A. 227 = 5 C.W.N. 193 = 3 Bom. L.R. 154 = 7 Sar. 825 = 11 M. L. J. 56.

—*Validity of—Appealable value—Subject-matter below—Substantial question of law—Existence of, not enough.*

The existence of a point of law does not give a right of appeal to the Privy Council in the ordinary course of procedure under the Code. S. 596 of C.P.C. of 1882 required that in order to give such a right there must be in dispute either directly or indirectly an amount of Rs. 10,000. If the decree affirms the Court below, another condition is affixed, *viz.*, that the appeal must involve some substantial question of law. The presence of such a question does not give a right when the value is below the mark; the requirement of it restricts the right when the higher decree affirms the lower. (*Lord Hobhouse*.) **BANARSI PARSHAD v. KASI KRISHNA NARAIN.** (1900) 28 I. A. 11 = 23 A. 227 = 5 C.W.N. 193 = 3 Bom. L.R. 154 = 7 Sar. 825 = 11 M.L.J. 56.

—A petition for leave to appeal to His Majesty in Council stated that the valuation in the appeal was below Rs. 10,000, but that it involved substantial questions of law and fact, and prayed for the grant of a certificate under S. 596 of the Code of 1882. The order passed on that petition was "Let certificate issue, that the case is a fit one for appeal to His Majesty in Council." The certificate made ran thus:—"The Court having had before it an application for leave to appeal to His Majesty in Council... it is certified that though the valuation of the case is below Rs. 10,000, yet as regards the value and nature of the case it fulfils the requirements of S. 596 of C.P.C. of 1882."

Held that, valuation being an essential part of the requirements under S. 596, and the valuation of the case being below Rs. 10,000, the leave to appeal granted by the High Court was not properly granted, and the appeal to His Majesty in Council was incompetent.

The certificate must have been granted under the erroneous impression that the existence of a point of law gave a right of appeal in the ordinary course of procedure under the Code. (*Lord Davey*.) **RADHAKRISHNAN DAS v. RAI KRISHNAN CHAND.** (1901) 28 I. A. 182 = 23 A. 415 = 5 C. W. N. 689 = 3 Bom. L. R. 469 = 8 Sar. 114.

S. 110—Construction of.

—*Wide construction—Permissibility.*

No real mischief can arise from not allowing a very wide construction of S. 110 of C.P.C. of 1908, because such cases, if worthy of being tried by a higher tribunal, can always be dealt with under sub-sec. (c) of S. 109 (211). (*Lord Dunedin*.) **UDOYCHAND PANNALAL v. P. E. GUZDAR & CO.** (1925) 52 I.A. 207 = 52 C. 650 = 27 Bom. L. R. 867 = 41 C. L. J. 623 = 22 L.W. 255 = 30 C.W.N. 98 = A. I. R. 1925 P.C. 159 = 88 I. C. 445 = 49 M. L. J. 20.

—**Para. 1—"And"—Meaning of—"Or," if means, t**
Held, that the High Court were quite right in saying that the word "and" in S. 596 of C. P. C. of 1882 meant "and" and not "or" (41). (*Lord Davey*.) **MOTI CHAND v. GANGA PARSHAD SINGH.** (1901) 29 I. A. 40 = 24 A. 174 (177) = 6 C. W. N. 362 = 4 Bom. L. R. 159 = 8 Sar. 247.

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—Para. 1—Subject matter of appeal—Value of.

—Amount actually at stake when not necessarily true value of. *See* C.P.C. OF 1908, S. 110, PARA. 1.—SUBJECT-MATTER OF APPEAL—VALUE OF—RENT.

—Annuity—Suit to enforce.

In a suit in which an annuity is sought to be recovered, S. 110 of C.P.C. of 1908 applies to the value of the annuity which is sought to be recovered, but not to the value of the property upon which that annuity is charged.

Where the annuity which was sought to be enforced was only Rs. 125 per annum *held*, that by no reasonable method of valuation could an annuity of Rs. 125 per annum be worth Rs. 10,000 and that the appeal to the Privy Council was therefore incompetent. (*Lord Atkinson.*) *MIRZA ABID HUSSAIN KHAN v. AHMAD HUSSAIN.*

18 L. W. 146 = (1923) P.C. 102 =
(1923) M. W. N. 590 = 28 O. C. 216 =
33 M.L.T. 232 (P.C.) = 10 O.L.J. 288 =
9 O. & A. L. R. 484 = 28 C.W.N. 289 = 75 I.C. 502 =
(1923) 45 M. L. J. 253.

—Certificate of High Court as to—Effect — Order in Council of 10th April, 1838.

On objection taken at the hearing of the Privy Council appeal that the Sudder Court were wrong in admitting the appeal, the value of the matter in dispute being under the sum of Rs. 10,000 and that no special certificate was made on admitting the appeal in accordance with Rule II of the Order in Council of 10th April, 1838, so as to preclude the respondents taking objection as to the value of the matter in dispute in the appeal and the admissibility thereof, *held*, that, as leave had been granted by the Court below, the objection to the value of the subject-matter in dispute could not be sustained. (412). (*Lord Justice Turner.*) *MYNA BOYEE v. OOTARAM.* (1861) 8 M.I.A. 400 = 2 W.R. 4 = 2 M.H.C.R. 196 = 1 Suth. 452 = 1 Sar. 797.

—Certificate of High Court as to—Effect — Orders in Council of 10th April, 1838 and of 9th February, 1920—Distinction.

The ruling provision as to certificates of value was No. 2 of the schedule to the Order in Council of April 10, 1838. While that Rule remained in operation, a certificate of a High Court to the effect that the value of the subject-matter in dispute in the appeal amounted to Rs. 10,000 and upwards was conclusive and could not be attacked before the Board.

Rule 2 of the order in Council of 1838 was repealed by the Order in Council of February 9, 1920. Under the latter Order the value of the subject-matter of the appeal is not concluded by the certificate of the Court below. (*Lord Shaw.*) *RADHAKRISHNA AIYAR v. SUNDARASWAMIER.*

(1922) 49 I. A. 211 (215) = 45 M. 475 (480-1) =
16 L. W. 18 = 31 M. L. T. 31 = 27 C. W. N. 1 =
20 A.L.J. 937 = 36 C. L. J. 450 = A.I.R. 1922 P.C. 257 =
74 I. C. 584 = 43 M. L. J. 323.

—Certificate of High Court as to—Interference with.

This Court is unwilling to interfere with the discretion of the Judge below as to value, but this case presents peculiar features.

Where the Judge below rejected an application for leave to appeal to His Majesty in Council on the ground that the value of the subject-matter was under Rs. 10,000, and it appeared that in doing so he did not give due weight to the acts of both the parties in accepting a valuation which entitled the petitioner to appeal to the Privy Council, their Lordships held that special leave should be given on the usual terms as to giving security. (*Sir James Colville.*) *KRISTO INDRO SAHA v. HUROMONEE DASSEE.* (1873) 1 I. A. 84 = 3 Sar. 317.

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—Certificate of High Court as to—Weight attached by Privy Council to.

Where, in cases in which the High Court grants a certificate that the subject-matter is of a value greater than Rs. 10,000, objection is raised to the competency of the appeal on the ground that the amount or value of the subject-matter is not Rs. 10,000, the Privy Council will always naturally and very greatly defer to the certificate given by the High Court. (*Lord Shaw.*) *RADHAKRISHNA AIYAR v. SUNDARASWAMIER.* (1922) 49 I. A. 211 (216) =

45 M. 475 (481) = 16 L. W. 18 = 31 M. L. T. 31 =
27 C. W. N. 1 = 20 A. L. J. 937 = 36 C. L. J. 450 =
A. I. R. 1922 P. C. 257 = 74 I. C. 584 =
43 M. L. J. 323.

—Costs of suit not to be included in

(*Lord Chelmsford.*) *DOORGA DOSS CHOWDRY v. RAMANAATH CHOWDRY.* (1860) 8 M. I. A. 262 = 1 Sar. 772.

(*Sir James W. Colville.*) *NILMADHUB DOSS v. BISHUMBER DOSS.* (1869) 13 M. I. A. 85 (103) =
12 W. R. P. C. 291 = 3 B. L. R. P. C. 27 =
2 Suth. 257 = 2 Sar. 489.

—Court-fee valuation not conclusive.

(*Dr. Lushington.*) *MT. AMEENA KHATOON v. RADHAKRISHNA AIYAR.* (1859) 7 M. I. A. 261 =
12 Moo. P. C. 470 = 1 Sar. 644.

—The plaintiff in the suit applied for special leave to appeal. His suit was to recover possession of property mortgaged under a Bye-bil-wufa or deed of conditional sale. In his plaint the plaintiff valued the property at Rs. 3,500 and odd. In his *ex parte* application for special leave he alleged that the plaint valuation of the suit property was one given for fiscal purposes, namely, three times the amount of one year's jumma or rent, and that the real of market value of the suit property exceeded the sum of Rs. 10,000.

Leave to appeal was granted, such leave to be subject to the production of proper evidence in India of the actual value of the property sued for. (*Lord Chelmsford.*) *MOHUN LALL SOOKUL v. BEBEE DOSS.* (1860) 7 M. I. A. 428 = 1 Suth. 458 = 1 Sar. 739.

—The valuation of the suit property given in the plaint for purposes of Court-fee furnishes no criterion of what the actual or market value of the property is. And when a question arises as to the real or market value of the suit property, parties are not to be concluded by the valuation given in the plaint for purposes of Court-fee (196). (*Lord Kingsdown.*) *MOHUN LALL SOOKUL v. BEBEE DOSS.*

(1861) 8 M. I. A. 193 = 1 Suth. 458 = 1 Sar. 792.

—In a case in which the value of the suit property was laid in the plaint at a sum less than Rs. 10,000, in order to fix the amount of the stamp to be used on the plaint, their Lordships, upon evidence stating the value of the property much to exceed the appealable value of Rs. 10,000, granted special leave to appeal, subject, as the application was *ex parte* to the order admitting the appeal being dismissed, on application by the respondent. *GOURMONEY DEBIA v. KHAJA ABDOOL GUNNY.* (1860) 8 M. I. A. 268 = 1 Sar. 774.

—In this case, though the property in dispute in appeal was of the value of Rs. 10,000, the High Court refused leave to appeal to the Privy Council, because the plaint had, in accordance with the requisitions of the Indian Stamp Act of 1867, Art. II, note (a), been valued at a sum much less than the appealable amount, such sum being ten times the annual revenue assessed upon the property.

On a petition presented to the Privy Council for leave to appeal, their Lordships granted leave to appeal on the ordinary terms.

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It was decided on the old stamp law, that a valuation made in conformity with that law, did not prevent a party from obtaining leave to appeal where the real value did not fall short of the appealable amount; and the new stamp law does not appear to be distinguishable from the old in this respect. The stamp duties imposed for fiscal purposes are calculated on a certain rule, fixed by law, but the right of appeal depends on the value, which is a matter of fact; and on this head the Court below appears to have been satisfied. (*Sir James W. Colvile*). **BABOO LEKRAJ ROY v. KANHYA SINGH.** (1874) 1 I. A. 317 = 18 W. R. 494 = 3 Sar. 373.

—*Damages—Suit for—Dismissal of—Appeal against—No decision by Courts below that plaintiff was entitled only to less than Rs. 10,000—Suit for more.*

In a case in which the suit was for the recovery of a sum of Rs. 30,000 by way of damages and the first Court had directed damages but had not decided even the principle on which they should be assessed, while the High Court had dismissed the suit, a petition by plaintiff for special leave to appeal to the Privy Council was dismissed by the High Court on the ground that the appeal only related to damages and the petitioner had not shown under S. 596 of the Code of 1882 that the damages resulting necessarily amounted to Rs. 10,000 or upwards. *Held*, by the Privy Council, that in the absence of a decision that plaintiff was only entitled to a less amount he was entitled to appeal as of right. **MOULVI MAHOMED IKRAMUL HUQ v. WILKIE.**

(1906) 33 I. A. 106 = 11 C. W. N. 946 =
4 A. L. J. 740 = 2 M. L. T. 448 = 6 C. L. J. 682 =
17 M. L. J. 454.

—*Defendants several—Property in hands of—Suit for—Decree for portions of property in hands of some—Appeal by them—Value of.* See C. P. C. OF 1908, S. 110
—*SUBJECT-MATTER OF APPEAL—VALUE OF—PROPERTY IN HANDS OF, ETC.* (1859) 7 M. I. A. 261.

—*Grounds tenable and untenable—Joinder of, to bring case within rule as to appealable value—Improper and to be discouraged.* (*Sir Barnes Peacock*). **HURRO DOORGA CHOWDHURANI v. MAHARANI SURUT SOONDARI DEBI.** (1881) 9 I. A. 1 (17) = 8 C. 332 (337) = 4 Sar. 304.

—*Inquiry as to—Direction to Court below for—Counter-evidence—Opportunity to adduce—Necessity.*

An order granting special leave to appeal to the Privy Council directed that the appellants should supply satisfactory evidence to the Registrar of the Court below that the real or market value of the land in dispute exceeded the sum of Rs. 10,000. The appellants did so; but, on the application coming on for final orders, the respondents asked that they might be at liberty to go into evidence on the question of value.

Their Lordships observed that they were not disposed to deviate in that respect from their original order, which was carefully and designedly confined to evidence to be adduced by the appellants, with a view to prevent the introduction, for the purpose of a merely fiscal regulation, of a contested issue on the question of value, a result which ought in all cases, as far as justice will permit, to be avoided (497). (*Lord Justice Turner*). **MOHUN LALL SOOKUL v. BEBEE DOSS.** (1861) 8 M. I. A. 492 = 2 W. R. 9 = 1 Suth. 458 = 1 Sar. 811.

—*Interest subsequent to decree below not to be included in.* (*Lord Justice Turner*). **GOOROPERSAD KHOOND v. JUGGUTCHUNDER.**

(1860) 8 M. I. A. 166 (169) = 13 Moo. P. C. 472 = 3 W. R. 14 = 1 Suth. 399 = 1 Sar. 742.

—*Interest subsequent to decree below not to be included in—Order in Council of 10th April, 1838—Effect.*

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(*Lord Chelmsford*). **DOORGA DOSS CHOWDRY v. RAMANATH CHOWDRY.** (1860) 8 M. I. A. 262 = 1 Sar. 772.

—*Interest up to date of decree below awarded by it—Inclusion of—Order in Council of 10th April, 1838—Effect.*

Where the appeal is from the whole decree and the decree has given an amount, including interest up to the date of the decree, which exceeds Rs. 10,000, the matter which is in dispute in the appeal must exceed the sum of Rs. 10,000. Where, therefore, at the date of the judgment the sum which is recoverable under the decree of the Sudder Court is an amount exceeding Rs. 10,000, there the case clearly falls within the terms of the Order in Council of the 10th April, 1838 (168). (*Lord Justice Turner*). **MAHARAJA SUTTEESCHUNDER ROY v. GUNESCHUNDER.**

(1860) 8 M. I. A. 164 = 13 Moo. P. C. 469 = 3 W. R. 14 = 1 Suth. 399 = 1 Sar. 741.

—*Mortgage decree—Appeal against, by person claiming by title paramount—Value of.*

Where to a suit to enforce a mortgage, a person who claimed a portion of the mortgaged property adversely to the mortgagor was added as a party, and his claim was allowed in part by the trial Court but was wholly disallowed on appeal by the High Court, and he sought to appeal to the Privy Council from that decree, *held*, that the subject-matter of the appeal was the value of the property claimed by the appellant and not the amount sought to be recovered under the mortgage, because the appellant could under no circumstances have been made responsible for the amount of the mortgage, nor could its extent in any way whatever have in the least degree varied the appellant's rights (190). (*Lord Buckmaster, L. C.*) **RADHA KUNWAR v. REOTI SINGH.** (1916) 43 I. A. 187 = 38 A. 488 (493) = 20 C. W. N. 1279 = 14 A. L. J. 1002 = 20 M. L. T. 211 = (1916) 2 M. W. N. 200 = 24 C. L. J. 603 = 18 Bom. L. R. 853 = 35 I. C. 939 = 31 M. L. J. 571.

—*Plaint valuation—Defendant's right to object to—Estoppel—Defendant appealing to High Court on basis of that valuation.*

The defendant as well as the plaintiff has taken the values at the rates fixed in the plaint. The cases were consolidated and heard together, and the defendant has carried out that consolidation, and has obtained the benefit of an appeal to the High Court upon the facts by adopting the plaintiff's valuation. She cannot afterwards come here and object to that valuation. (*Sir James Colvile*). **KRISTO INDRO SAHA v. HUROMONEE DASSEE.**

(1873) 1 I. A. 84 = 3 Sar. 317.

—*Presentation of appeal—Appeal bona fide of appealable value at—Appeal as confined in printed case and in argument below that value—Competency of appeal in case of.* See PRIVY COUNCIL—APPEAL—COMPETENCY OF—APPEAL bona fide COMPETENTLY MADE.

(1894) 22 I. A. 68 (73-4) = 22 C. 434 (442-3).

—*Property in hands of several defendants—Decree for portions of, in hands of some—Appeal by them—Value of—Entire property on their portion only basis of.*

In estimating the appealable value, restricted by the Order in Council of the 10th of April, 1838, for regulating appeals from the Supreme and Sudder Dewanny Courts in the East Indies to Rs. 10,000, as the amount in dispute, regard should be had to the whole matter involved in the suit, and not to the value of a fractional part of the property sought to be recovered.

A suit was brought to recover a *Zemindary* in the possession of different persons under deeds of sale in

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execution of a decree. The value of the property sued for was, by Bengal Reg. X. of 1820, sec. 17, stated in the plaint to be Rs. 14,525. The *Sudder* Court upheld the sales so far as related to the claim of some of the defendants. The other defendants applied for leave to appeal to *England*, which the *Sudder* Court refused, on the ground that, as the value of their portion was only Rs. 8,215, it was not within the appealable value prescribed by the Order in Council of the 10th of April, 1838. Such construction overruled, and leave to appeal granted by the Judicial Committee. (*Dr. Lushington.*) MUSSUMAT AMMENA KHATOON v. RADHABENOD MISSEK.

(1859) 7 M. I. A. 261 = 12 Moo. P. C. 470 = 1 Sar. 644.

—Quit Rent of Rs. 64—Decree enhancing, to Rs. 822 per annum—Value of subject-matter in case of.

Where the party applying for leave to appeal claimed to be entitled to an estate, subject only to the payment of a fixed annual rent of Rs. 64; but the plaintiff in the suit, who was in possession of the judgment of the Court below, and would be the respondent upon the appeal, claimed the right to set upon the estate any rate which he might think fit, and the decree below gave Rs. 822 as the amount of the enhanced rent, *Seemle* the value of the matter in dispute in the appeal would exceed the sum of Rs. 10,000 (168-9).

An estate held at a quit-rent of Rs. 64 must of course be increased in value to an amount far exceeding Rs. 10,000 if it be chargeable with a rent of Rs. 822. (169). (*Lord Justice Turner.*) SREEMUTTY RANEE SARNOMOYEE v. MAHARAJAH SUTTISCHUNDER ROY.

(1860) 8 M. I. A. 165 = 13 Moo. P. C. 469 = 3 W. R. P. C. 14 = 1 Suth. 399 = 1 Sar. 742.

—Rent—Suit for.

The sum of money actually at stake may not represent the true value of the subject-matter of the appeal. The proceeding may, in many cases, such as a suit for an instalment of rent or under a contract, raise the entire question of the contract relations between the parties and that question may, settled one way or the other, affect a much greater value, and its determination may govern rights and liabilities of a value beyond the limit.

In a suit brought in the Revenue Court under S. 77 of the Madras Estates Land Act to recover the sum of Rs. 4,560, being arrears of rent of certain inam lands, the High Court held that the subject-matter was of a value greater than Rs. 10,000, and that a substantial question of law was involved, and certified that the case was a fit one for appeal to His Majesty in Council with reference to Ss. 109 and 110 of C. P. C. of 1908.

The competency of the appeal was objected to on the ground that the rent sued for being only Rs. 4,560, it sufficiently appeared that the amount or value of the subject-matter of the suit was not Rs. 10,000 as required by Ss. 109 and 110 of C. P. C. of 1908.

Held, that, in view of the nature of the claim, the High Court acted with propriety in making the necessary certificate. (*Lord Shaw.*) RADHAKRISHNA AIYAR v. SUN-DARASWAMIER.

(1922) 49 I. A. 211 (215 6) = 45 M. 475 (481) = 16 L. W. 18 = 31 M. L. T. 31 = 27 C. W. N. 1 = 20 A. L. J. 937 = 36 C. L. J. 450 = A. I. R. (1922) P. C. 257 = 74 I. C. 584 = 43 M. L. J. 323.

—The suits were by a putnidar to recover rent from his darpatnidars. The amount claimed in one of the suits was only Rs. 1,136; that claimed in the other was Rs. 1,321. The annual rent of the darpatni tenure was Rs. 4,325. The High Court decreed the suit against all the defendants. The defendants, other than 3, 14 and 15 appealed disputing their liability for the rent altogether. The High Court consolidated the two appeals, and granted certificates that

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as regards amount or value and nature the cases fulfilled the requirements of S. 110 of C. P. C. of 1908.

Held, that, as the subject-matter in dispute related to a recurring liability and was in respect of a property considerably over the appealable value, the certificate was in order. (*Mr. Ameer Ali.*) SURAPATI ROY v. RAM NARAYAN MUKERJI.

(1923) 50 I. A. 155 (161) = 50 C. 680 (687) = A. I. R. (1923) P. C. 88 = 33 M. L. T. 314 = 18 L. W. 681 = 39 C. L. J. 26 = 28 C. W. N. 517 = 73 I. C. 193 = 45 M. L. J. 219.

—S. 110, Para. 2—Decree or Order involving, directly or indirectly, some claim or question to or respecting property of like amount or value.

A contract for sale of goods between the petitioner and the respondents contained a provision for referring disputes to arbitration. A dispute arose, cross-claims were made, arbitrators were appointed in a manner directed by the Court, and they passed an *ex parte* award in favour of the respondents. That award was set aside by the Court, and the respondents preferred an appeal against that order. The petitioner filed a suit for a sum of Rs. 81,000 odd, being the damages claimed in the arbitration proceedings, and the suit was ordered by the Court to be stayed pending the disposal of the appeal by the respondents or till otherwise the matter was settled by arbitration. Against that order the petitioner preferred an appeal. Both appeals were dismissed. Thereupon the parties again betook to arbitration proceedings. The arbitrators passed an award in favour of the petitioner for Rs. 81,000, and another in favour of the respondents for Rs. 3,900 odd. The former award was set aside by an application to the Court. The petitioner then sued to set aside the award for Rs. 3,900 odd in favour of the respondents. That suit was decreed by the trial Judge but dismissed on appeal. The petitioner thereupon applied for leave to appeal, but that was refused upon the ground that the sum involved was neither directly nor indirectly of the value of Rs. 10,000.

Held, affirming the High Court, that the case did not fall within the second paragraph of S. 110, the only clause applicable to the case.

By the proposed appeal, the petitioner would get rid of his present liability to pay Rs. 3,900. The first thing that he would have to do would be to get rid of the judgment staying his suit. He did not appeal against that, though he has appended to the present petition a further prayer to be allowed to appeal against that order. He would have to be successful in that appeal and then also he would have to succeed on the merits of his suit, and not till then would he be in possession of anything tangible in the way of money. This is not really consequential on the present decree and too remote to be entitled to the description of being property indirectly involved in the issue of this suit. (*Lord Dunedin.*) UDOYCHAND PANNALAL v. P. E. GUZDAR & CO.

(1925) 52 I. A. 207 = 52 C. 650 = 27 Bom. L. R. 867 = 41 C. L. J. 623 = 22 L. W. 255 = 30 C. W. N. 98 = A. I. R. (1925) P. C. 159 = 88 I. C. 445 = 49 M. L. J. 20.

—S. 110, Para. 3—Affirming decision—What amounts to a.

Mr. De Gruyther says that "decision" in S. 596 of C.P.C. of 1882, does not mean the decision of the Court, or the decree made by the Court, but means the reasons given by the Court for their decree, although the decision in each case may be different. If the reasons are not the same in respect of some matter of fact, says Mr. De Gruyther, the decree appealed from does not affirm the decision of the Court immediately below (38-9). Mr. De Gruyther appears to wish to give the word "decision" the same meaning as the word "judgment," and he says that it is necessary that the appellate Court should not only affirm the decree made by

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the Court below, but should also affirm the grounds of fact upon which the judgment was passed. Their Lordships cannot come to that conclusion. They think that the natural, obvious, and *prima facie*, meaning of the word "decision" is decision of the suit by the Court, and that that meaning should be given to it in the section (39). (*Lord Davey*.) **RAJAH TASADDUQ RASUL KHAN v. MANICK CHAND.** (1902) 30 I. A. 35 = 25 A. 109 (113) = 7 C. W. N. 177 = 5 Bom. L. R. 100 = 8 Sar. 337.

—In a suit for specific performance of an agreement the Court below decreed specific performance. There was an appeal by the defendants, and the only order of the appellate Court, the decree in the appeal, was one which simply dismissed the appeal. The first Court found that a certain contract of sale was proved, and that a certain draft conveyance put forward by the plaintiffs was also proved. But the appellate court found that the contract was established, but "that the alleged approved draft was not an essential portion of the plaintiff's case", and that under the plaintiff's claim for general relief he could obtain a decree for specific performance by the execution of any sufficient conveyance". They, therefore, dismissed the appeal, and affirmed the decree and the decision of the suit by the Court below.

Held, differing from the High Court, that the decree of the appellate Court did affirm the decision of the Court below within the meaning of S. 596 of C. P. C. of 1882 (40). (*Lord Davey*.) **RAJAH TASADDUQ RASUL KHAN v. MANIK CHAND.** (1902) 30 I. A. 35 = 25 A. 109 (114) = 7 C. W. N. 177 = 5 Bom. L. R. 100 = 8 Sar. 337

Plaintiff, claiming to be the adopted son of a deceased Hindu by virtue of an adoption made by one of his widows, sued for the recovery of possession of the deceased's property. The other widow and a person alleged to have been adopted to the deceased by her were defendants in the suit. The defendant-widow prayed for maintenance in case the adoption made by her was not proved. The first Court decreed the suit but granted the defendant widow maintenance at a certain rate. The appellate Court increased the rate of maintenance payable to the widow but in other respects affirmed the decree below. The appellate-court refused to grant leave to appeal on the ground that its decree was an affirming decree except in respect of "a small change" in the amount of maintenance and that no question of law was involved.

Held, that the appellate decree was not an affirming decree within the meaning of S. 110 of C. P. C. of 1908, that consequently no substantial question of law need be involved to entitle the defendant widow to appeal to the P. C., but that the appeal should be limited to the question as to the maintenance allowance. (*Lord Dunedin*.) **ANNAPURNABAI v. RUPRAO.** (1924) 51 C. 969 = A. I. R. (1925) P. C. 60 = 86 I. C. 504.

—Substantial question of law—Documents—Construction of—Question as to—Documents forming root of title or basis of claim—Documents forming evidence in the case—Distinction—Revenue arrears—Existence of—Question as to—Fact or law—Jama-wasil-bakis—Evidence consisting of—Effect.

In a case in which the courts below had concurrently found that no revenue payment had been in arrear at the time when a mahal was sold for arrears of revenue under Bengal Act XI of 1859, *held* that the fact that the evidence on which the finding of the Courts below was based consisted of the *jama-wasil-bakis* did not by itself take the case out of the rule as to concurrent findings of fact.

Where special documents, which are either themselves documents of title or are statements intended to have effect as claims, compromises, or surrenders of legal rights, are the material from which an inference is to be drawn, the

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special character of the documents assimilates the questions which they raise to questions intrinsically of law. The facts stated in the *jama-wasil-bakis* are, however, materials from which, when their purport is gathered, the inference of fact is finally to be drawn, namely, whether or not certain and sufficient payments had been made and made in time. Errors in those accounts, and obscurity in the mode of keeping them and of posting the amounts mentioned, are no more than similar errors and obscurities would be in oral testimony, and present the same difficulties in drawing a conclusion, but that conclusion, when once it is arrived at, is one of fact and no question arises of legal problems turning on the construction of legal instruments. Nor does it avail to say that there is no error shown on the face of the accounts and that the system on which they have been kept and the result which they show are quite plain, for that is not to state a question of law, but to disagree with the Indian Court *in toto* on a matter of fact. (*Viscount Sumner*.) **NARENDRA NATH DUTTA v. SHEIKH ABDUL HAKIM.** (1928) 55 I. A. 380 = 111 I. C. 288 = 28 L. W. 847 = 48 C. L. J. 557 = A. I. R. (1928) P. C. 243 = 56 M. L. J. 1.

—Substantial question of law—Meaning of.

"Substantial question of law" in S. 110 of C. P. C. of 1908 does not mean a question of general importance. The expression means a substantial question of law as between the parties in the case involved.

Where, upon the face of the matter, there was, as between the parties, a substantial question of law, *held* that special leave to appeal could not be refused, on the ground that the decision sought to be appealed from was right upon the merits, especially in a case which occupied the court below for a very long time, and on which there was a very elaborate judgment. (*Viscount Dunedin*.) **RAGHUNATH PRASAD SINGH v. DY. COMMISSIONER OF PARTABGARH.** (1927) 54 I. A. 126 = 2 Luck. 93 = (1927) M. W. N. 519 = 26 L. W. 70 = 102 I. C. 889 = 31 C. W. N. 495 = 4 O. W. N. 515 = A. I. R. (1927) P. C. 110.

A substantial question of law, within the last clause of S. 110 of C. P. C., does not mean a substantial question of general importance, but a substantial question of law as between the parties in the case involved. (*Lord Parmoor*.) **GURAN DITTA v. RAM DITTA.** (1928) 55 I. A. 235 = 55 C. 944 = 32 C. W. N. 817 = 29 Punj. L. R. 429 = 28 L. W. 66 = 109 I. C. 723 (2) = 48 C. L. J. 119 = 5 O. W. N. 668 = 1 L. T. 40 Lah. 144 = 30 Bom. L. R. 1184 = 26 A. L. J. 1215 = (1928) M. W. N. 917 = A. I. R. (1928) P. C. 172 = 55 M. L. J. 651.

—S. 115—Award—Decree in accordance with—Revision against—Maintainability of. See ARBITRATION—AWARD—DECREE IN ACCORDANCE WITH—REVISION AGAINST. (1901) 29 I. A. 51 (60) = 29 C. 167 (185).

—"Case"—Meaning of—Trustee or official—Performance of duties by—Order for—Ex parte application praying for, if a "case".

The word "case" in S. 115 of C. P. C. is not confined to a litigation in which there is a plaintiff who seeks to obtain particular relief in damages or otherwise against a defendant who is before the court. It includes an *ex parte* application praying that persons in the position of trustees or officials should perform their trust or discharge their official duties (269). (*Lord Atkinson*.) **BALAKRISHNA UDAYAR v. VASUDEVA AIYAR.** (1917) 44 I. A. 261 = 40 M. 793 = 22 C. W. N. 60 = 22 M. L. T. 45 = 26 C. L. J. 143 = 15 A. L. J. 645 = 2 Pat. L. W. 101 = 19 Bom. L. R. 715 = (1917) M. W. N. 628 = 6 L. W. 501 = 40 I. C. 650 = 33 M. L. J. 69.

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——Certiorari—Writ of—Grant of—High Court—Jurisdiction. *See* CERTIORARI—WRIT OF—GRANT OF—HIGH COURTS. (1919) 46 I. A. 176=43 M. 146 (159).

——C. P. C. of 1908, O. 21, R. 92—Refusal to confirm sale under—Improper order of—Interference with. *See* C. P. C. OF 1908, O. 21, R. 92—CONFIRMATION OF SALE UNDER—REFUSAL IMPROPER OF.

——*Fact—Error of—Interference in case of.*

S. 115 of C. P. C. applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved (267). (*Lord Atkinson*). BALAKRISHNA UDAYAR v. VASUDEVA AIYAR. (1917) 44 I. A. 261=40 M. 793=22 C. W. N. 60=22 M. L. T. 45=26 C. L. J. 143=15 A. L. J. 645=2 Pat. L. W. 101=19 Bom. L. R. 715=(1917) M. W. N. 628=6 L. W. 501=40 I. C. 350=33 M. L. J. 69.

——*Law—Error of—Interference in case of.*

In a suit brought to cancel a document which was alleged to have been granted by the plaintiff to the defendant, on the ground that it was a forgery, the sub-Judge found that the document was genuine, and dismissed the suit. On appeal the District Judge also found the document to be genuine, and confirmed the original decree. In his judgment, however, he stated that two words "have the appearance of being added to the defendant's document." The judgment of the District Judge was by law final, and no appeal lay against it. Nevertheless the Judicial Commissioner reversed the District Judge and granted the plaintiff the relief sought for purporting to act under S. 622 of C. P. C. of 1877. His ground for doing so was, that, as the District Judge had found that two words had been added to the disputed document, that threw upon the defendant the burthen of showing when they had been added, and, as he had offered no evidence upon the point, it was the duty of the District Judge to assume that they had been added after execution, and therefore that he should have cancelled the document.

Held, that in so doing the Judicial Commissioner proceeded on an erroneous interpretation of S. 622 of the Code, an interpretation held by the P. C. to be erroneous in L. R. 11 I. A. 237, and that his order could not be supported on any ground whatever. (*Lord Macnaghten*). MUHAMMAD YUSUF KHAN v. ABDUL RAHMAN KHAN.

(1889) 16 I. A. 104=16 C. 749=5 Sar. 362

——*Parties necessary—Decision of suit in absence of—Interference in case of.*

Claiming the suit lands under a mortgage from F, the plaintiffs sued for a declaration of their title to the suit lands and for possession thereof. The defendant in the suit was a trespasser, who denied that the suit lands were included in the mortgage by F under which the plaintiffs claimed, and the main question in the case was whether the suit lands were included in that mortgage. Nevertheless F was not made a defendant in the suit, and the Courts below decreed the suit. The Chief Commissioner in revision set aside the decree of the Courts below.

Held, that it was a material irregularity, within the meaning of S. 115 (c) of C. P. C. of 1908, to decide the question whether F ever conveyed the suit lands to the mortgagees in the absence of F herself, that the Courts below acted in the exercise of their jurisdiction with material irregularity within the meaning of S. 115 (c) of C. P. C. in doing so, and that under the circumstances the Chief Commissioner had the power to set aside their decree in revision. (*Viscount Haldane*). UMED MAL v. CHAND MAL.

(1926) 53 I. A. 271=25 A. L. J. 61=25 L. W. 90=

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3 O. W. N. 989=(1927) M. W. N. 84=38 M. L. T. P. C. 43=A. I. R. (1926) P. C. 142=99 I. C. 749=52 M. L. J. 368.

——Religious Endowment Act of 1863, S. 10—Order without jurisdiction under—Interference with. *See* RELIGIOUS ENDOWMENTS ACT OF 1863, S. 10—TEMPLE COMMITTEE—VACANCY IN.

(1917) 44 I. A. 261 (266-8)=40 M. 793.

——Rent decree under Bengal Rent Act of 1859—Execution—Transfer into another district for—Validity—Question as to—Revision under Charter Act—Jurisdiction to entertain. *See* UNDER BENGAL ACTS—RENT ACT X OF 1859—RENT DECREE UNDER. (1882) 9 I. A. 174 (177-8)=9 C. 295 (299-300).

——Res judicata—Bar of—Erroneous decision as to—Interference with.

Where a Court has perfect jurisdiction to decide the question which is before it, and it does decide it, its decision cannot be interfered with in revision under S. 622 of C. P. C. of 1882, unless, in the exercise of its jurisdiction, it has acted illegally or with material irregularity. It cannot be held to have exercised its jurisdiction illegally or with material irregularity merely because it decides wrongly.

Whether it has decided the question rightly or wrongly, it had jurisdiction to decide the case.

N. B.—The question for the decision of the Courts below in this case was whether or not the suit was barred under Ss. 13 and 43 of C. P. C. of 1882. (*Sir Barnes Peacock*). AMIR HASSAN KHAN v. SHEO BAKSH SINGH.

(1884) 11 I. A. 237=11 C. 6=4 Sar. 559=R. & J.'s. No. 83 (Oudh).

——Statute—Duty imposed by—Failure to do—Interference in case of. *See* C. P. C. OF 1908, O. 21, R. 92—CONFIRMATION OF SALE UNDER—DUTY OF COURT.

(1892) 19 I. A. 154=20 C. 8.

——S. 141—Proceedings referred to in—Execution applications—Inapplicability of section to.

The proceedings spoken of in S. 647 of C. P. C. of 1882 include original matters in the nature of suits such as proceedings in probates, guardianships, and so forth, and do not include executions (50).

The whole of Chapter 19 of the Code of 1882, consisting of 121 sections, is devoted to the procedure in executions, and it would be surprising if the framers of the Code had intended to apply another procedure, mostly unsuitable, by saying in general terms that the procedure for suits should be followed as far as applicable (49-50). (*Lord Hobhouse*). THAKUR PERSHAD v. SHEIKH PAKIR-ULLAH.

(1894) 22 I. A. 44=17 A. 106 (111)=6 Sar. 526=5 M. L. J. 3.

——S. 144—Decree reversed on appeal—Amount recovered under—Interest on—Liability of unsuccessful party for.

It is but equitable that the party who has received money under a decision afterwards found to be wrongful should account for that money with interest (146). (*Sir James W. Colville*). FORESTER v. SECRETARY OF STATE FOR INDIA.

(1877) 4 I. A. 137=3 C. 161 (173)=3 Sar. 717=3 Suth. 405=1 P. R. 1877.

——Decree reversed on appeal—Amount recovered under—Interest on—Rate of, to be allowed—Discretion as to—High Court's discretion—P. C.'s interference with.

The discretion of the High Court fixing the rate of interest when making an order for restitution under S. 144 of C. P. C. of 1908 will not lightly be interfered with. Where money to be restored had been paid over by a Receiver, and the High Court ordered interest at a rate higher than the bank rate, *held* that the High Court were fully qualified to exercise the discretion which they did in the matter, and that the Privy Council would not lightly interfere with the

C. P. CODE (ACT V OF 1908), S. 144—(Contd.)

exercise of such a power (154). (*Lord Buckmaster.*)
VENKATADRI APPA RAO v. PARTHASARATHY APPA RAO. (1921) 48 I.A. 150 = 44 M. 570 (574) = 19 A.L.J. 465 = 33 C.L.J. 447 = (1921) M.W.N. 347 = 14 L.W. 25 = 23 Bom. L.R. 644 = 61 I.C. 31 = 30 M.L.T. (P.C.) 36 = (1922) P.C. 233 = 40 M.L.J. 549.

—Decree reversed on appeal—Costs recovered under—Restitution of—Appellate decree not expressly directing—Effect.

The general obligation of a party to refund whatever he has received in respect of the costs awarded by the erroneous decree, although there was no positive direction for a refund in the appellate decree, has been properly admitted (146). (*Sir James W. Colville.*) **FORESTER v. SECRETARY OF STATE FOR INDIA.** (1877) 4 I.A. 137 = 3 C. 161 (173) = 3 Sar. 717 = 3 Suth. 405 = 1 P.R. 1877.

—Decree reversed on appeal—Status quo in case of—Restoration of—Duty and power of appellate Court—Maxim—Court's duty to see that its acts do no injury to any of the suitors—Application of.

It is the duty of the Court under S. 144, C. P. C. of 1908 to "place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed." Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved. As was said by Lord Cairns, L.C. "One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors and when the expression 'the act of the Court,' is used, it does not mean merely the act of the primary Court, or of any intermediate Court of Appeal, but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case". (*Lord Carson.*) **JAI BARHAM v. KEDAR NATH MARWARI.** (1922) 49 I.A. 351 (355-6) = 2 Pat. 10 (16) = 27 C.W.N. 582 = 21 A.L.J. 490 = 37 C.L.J. 351 = 32 M.L.T. (P.C.) 10 = 4 Pat. L.T. 61 = 18 L.W. 802 = 25 Bom. L.R. 643 = L.R. 4 P.C. 117 = (1923) M.W.N. 368 = 69 I.C. 278 = (1922) P.C. 269 = 44 M.L.J. 735.

—Execution sale—Setting aside of—Interest on purchase-money—Payment of—Order for—Power to make—C.P.C., O. 21, Rr. 90 and 91—Sale set aside under, See C. P. C. OF 1901, O. 21, R. 93—SETTING ASIDE OF SALE UNDER—RR. 90 AND 91—INTEREST ON PURCHASE-MONEY. (1920) 40 M.L.J. 141.

—Execution sale—Setting aside of—Mesne profits on—Recovery of—Mode of. See C. P. C. OF 1908, S. 47—EXECUTION PROCEEDING—SEPARATE SUIT—REMEDY APPROPRIATE—EXECUTION SALE—SETTING ASIDE OF. (1909) 36 I.A. 197 = 31 A. 551.

—Execution sale—Setting aside of—Restoration of property sold to judgment-debtor—Condition of—Deposit paid into Court by auction-purchaser to complete sale—Amount paid by him to discharge debt charged on property—Refund of—Auction-purchaser's right to—Distinction. See EXECUTION SALE—SETTING ASIDE OF. (1922) 49 I.A. 351 (355-6) = 2 Pat. 10 (16-7).

—Judgment—Dependent and subordinate judgment subsequently reversed or superseded—Money paid under—Recovery of—Mode of. See JUDGMENT—MONEY PAID UNDER. (1865) 10 M. I. A. 203 (211-2).

—Restitution—Order erroneous for—Remedy of aggrieved party in case of. See MORTGAGE—USUFRUCTUARY MORTGAGE—REDEMPTION OF—DECREE FOR—AMOUNT PAYABLE UNDER.

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(1915) 43 I.A. 43 (47) = 38 A. 163 (168).

—S. 145—Execution of decree pending appeal—Security bond given by third parties as a condition of—Enforcement of—Mode of—Charge and no personal liability—Bond creating. See C.P.C. OF 1908, O. 41, Rr. 5 AND 6.

(1919) 46 I. A. 228 (236) = 42 A. 158 (166).

—S. 149—Appeal presented with deficient court-fee—Procedure in case of—Opportunity to appellant to make up deficiency—Deficiency subsequently made up by him—Date of presentation of appeal in case of.

The discretion conferred by S. 149 of C. P. C. of 1908 extends to the whole or any part of any fee prescribed and can be exercised at any stage in the case.

Where, therefore, the court-fee paid on a memorandum of appeal and accepted as sufficient by the office of the court is held to be insufficient, the case is pre-eminently one for the exercise of the Court's discretion (under S. 149 C. P. C.) for giving an opportunity to the appellant to make up the deficiency. Upon the extra payment being made the memorandum of appeal will, under S. 149, C.P.C., have the same effect as if it had been paid in the first instance.

An appeal presented within time with a court-fee which was accepted by the office as sufficient, is not a nullity, merely because the valuation is found to be unsatisfactory or in the end insufficient. That is validated by payment of the deficient court-fee, the result of which is that the memorandum of appeal stands good from its date. (*Lord Shaw.*) **FAIZULLAH KHAN v. MAULADAD KHAN.**

(1929) 56 I.A. 232 = 33 C. W. N. 781 = 50 C.L.J. 39 =

A. I. R. (1929) P. C. 147 = 31 Bom. L.R. 841 =

30 L.W. 104 = 117 I.C. 493 = 57 M.L.J. 281.

—Plaint with deficient court-fee subsequently made up—Date of presentation of.

When a wrong stamp is put upon the plaint originally, and the proper stamp is afterwards affixed, the plaint is not converted into a plaint from that time only, but remains with its original date on the file of the court, and becomes free from the objection of an improper stamp when the correct stamp has been placed upon it (135). (*Sir Montague E. Smith.*) **SKINNER v. ORDE.** (1879) 6 I. A. 126 = 2 A. 241 (250) = 4 C. L.R. 331 = 4 Sar. 31 = 3 Suth. 627.

—S. 151—Appeal—Right of—Costs—Terms as to—Imposition of—Inherent power as to. See DECREE—APPEAL FROM—RIGHT OF—COSTS—TERMS AS TO.

(1921) 48 I. A. 76 = 48 C. 481 (486)

—Applicability—Matter specially provided for in code—Effect.

Quare as to how far a mere general saving clause (like S. 151 of C. P. C. of 1908) gives power in effect to refuse to apply an appropriate rule [like O. 41, R. 10 (2)], made in the exercise of other powers of the court and having statutory force? (*Lord Sumner.*) **SABITRI THAKURAIN v. SAVI.** (1921) 48 I. A. 76 = 48 C. 481 (491) = 19 A.L.J. 281 = (1921) M. W. N. 159 = 33 C. L.J. 307 = 60 I.C. 274 = 23 Bom. L.R. 681 = 14 L.W. 362 = 40 M. L. J. 308.

—C. P. C., O. 9, Rr. 8 and 9—Dead plaintiff—Suit of—Dismissal for default of—Restoration of, at instance of L. R.—Power of. See C. P. C. OF 1908, O. 9, Rr. 8 and 9—DEAD PLAINTIFF. (1913) 40 I. A. 151 = 35 A. 331.

—Decree or order—Reversal on appeal of—Status Quo—Restoration of—Power of. See C. P. C. OF 1908, S. 144—DECREE REVERSED ON APPEAL—Status Quo.

(1922) 49 I. A. 351 (355-6) = 2 Pat. 10 (16).

—Exercise of power under—Condition of—Justice—Securing ends of.

The inherent powers saved by S. 151 of C. P. C. are such as are used to secure the ends of justice.

C. P. CODE (ACT V OF 1908), S. 151—(Contd.)

Their Lordships refused to invoke the section in favour of the appellant as, on the materials before them, they were not in a position to say that the ends of justice would be secured by its application. (*Lord Sumner.*) **SABITRI THAKURAIN v. SAVI.** (1921) 48 I. A. 76 =

48 C. 481 (491-2) = (1921) M. W. N. 159 = 33 C. L. J. 307 = 19 A. L. J. 281 = 23 Bom. L. R. 681 = 14 L. W. 362 = 60 I. C. 274 = 40 M. L. J. 308.

—Injury to suitors—Duty and power to avoid—See UNDER THIS SECTION. (1871) 14 M. I. A. 40 (47-8);

and (1922) 49 I. A. 351 (355-6) = 2 P. 10 (16).

—Invalid order—Recalling and cancellation of—Power and duty of court.

Mr. Fraser appears to have supposed a Judge of that Court unable to correct his own error, in sending forth, *per incuriam*, an invalid Order which he would not have made if duly informed. To proceed, so far as the practice of his court will allow him, to recall and cancel an invalid order is not simply permitted to, but is the duty of a Judge, who should always be vigilant not to allow the act of the Court itself to do wrong to the suitor. It would be a serious injury to the suitor himself to suffer him to attempt to execute an inoperative order (47-8). (*Lord Justice James*) **SYUD TUFFUZZOOL KHAN v. RUGHONATH PERSHAD.**

(1871) 14 M. I. A. 40 = 7 B. L. R. 186 = 2 Suth. 434 = 2 Sar. 656 = R. & J's No. 10 (Oudh).

—Issue—Framing of—Inherent jurisdiction as to—Question cutting at root of subject-matter of controversy between parties. See PRACTICE—ISSUES—FRAMING OF—INHERENT POWER AS TO. (1912) 39 I. A. 218 (223) = 35 M. 607 (612)

—Mistake inadvertent of court—Rectification of—Inherent power of, apart from section.

Quite apart from S. 151, any court might have rightly considered itself to possess an inherent power to rectify the mistake which had been inadvertently made. (*Lord Shaw.*) **DEBI BAKSH SINGH v. HABIB SHAH.**

(1913) 40 I. A. 151 = 35 A. 331 (337) =

11 A. L. J. 625 = 17 C. W. N. 829 = 18 C. L. J. 9 =

15 Bom. L. R. 640 = 14 M. L. T. 33 =

(1913) M. W. N. 566 = 19 I. C. 526 = 25 M. L. J. 148.

S. 152—Decree—Amendment of.

—Appeal—Affirmance of decree on—Amendment after—Jurisdiction of original court.

After a decree is affirmed on appeal the original court has no jurisdiction to amend the decree. (*Lord Collins.*) **LALA BRIJ NARAIN v. TEJBAL BIKRAN BAHADUR.**

(1910) 37 I. A. 70 = 32 A. 295 = 8 M. L. T. 57 =

11 C. L. J. 560 = 14 C. W. N. 667 = 12 Bom. L. R. 444 =

7 A. L. J. 507 = 6 I. C. 669 = 20 M. L. J. 587.

—Appeal—Amendment after—Jurisdiction of original court.

The order of the High Court, which is appealed from, is dated 10—12—1886. After the appeal was presented, the High Court appears to have amended the order. Strictly speaking such an alteration of the order appealed from was beyond the competence of the Court (163). (*Lord Hobhouse.*) **NAVIVAHOO v. TURNER.** (1889) 16 I. A. 156 =

13 B. 520 (533-4) = 5 Sar. 400.

—Compromise subsequent to decree between all parties regarding subject-matter of suit—Amendment of decree with consent of parties in case of.

Quære whether if, after a decree a compromise is entered into by all the parties thereto, the court which passed the decree can, with their consent, amend it. (*Lord Davey.*) **RAJAH KOTAGIRI VENKATA SUBBAMMA RAO v. RAJA VELLANKI VENKATARAMA RAO.** (1900) 27 I. A. 197 =

24 M. 1 (10-1) = 4 C. W. N. 725 = 2 Bom. L. R. 771 =

7 Sar. 678 = 10 M. L. J. 221,

C. P. CODE (ACT V OF 1908).—(Contd.)**S. 152—Decree—Amendment of—(Contd.)**

—Compromise subsequent to decree between some of parties only regarding subject-matter of suit—Amendment of decree in case of. See DECREE—COMPROMISE SUBSEQUENT TO—COMPROMISE BETWEEN SOME OF PARTIES ONLY. (1900) 27 I. A. 197 (206) = 24 M. 1 (11).

—Interest subsequent to suit—Omission of court below to award, though prayed for—P. C. appeal—Amendment of decree below in, by awarding such interest—Cross-appeal—Necessity.

In a suit on a pro-note, the plaintiff prayed for interest on the principal sum from the date of the institution of the suit until decree and on the amount decreed until realisation.

The original court found that only a sum of Rs. 500 was due under the suit note, and made a decree for that sum, with interest at the rate provided for by the note from the date of the institution of the suit till realisation as prayed in the plaint.

On appeal the appellate court found, differing from the court below, that the full amount claimed was due under the note, and gave a decree for that amount; but said nothing about interest.

On 26—3—1907 special leave to appeal against the judgment of the appellate court was granted to the defendant by His Majesty in Council. On 26—4—1907 the plaintiffs applied to the appellate court by petition praying that under the provisions of S. 206 of C. P. C. of 1882 that court would amend its decree by setting out specifically that interest was payable on the decretal amount. That Court, however, dismissed that application on the ground that the omission of interest in its judgment and decree could not be regarded as a clerical error, and that its judgment did not necessarily imply that the decree would carry the contract rate of interest on the principal sum.

Shortly before the defendant's appeal to the P. C. came on for hearing, the plaintiffs-respondents petitioned His Majesty in Council for special leave to enter a cross-appeal, so far as the lower court's decree failed to include interest after the institution of the suit. A consent order in council was made that the respondents should have leave on the hearing to appeal on the question as to interest subsequent to the institution of the suit raised on their petition.

Held that the decree of the lower court should be amended by the providing for interest subsequent to the decree in accordance with the prayer of the petition presented by the respondents. (*Lord Macnaghten.*) **CASSIM AHMED JEWAR v. NARAINAN CHETTY.** (1910) 37 C. 623 =

8 M. L. T. 229 = 12 Bom. L. R. 646 = 12 C. L. J. 231 =

7 I. C. 814 = 9 Sar. 698 = 20 M. L. J. 630.

—Power of—S. and O. 47, R. 1 if exhaustive of.

The High Court has no power to alter its own decree except under the provisions of Ss. 206 and 623 of C. P. C. of 1882 (205). (*Lord Davey.*) **RAJAH KOTAGIRI VENKATA SUBBAMMA RAO v. RAJAH VELLANKI VENKATARAMA RAO.** (1900) 27 I. A. 197 = 24 M. 1 (10) =

4 C. W. N. 725 = 2 Bom. L. R. 771 = 7 Sar. 678 =

10 M. L. J. 221.

S. 152—Orders and Rules under.

—Letters Patent appeals—Applicability to. See LETTERS PATENT—APPEALS UNDER—C.P.C. OF 1908.

(1921) 48 I. A. 76 = 48 C. 481 (488).

—Procedure—Rules regulating—Appeal—Right of—Costs—Terms as to—Imposition of—Power as to—Rule limiting exercise of, to applications contemporaneous with institution of appeal—Validity. See DECREE—APPEAL FROM—RIGHT OF—COSTS—TERMS AS TO.

(1921) 48 I. A. 76 = 48 C. 481 (486).

—Procedure—Rules regulating—Letters Patent and other appeals—Uniformity as regards—Necessity.

C. P. CODE (ACT V OF 1908)—(Contd.)**S. 152—Orders and Rules under—(Contd.)**

The Code of Civil Procedure is framed on the scheme of providing generally for the mode in which the High Court is to exercise its jurisdiction, whatever it may be, while specifically excepting the powers relating to the exercise of original civil jurisdiction, to which the Code is not to apply. It confers a general rule-making power saving only what is excepted in the body of Code. There is no reason why there should be any general difference between the procedure of the High Court in matters coming under the Letters Patent and its procedure in other matters. The High Court's power to regulate procedure in Letters Patent Appeals has been preserved by the general rule-making power conferred upon it by the Code of Civil Procedure. (*Lord Sumner.*) **SABITRI THAKURAIN v. SAVI.** (1921) 48 I. A. 76 =

48 C. 481 (492) = (1921) M. W. N. 159 =
33 C.L.J. 307 = 19 A.L.J. 281 = 23 Bom. L.R. 681 =
14 L.W. 362 = 60 I.C. 274 = 40 M.L.J. 308.

—Procedure—Rules regulating—Validity of.

Under C. P. C. of 1908, rules relating to all procedure are competent, unless the body of the code contains something inconsistent with them. (*Lord Sumner.*) **SABITRI THAKURAIN v. SAVI.** (1921) 48 I. A. 76 =

48 C. 481 (491) = (1921) M.W.N. 159 = 33 C.L.J. 307 =
19 A.L.J. 281 = 23 Bom. L.R. 681 = 14 L.W. 362 =
60 I.C. 274 = 40 M. L. J. 308.

—O. 1, Rr. 1 to 7—See under PRACTICE—PARTIES.

—O. 1, R. 8—Defrauded persons—Representative action by one of, on behalf of himself and all others—Maintainability.

A representative action by one of several defrauded persons on behalf of himself and all others will not lie (205). **GEOFFREY TEIGNMOUTH CLARKSON v. E. C. DAVIES.**

(1922) 32 M.L.T. 196 P.C.

—Final decree—Applicability after, of O. 1, Rr. 8, 10 and O. 22, R. 10.

Quare, whether Ss. 32 and 372 of C.P.C. of 1882 are applicable after final decree (255). (*Lord Parker.*) **RAGHUNATH DAS v. SUNDER DAS KHETRI.**

(1914) 41 I.A. 251 = 42 C. 72 (81) = 1 L. W. 567 =
16 M.L.T. 353 = (1914) M.W.N. 747 = 18 C.W.N. 1058 =
16 Bom. L.R. 814 = 20 C.L.J. 555 = 13 A.L.J. 154 =
24 I.C. 304 = 27 M.L.J. 150.

—Tengalai community—Class known as—Suit designed or framed to bind—Maintainability.

Quare, whether there is any body that can be described as the Tengalai community, and whether a representative suit designed or framed for the purpose of binding for all time the Tengalai community is competent. (*Lord Macnaghten.*) **SADAGOPA CHARIAR v. RAMA RAO.**

(1907) 34 I.A. 93 (101) = 30 M. 185 (190) =
5 C.L.J. 566 = 11 C.W.N. 585 = 2 M.L.T. 204 =
9 Bom. L.R. 663 = 4 A.L.J. 333 = 17 M.L.J. 240.

—O. 1, R. 9—See PRACTICE—PARTIES—(1) MISJOINDER OF, (2) NON-JOINDER OF.

—O. 1, R. 10—Final decree—Applicability after. See C.P.C. OF 1908, O. 1, R. 8—FINAL DECREE.

—O. 1, R. 10 (2)—Defendants added under—Date of institution of suit as regards—Limitation bar as regards them prior to—Effect on—Limitation Act of 1908, S. 22.

When parties are added by the court after the institution of a suit under O. 1, R. 10 (2), S. 22 of the Limitation Act provides that the date when they are added is to be deemed to be the date of the institution of the suit so far as they are concerned for purposes of limitation and the rights which they may have acquired under the Limitation Act are, therefore, sufficiently safeguarded. (*Sir John Wal-*

lis.) **CHOCKALINGAM CHETTY v. SEETHAI ACHI.** (1927) 55 I. A. 7 = 6 R. 29 = 27 L.W. 1 =

C. P. CODE (ACT V OF 1908), O. 1, R. 10 (2)—(Contd.)

(1928) M.W.N. 20 = 4 O.W.N. 1231 = 32 C.W.N. 281 =
47 C.L.J. 136 = I.L.T. 40 R. 18 = 30 Bom. L. R. 220 =
107 I. C. 237 = 26 A.L.J. 371 =
A.I.R. 1927 P. C. 252 = 54 M.L.J. 88.

—Religious Endowment—Temple—Suit by trustee on behalf of—Compromise improper of—Addition of parties to protect interests of worshippers—Propriety of. See HINDU LAW—RELIGIOUS ENDOWMENT—TEMPLE—SHEBAIT OF—SUIT BY—COMPROMISE IMPROPER OF.

(1908) 35 I. A. 176 = 31 M. 236.

—O. 1, R. 11—Misjoinder or non-joinder of parties. See UNDER PRACTICE—PARTIES.

—O. 2, R. 2.

APPLICABILITY OF.

APPLICATION OF.

BAR UNDER.

CAUSE OF ACTION—MEANING OF.

OBJECT AND EFFECT OF.

OBJECTION BASED ON.

OMITS TO SUE—MEANING OF.

PORTION OF CLAIM.

SCOPE OF—EXTENSION OF.

SPLITTING PERMISSIBLE BUT UNNECESSARY—COSTS DUE TO.

CASES UNDER.

[*N. B.*—Under this head are collected in alphabetical order all the cases in which the rule was or was not held to operate as a bar.]

O. 2, R. 2—Applicability of.

—Test.

The true test of the proper application of S. 7 of C. P. C. of 1859 to any particular case must be, whether there has been a splitting of the cause of action (197). (*Sir James Colvile.*) **RAO KURUN SING v. NAWAB MAHOMED FYZ ALI KHAN.** (1871) 14 M.I.A. 187 = 10 B.L.R. 1 =

2 Suth. 474 = 2 Sar. 722.

O. 2, R. 2—Application of.

—Duty of Court—Hardship in individual cases—Consideration of—Propriety.

There were, no doubt, good grounds of policy that caused the introduction into the Code of Civil Procedure of the provisions (O. 2, R. 2) which in the result of this case, will involve the appellant in some pecuniary loss, and it is the duty of the court to interpret and carry into effect those rules uninfluenced by the consideration of the individual loss that may be occasioned by disobedience of the provisions (120.) (*Lord Buckmaster.*) **KISHAN NARAIN v. PALA MAL.** (1922) 50 I.A. 115 = 4 Lah. 32 =

25 Bom. L.R. 220 = 32 M.L.T. 41 = 27 C.W.N. 802 =
38 C.L.J. 126 = 18 L.W. 341 = 9 O. & A.L.R. 488 =
A.I.R. (1922) P.C. 412 = 72 I.C. 187 = 44 M.L.J. 123.

O. 2, R. 2—Bar under.

—Test.

In all cases in which C.P.C. of 1859, S. 7, is pleaded as a bar to a second suit, the correct test is, whether the claim in the new suit is, in fact, founded on a cause of action distinct from that which was the foundation of the first suit (605). (*Sir James W. Colvile.*) **MOONSHEE BUZLOOR RUHEEM v. SHUMSOONISSA BEGUM.**

(1867) 11 M.I.A. 551 = 8 W.R.P.C. 3 = 2 Suth. 59 =
2 Sar. 259.

O. 2, R. 2—Cause of action—Meaning of.

—Larger and wider relief—Party entitled to—Suit by, limiting claim—Subsequent suit for balance—Maintainability.

The cause of action in O. 2, R. 2 of C. P. C. of 1908 is the cause of action which gives occasion for and forms the

C. P. CODE (ACT V OF 1908)—(Contd.)

O. 2, R. 2—Cause of action—Meaning of—(Contd.)

foundation of the suit, and if that cause enables a man to ask for larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance by independent proceedings. (*Lord Buckmaster.*) MUHAMMAD HAFIZ v. MUHAMMAD ZAKARIYA.

(1921) 49 I.A. 9 (15) = 44 A. 121 (126) = 20 A.L.J. 17 = 35 C.L.J. 126 = (1922) M.W.N. 89 = 26 C.W.N. 297 = 15 L.W. 377 = 24 Bom. L.R. 341 = 30 M.L.T. 224 = 1 P.W.R. 1922 = 3 Pat. L.T. 279 = A.I.R. (1922) P.C. 23 = 65 I.C. 79 = 42 M.L.J. 248.

O. 2, R. 2—Object and Effect of.

—Ss. 42 and 43 of C.P.C. of 1882 are aimed against a multiplicity of suits in respect of the same cause of action, and shortly stated, they enact that if a plaintiff fails to sue for the whole of his claim or remedy in respect of a particular cause of action he shall not afterwards sue in respect of the portion so omitted or relinquished (145). (*Lord Robson.*) MAUNG PE v. MA LON MA GALE. (1911) 38 I.A. 140 = 38 C. 629 (637-8) = 13 Bom. L.R. 464 = 15 C.W.N. 766 = 8 A.L.J. 739 = 14 C.L.J. 15 = (1911) M.W.N. 397 = 4 Bur. L.T. 153 = 6 L.B.R. 18 = 10 M.L.T. 479 = 11 I.C. 497 = 21 M.L.J. 749.

—See also CEYLON CIVIL PROCEDURE CODE, 1889, S. 34. (1913) 41 I.A. 142 (148).

O. 2, R. 2—Objection based on.

—Time for taking—Appeal—Objection for first time in—Maintainability—Conditions.

An objection founded upon Ss. 42 and 43 of C. P. C. of 1882 should be treated as a preliminary point, and, when no notice of the point is given by the defence either in his defence, or at the trial or in the grounds of appeal first delivered, he should not be allowed to raise the point in the court of appeal except upon terms which will indemnify the plaintiff for his omission to raise it at the proper time (145). (*Lord Robson.*) MAUNG PE v. MA. LON. MA. GALE.

(1911) 38 I.A. 140 = 38 C. 629 (637) = 13 Bom. L.R. 464 = 15 C.W.N. 766 = 8 A.L.J. 739 = 14 C.L.J. 15 = (1911) M.W.N. 397 = 4 Bur. L.T. 153 = 6 L.B.R. 18 = 10 M.L.T. 479 = 11 I.C. 497 = 21 M.L.J. 749.

O. 2, R. 2—Omits to sue—Meaning of.

—Accidental or involuntary omissions if included.

The words of S. 7 of C. P. C. of 1859 are:—"If a plaintiff relinquish or omit to sue for any portion of his claim." It plainly includes accidental or involuntary omissions as well as acts of deliberate relinquishment (604-5). (*Sir James W. Colville.*) MOONSHEE BUZLOOR RUHEEM v. SHUMSOONISSA BEGUM. (1867) 11 M.I.A. 551 = 8 W.R.P.C. 3 = 2 Suth. 59 = 2 Sar. 259.

O. 2, R. 2—Portion of claim.

—Right not known to party not a. See under this rule—Cases under—RIGHT NOT KNOWN TO PLAINTIFF AT TIME OF PRIOR SUIT.

(1888) 15 I.A. 106 (112) = 15 C. 800 (808).

O. 2, R. 2—Scope of—Extension of.

—Objection to—Duty of Courts.

No one would be anxious to stretch or strain the language of O. 2, R. 2 of C. P. C. of 1908 in order to cover a case where, if it be made applicable, it is obvious that the plaintiffs may suffer a substantial wrong. (*Lord Buckmaster.*) MUHAMMUD HAFIZ v. MUHAMMUD ZAKARIYA.

(1921) 49 I.A. 9 (13) = 44 A. 121 (125) = 20 A.L.J. 17 = 35 C.L.J. 126 = (1922) M.W.N. 89 = 26 C.W.N. 297 = 15 L.W. 377 = 24 Bom. L.R. 341 = 30 M.L.T. 224 = 1 P.W.R. 1922 = 3 Pat. L.T. 279 = A.I.R. (1922) P.C. 23 = 65 I.C. 79 = 42 M.L.J. 248.

C. P. CODE (ACT V OF 1908)—(Contd.)

O. 2, R. 2—Splitting permissible but unnecessary—Costs due to.

—Order as to.

If the Court is of opinion that a plaintiff has unnecessarily severed his claims, it may, of course, punish the plaintiff by the exercise of its discretion as to costs (145-6). (*Lord Robson.*) MAUNG PE v. MA LON MA GALE.

(1911) 38 I.A. 140 (145-6) = 38 C. 629 (638) = 13 Bom. L.R. 464 = 15 C.W.N. 766 = 8 A.L.J. 739 = 14 C.L.J. 15 = (1911) M.W.N. 397 = 4 Bur. L.T. 153 = 6 L.B.R. 18 = 10 M.L.T. 479 = 11 I.C. 497 = 21 M.L.J. 749.

O. 2, R. 2—Cases under Rule.

—Accretion—New accretion after suit—Fresh suit in respect of.

The question whether land is formed by gradual accretion depends on evidence. Suing for a new accretion after a former suit is not a splitting of action, within the meaning of S. 7 of C. P. C. of 1859. (169-70). PAHALWAN SINGH v. MAHARAJAH MUHESSUR BUKHSH SINGH BAHADOOR. (1871) 9 B.L.R. 150 (P.C.) = 16 W.R.P.C. 5 = 2 Sar. 683 = 2 Suth. 442.

—Award—Sum found due under—Portion of—Suit for—Suit subsequent for the remainder. See ARBITRATION—AWARD—SUM FOUND DUE UNDER—PORTION OF.

(1913) 41 I.A. 142 (149).

—Award—Sum found due under—Pro-notes executed for—Suit upon—Dismissal of—Suit subsequent for amount found due under award. See CEYLON CIVIL PROCEDURE CODE, 1889—S. 34—AWARD. (1913) 41 I.A. 142 (148).

—Burmese Buddhist Law—Divorce—Husband's suit for, based on wife's misconduct—Decree granting—Partition—Suit subsequent by him against wife for. See BURMESE BUDDHIST LAW—DIVORCE—HUSBAND'S SUIT FOR, BASED ON WIFE'S MISCONDUCT.

(1911) 38 I.A. 140 (145) = 38 C. 629 (637-8).

—Cause of action—Larger and wider relief—Cause of action entitling party to—Suit limiting claim in case of—Subsequent suit for balance—Maintainability. See C. P. C. of 1908, O. 2, R. 2—CAUSE OF ACTION—MEANING.

(1921) 49 I.A. 9 (15) = 44 A. 121 (126).

—Causes of action distinct—Separate suits in respect of.

—S. 7 of C. P. C. of 1859 does not say that every suit shall include every cause of action, or every claim which the party has, but "every suit shall include the whole of the claim arising out of the cause of action,"—meaning the cause of action for which the suit is brought (119). (*Sir Barnes Peacock.*) RAJAH OF PITTAPUR v. VENKATA MAHIPATI SURYA. (1885) 12 I.A. 116 = 8 M. 520 = 4 Sar. 638.

—S. 7 of C. P. C. of 1859 does not say that every suit shall include every cause of action, or every claim which the party has, but "every suit shall include the whole of the claim arising out of the cause of action"—meaning the cause of action for which the suit is brought.

Where the claim in a subsequent suit did not arise out of the cause of action which was the foundation of the former suit, held that the subsequent suit was not barred under S. 7 of C. P. C. of 1859 (111-2). (*Lord Macnaghten.*) AMANAT BIBI v. IMDAD HUSAIN.

(1888) 15 I.A. 106 = 15 C. 800 (807-8) = 5 Sar. 214.

—S. 43 of C. P. C. of 1882 does not say that every suit shall include every cause of action or every claim which the party has, but every suit shall include the whole of the claim arising out of the cause of action, meaning the cause of action for which the suit is brought (158-9). (*Sir Richard Couch.*) MAHOMED RIASAT ALI v. MUSSUMUT HASIN BANU. (1893) 20 I.A. 155 = 21 C. 157 (162-3) = 6 Sar. 374 = R. and J.'s No. 133 (Oudh).

C. P. CODE (ACT V OF 1908)—(Contd.)

Or. 2, R. 2—Cases under—(Contd.)

—Causes of action inconsistent and mutually exclusive—Separate suits in respect of. (See CEYLON CIVIL PROCEDURE CODE—S. 34—AWARD.

(1913) 41 I. A. 142 (148).

—Conversion—Deceased—Conversion of goods of—Suit for—Legacies bequeathed by her—Suit subsequent for payment of—Maintainability—Subject-matter of two suits same. See CONVERSION—DECEASED.

(1925) 52 I. A. 214 (224) = 48 M. 312.

—Conversion—Several things—Conversion of—Suit to recover one thing—Suit subsequent to recover another. See CONVERSION—SEVERAL THINGS.

(1885) 12 I. A. 116 (119) = 8 M. 520.

—Deposit—Items of—Suits different in respect of.

Company's paper for Rs. 10,000, the subject of the suit, had been made over to the defendant together with two other sets of paper for Rs. 9,500, and Rs. 7,000, which were claimed in a previously instituted suit. The present claim was precisely the same as that for the other two sets. The only reason assigned for not suing for this paper in the former suit was that "as the plaintiff was a purdah lady and unacquainted with reading and writing, she could not ascertain anything about the aforesaid paper." It was stated that the mistake was discovered subsequently, and that the cause of action arose on that subsequent date.

The cause of action in the former suit seems to be the refusal of the defendant to restore, or his misappropriation of, the plaintiff's property, which she says she entrusted to him. There is nothing to distinguish the deposit of this particular paper from the deposit of those which she deposited with it, and has recovered in the former suit. It was a mere item of her demand, and is admitted on the face of her present plaint to have been omitted from it for no other reason than the very insufficient one before mentioned. The Zilla Judge rightly held that the suit was barred under S. 7 of C.P.C. of 1859. (Sir James Colville.) MOONSHEE BUZLOOR RUHEEM v. SHUMSOONNISSA BEGUM.

(1867) 11 M. I. A. 551 (605-6) = 8 W. R. P. C. 3 = 2 Suth. 59 = 2 Sar. 259.

—Hindu Law—Daughter—Suit by, after death of mother (life-tenant) for possession of house appertaining to father's estate—Maintainability—Suit prior during her lifetime against, inter alia, same defendant to establish her reversionary right—Omission to include house in.

During the lifetime of her mother, the life-tenant, the daughter of a deceased Hindu instituted a suit against, inter alia, her aunt, seeking to establish her title to her father's estate as heir in reversion on her mother's death. In that suit the daughter omitted to include a house which appertained to the estate of her father but to which the aunt set up some sort of claim. Held that that omission was not a bar, under O. 2, R. 2 of C. P. C. of 1908, to a suit instituted by the daughter after the death of her mother to recover possession of the house upon the footing that it formed part of her father's estate and that the defendant, who claimed through the aunt, was in wrongful possession of it.

In the prior suit the daughter was not seeking, and could not then have sought, to recover possession from the aunt of any particular item of property forming part of her father's estate. The cause of action in the present suit arises out of tortious conduct on the part of the defendant or his predecessor the aunt in respect of the house, and is a cause of action distinct from that in the previous suit.

The claim which the plaintiff is now making could not in fact have been made in the previous suit. ((Lord Tomlin). MT. JAGGO BAI v. UTSAVA LAL. (1929) 30 L. W. 60 = 56 I.A. 267 = 27 A.L.J. 716 = 33 C.W.N. 809 = 10 P.L.T. 527 = 31 Bom. L.R. 891 = 6 O.W.N. 589 =

C. P. CODE (ACT V OF 1908)—(Contd.)

Or. 2, R. 2—Cases under—(Contd.)

50 C.L.J. 52 = 117 I.C. 498 = A.I.R. 1929 P.C. 166 = 57 M.L.J. 160.

—Hindu Law—Joint family—Member of—Properties purchased in names of different strangers to family at different times—Suits different for shares of, on ground that they are joint family property—Maintainability. See HINDU LAW—JOINT FAMILY—MEMBER OF—PROPERTIES PURCHASED IN NAMES OF DIFFERENT STRANGERS TO FAMILY, ETC. (1873) 20 W. R. 450.

—Hindu Law—Reversioner—Widow—Alienations different by, some as absolute owner and others as limited owner—Suits different to set aside—Not barred. See HINDU LAW—REVERSIONER—WIDOW—ALIENATION BY—DIFFERENT ALIENATIONS, ETC. (1871) 14 M.I.A. 187 (198).

—Larger and wider relief—Cause of action entitling party to—Suit limiting claim in case of—Suit subsequent for balance. See C. P. C. OF 1908, O. 2, R. 2—CONSTRUCTION—WORDS—CAUSE OF ACTION. (1921) 49 I. A. 9 (15) = 44 A. 121 (126).

—Mahomedan Law—Dower—Widow's suit for—Subsequent suit by her as heiress—Maintainability—Causes of action in two suits different. See MAHOMEDAN LAW—DOWER—WIDOW'S SUIT FOR—SUIT SUBSEQUENT BY HER AS HEIRESS. (1893) 20 I. A. 155 (158-9) = 21 C. 157 (162-3).

—Mortgage—Interest in arrear under—Suit for—Subsequent suit for principal—Bar of—Conditions. See MORTGAGE—INTEREST IN ARREAR UNDER—SUIT FOR. (1921) 49 I. A. 9 = 44 A. 121 and (1922) 50 I. A. 115 = 4 Lah. 32.

—Mortgage—Several mortgages on same property in favour of same person—Different suits in respect of—Maintainability. See MORTGAGE—SEVERAL MORTGAGES, ETC. (1902) 29 I. A. 118 (126) = 24 A. 429 (438-9).

—Partnership—Accounts—Suit for—Dismissal of, as barred by limitation—Specific sums realised before date of—Suit for share of—Maintainability. See PARTNERSHIP—ACCOUNTS—SUIT FOR—DISMISSAL OF, AS BARRED BY LIMITATION. (1922) 49 I. A. 181 (194) = 45 M. 378.

—Pensions Act, 1871—Certificate under—Absence of—Dismissal of suit on ground of—Suit subsequent instituted after obtaining such certificate—Not barred.

Where, owing to the absence of a certificate under the Pensions Act, 1871, the court in a previous suit instituted by the plaintiff had no jurisdiction and was not competent to deal with the question of *Malikana*, held that a subsequent suit instituted by the plaintiff in respect of the *Malikana*, after obtaining the necessary certificate under that Act, was not barred under O. 2, R. 2 of C.P.C. of 1908.

The plaintiff's claim to the *Malikana* was not, in the circumstances of the case, part of the claim which she was entitled to make in the previous suit. (Lord Tomlin.) MT. JAGGO BAI v. UTSAVA LAL. (1929) 30 L. W. 60 = 56 I.A. 267 = 27 A.L.J. 716 = 33 C.W.N. 809 = 10 P.L.T. 527 = 31 Bom. L.R. 891 = 6 O.W.N. 589 = 50 C.L.J. 52 = 117 I.C. 498 = A.I.R. (1929) P.C. 166 = 57 M.L.J. 160.

—Property—Claim to—Different grounds of—Suits different based on—Maintainability.

Where plaintiff in a former suit saw fit in that suit to admit that no portion of the land, then sued for, was included within the limits of her talook as originally settled and defined by the *dawl*, but that she had, as talookdar of that talook, acquired title to it as *tozfeer*:

Held, that she could not, under S. 2, Act VIII, 1859, bring her present suit and claim to fall back upon the other title.

C. P. CODE (ACT V OF 1908)—(Contd.)

Or. 2, R. 2—Cases under—(Contd.)

In the former suit plaintiff alleged that she acquired title to the land in dispute as *towfeer*, that is, that by gradual squatting or encroachment she had enlarged the boundaries of her talook, and by bringing the land into cultivation had acquired a preferable right to have the settlement made with her. Now it is perfectly clear that the real question in issue between the parties then was whether the lands then sued for, which included the land now sued for, belonged as of right to the talookdar, or to the defendant; and it was open to the plaintiff in that suit to shape her title in either of three ways. She might have said that the whole of the land then claimed was *towfeer* land; or she might have said, a portion of the land fell within the talook as originally settled, and the residue *towfeer* land; or she might have put her case in the alternative, and have said that she had good title to a portion as her original land, but that, should the proof of that fail, that portion also was to be considered as *towfeer* land. With the full knowledge of all the circumstances, she chose to shape her claim in the first form without any alternative. It is now urged that she has now a right to fall upon the other title. It appears to their Lordships that the contention cannot prevail against the clear terms of the section. They are clearly of opinion that the cause of action in both suits is the dispossession of the appellant by the fixing of the boundry which is now complained of, and the consequential affirming of the defendant's possession.

This case does not fall within the principle of the decision (*supra* 1) of *Durga Purshad's* case, because here no new circumstances have at all intervened. Here the matter in dispute throughout was the title of the talookdar to the land in question and the possession which she had thereby acquired, and it is perfectly clear, upon the proceedings in the earlier suit, that her right in any way to this land was capable of being therein determined. The principle of the *Kattama Nauchear's* case (*supra* 3) applies to the present case. This case is even stronger than that case, inasmuch as in the latter the party was a defendant in the first, and plaintiff in the second suit; while in this case the appellant is plaintiff in both suits, and as such had in both the means of shaping her case as she chose.

WOOMATARA DEBIA *v.* KRISTOKAMINEE DOSSEE.

(1872) 11 B. L. R. 158 = 18 W. R. 163 = 2 Suth. 653 = 3 Sar. 144.

—Property—Possession of—Suit for, as proprietor—Dismissal—Redemption on foot of mortgage—Subsequent suit for—Maintainability. See C. P. C. OF 1908, S. 11—POSSESSION OF PROPERTY. (1888) 15 I. A. 106 (111-2) = 15 C. 800 (807-8).

—Right not known at date of prior suit—Suit fresh in respect of.

A right which a litigant possesses without knowing or ever having known that he possesses it, can hardly be regarded as a "portion of his claim" within the meaning of S. 7 of C. P. C. of 1859 (112). (*Lord Macnaghten.*) AMANAT BIBI *v.* IMDAD HUSAIN.

(1888) 15 I. A. 106 = 15 C. 800 (808) = 5 Sar. 214.

—Vendor and purchaser—Purchaser—Possession of property purchased—Suit for—Dismissal—Purchase-money—Fresh suit for recovery of. See VENDOR AND PURCHASER—PURCHASER—POSSESSION OF PROPERTY PURCHASED—SUIT FOR. (1891) 18 I. A. 158 (164) = 19 C. 123.

—Vendor and purchaser—Purchaser—Possession of property purchased and damages—Suit for—Dismissal—Specific performance—Fresh suit for. See VENDOR AND PURCHASER—PURCHASER—POSSESSION OF PROPERTY AND DAMAGES. (1901) 28 I. A. 221 (226-7) = 24 M. 491 (503-4).

C. P. CODE (ACT V OF 1908)—(Contd.)

Or. 2, R. 2—Cases under—(Contd.)

—Will—Realty and personalty bequeathed under—Suits different in respect of—Maintainability.

The appeal arose out of a suit brought by the respondents to recover, *inter alia*, a half-share of certain moneys, jewels, and effects which they claimed under the will of one B. The question for decision was whether the suit was barred under S. 7 of C. P. C. of 1859 by reason of the non-claim in respect of the suit property in a prior suit (O. S. 12 of 1872) brought by the respondents against the same defendant.

The will of B, under which the respondents claimed the suit personal property, also devised to them the estate Viravaram. The defendant had applied to have the estate registered in her name. The respondents, having unsuccessfully resisted that registration, instituted O. S. 12 of 1872 to obtain cancelment of the registry, and obtained a decree in their favour, which was affirmed by the High Court. They afterwards instituted the suit out of which the appeal arose to recover the personal property bequeathed to them under the same will of B but withheld by them from the defendant.

Held, affirming the High Court that the suit was not barred under S. 7 of C. P. C. of 1859.

The claim in respect of the personalty was not a claim arising out of the cause of action which existed in consequence of the defendant having improperly turned the plaintiffs out of possession of Viravaram. It was a distinct cause of action altogether, and did not arise at all out of the other. It is not like the case of one conversion of several things. The correct test is, whether the claim in the new suit is in fact founded on a cause of action distinct from that which was the foundation of the former suit. Their Lordships are of opinion that the claim in respect of the personalty was founded on a cause of action distinct from that which was the foundation of the former suit. (*Sir Barnes Peacock.*) RAJAH OF PITTAPUR *v.* VENKATA MAHIPATI SURYA. (1885) 12 I. A. 116 = 8 M. 520 = 4 Sar. 638.

—O. 2, R. 2, Expl.—Provision in—English law—Distinction.

The Illustration (Explanation) given to O. 2, R. 2 of C. P. C. of 1908 shows that a personal claim for the mortgage money under a mortgage and the enforcement of the security for the debt are to be regarded as one and the same cause of action. This provision is in marked distinction to the law of this country, where a mortgagee is at liberty to appoint a receiver under his deed to sue for the debt and to take proceedings for sale or foreclosure independently and at the same time. It is important, therefore, in considering the effect of the Code to bear in mind that its obvious intention is to establish a rule of law different from that accepted here. (*Lord Buckmaster.*) KISHAN NARAIN *v.* PALA MAL. (1922) 50 I. A. 115 (117-8) = 4 Lah. 32 = 72 I. C. 187 = 25 Bom. L. R. 220 = 32 M. L. T. 41 = 27 C.W.N. 802 = 38 C. L. J. 126 = 18 L. W. 341 = 9 O. & A. L. R. 488 = A. I. R. 1922 P. C. 412 = 44 M. L. J. 123.

—O. 2, R. 3—Landlord—Tenants different of different lands—Ejectment suit single against—Evidence applicable to one tenant—Use of, against another—Irregularity—Waiver—Objection in appeal—Maintainability.

In disregard of the provisions of the Code of Civil Procedure, the plaintiff united in the same suit not merely several causes of action, but several actions or suits against separate defendants, with the result that in effect the litigation was conducted and treated throughout as though the defendants were a community with common interests. The evidence against each defendant was not kept distinct; nevertheless the plaintiff did not take exception when the evidence was tendered at the trial.

C. P. C. (ACT V OF 1908), Or. 2, R. 3—(Contd.)

In an appeal by the plaintiff to the Privy Council, *held*, that he could not for the first time take the objection that the evidence as to each defendant was not kept distinct and that much of the evidence used against him (the plaintiff) was not relevant.

The plaintiff cannot now be heard to object to the use of evidence to which the irregularity of his procedure has given relevance. (*Sir Lawrence Jenkins*.) **SETURATNAM AIYAR v. VENKATACHALA GOUNDAN.**

(1919) 47 I.A. 76 (86-7) = 43 M. 567 (578) = 25 C.W.N. 485 = 18 A.L.J. 707 = 56 I.C. 117 = 27 M. L. T. 102 = (1920) M. W. N. 61 = 11 L. W. 399 = 22 Bom. L. R. 578 = 38 M. L. J. 476.

—O. 2, Rr. 3 and 4—Landlord—Rent in arrear—Establishment of title—Suit for both—Propriety. *See* LANDLORD AND TENANT—LANDLORD—RENT IN ARREAR.

(1866) 10 M. I. A. 438 (449-51).
—Rent—Mesne profits—Claims for—Joinder of, in one suit—Propriety. *See* LANDLORD AND TENANT—LANDLORD—RENT—MESNE PROFITS.

(1866) 10 M. I. A. 438 (451).

—O. 2, R. 4—Hindu widow—Husband's share in moveable and immoveable property of family—Suit for—Misjoinder—Suit when not bad for. *See* HINDU LAW—WIDOW—HUSBAND'S SHARE IN MOVEABLE AND ETC.

(1903) 31 I. A. 10 (16) = 31 C. 262 (272).

—O. 2, R. 7—Causes of action—Misjoinder or non-joinder of. *See* UNDER PRACTICE—CAUSE OF ACTION

—O. 3, Rr. 1 & 2—Execution petition—Authorised agent of decree-holder—Pleader appointed by—Presentation of petition by—Validity.

The appellants, who held a decree, were resident within the local limits of the jurisdiction of the Court within which limits an application for execution of the decree was to be made. They executed a special power-of attorney in favour of R, authorising him on their behalf to, amongst other things, "execute vakalat to vakils, to sign execution petitions, and put in affidavits and to conduct all necessary proceedings" in the suit. R authorised a pleader to appear in the Court in question to present an execution verified by him, R. The execution petition was to be presented on behalf of the appellants. The pleader presented in Court an execution petition by him, and the writing appointing him to make the application embodied in the petition.

Held, that the petition was validly presented. (*Lord Atkinson*.) **THIRUVENKATASAMI IVENGAR v. PAVADAI PILLAI.**

(1921) 48 I. A. 534 = 44 M. 736 = 14 L. W. 244 = (1921) M. W. N. 552 = 26 C.W. N. 376 = 24 Bom. L. R. 606 = A. I. R. 1922 P. C. 225 = 70 I. C. 281 = 41 M. L. J. 643.

—O. 5, R. 20—Substituted service—Condition precedent to—Proof of—Necessity.

In cases of substituted service, that is, service substituted for the personal service which the Statute requires wherever it is practicable, the Courts should take care to be satisfied that the condition, on which alone substituted service is good, exists, namely, that the person who ought to be served personally is keeping out of the way. It will not be sufficient to show that the notice has been attached to the door, unless the condition which renders such a mode of service good has been first established to the satisfaction of the Court. **RAM CHUNDER DUTT v. JUGHESH CHUNDER DUTT.**

(1873) 19 W. R. 353 = 12 B. L. R. 229 = 2 Suth. 836 (840) = 3 Sar. 249.

—O. 6, R. 4—Fraud—Plea of. *See* PRACTICE—PLEADINGS—FRAUD.

—O. 6, R. 14—Pleadings—Signature of parties in—Presumption as to—Pleadings of 1817 and 1819. *See* LIMITATION ACT OF 1859, S. 1, CL. (15)—MORTGAGE—REDEMPTION. (1900) 27 I.A. 103 (107) = 27 C. 1004 (1011).

C. P. C. (ACT V OF 1908)—(Contd.)

—O. 6, Rr. 14 and 15—Applicability—Corporation—Suit by or on behalf of—Applicability to.

S. 51 of C. P. C. of 1882, which regulates proceedings taken by or on behalf of ordinary plaintiffs, does not apply to suits by or on behalf of corporations within S. 435 of C. P. C. of 1882 (142). (*Hon. George Denman*.) **DELHI AND LONDON BANK v. OLDHAM.** (1893) 20 I. A. 139 =

21 C. 60 = 6 Sar. 331 = R. & J's No. 130 (Oudh).

—Co-plaintiffs—Signing and verification of plaint in case of—Signature and verification by one only—Sufficiency of.

The suits out of which the appeals arose were instituted to recover moneys alleged to be due to M, G and K jointly, on an account acknowledged and signed.

On the face of the plaints the three joint creditors were named as co-plaintiffs. The names of G and K had not been struck out, nor did they, or either of them, attempt to repudiate the suits. But still it was contended that M was the sole plaintiff, because the plaints were signed and verified by him alone.

Held, that that was immaterial.

There is no rule providing that a person named as a co-plaintiff is not to be treated as a plaintiff unless he signs and verifies the plaint. (*Lord Macnaghten*.) **MOHINI MOHUN DAS v. BUNGSI BUDDAN SAHA DAS.**

(1889) 17 C. 580 (582) = 5 Sar. 498.

—O. 6, R. 15—Pleadings—Information and belief—Averment upon—Sufficiency of, as to a fact.

An averment upon "information and belief" is sufficient as to a fact within the defendant's knowledge and not within the plaintiff's (83). (*Mr. Justice Willes*.) **JUTTENDROMOHUN TAGORE v. GANENDROMOHUN TAGORE.**

(1872) Sup. I. A. 47 = 9 B. L. R. 377 = 18 W. R. 359 = 3 Sar. 82 = 2 Suth. 692.

—O. 6, R. 17—Pleadings—Amendment of. *See* PRACTICE—PLEADINGS—AMENDMENT OF.

—O. 6, R. 17; O. 7, R. 11 (a)—Plaint not disclosing cause of action—Procedure proper on—Amendment of plaint—Rejection of it—Dismissal of suit.

In disposing of the case upon the defects of the plaint as not setting forth a good cause of action, the subordinate Judge ought not to have taken the course of dismissing the suit. If he did not allow an amendment as authorised by S. 53 of C. P. C. of 1882, he ought, in terms of the same section, to have rejected the plaint. That, according to S. 56 of the Code of 1882, would have enabled the plaintiff to present a fresh plaint in respect of the same cause of action if he found himself in a position at any future time to make averments which would give relevancy to his action (122). (*Lord Watson*.) **GUNGA NARAIN GUPTA v. TILUCKRAM CHOWDHURY.** (1888) 15 I. A. 119 =

15 C. 533 (537-8) = 5 Sar. 168.

—O. 6, R. 17; O. 7, R. 11—Plaint not disclosing cause of action—Procedure proper on—Dismissal of suit—No objection in Courts below to—Objection not given effect to by Privy Council.

The Sub-Judge dismissed a suit on the ground that the plaint did not disclose a cause of action, instead of allowing the plaint to be amended under O. 6, R. 17, or rejecting it under O. 7, R. 11 of C. P. C. of 1908. No objection was, however, taken in the court below to the form of the judgment, which was the same in both courts, dismissing the action. And no objection was stated in the appellant's case to the Privy Council or raised by his counsel.

Held that, in those circumstances, and in view of the fact that the time limited for bringing an action to set aside the judgment had already elapsed, the ends of justice would be served by permitting the judgment of the court below to stand in its then form, *viz.*, dismissing the action (122).

C. P. C. (ACT V OF 1908), Or. 6, R. 17—(Contd.)

(Lord Watson.) **GUNGA NARAIN GUPTA v. TILUCKRAM CHOWDHURY.** (1888) 15 I. A. 119 = 15 C. 533 (538) = 5 Sar. 168.

—O. 6, R. 18; O. 7, R. 11—*Amendment of plaintiff—Order for—Refusal to comply with—Rejection of plaintiff on ground of—Propriety.*

A plaintiff was filed by the Raja of Bobili against the appellant, who might be shortly described as the Maharaja of Vizianagaram. The objection taken to the plaintiff was that the defendant was described on the face of that plaintiff by titles which did not correspond with the full titles to which he was entitled, and by which he ought to have been described. There was absolutely no doubt or dispute whatever as to the legal right of the appellant to bear those titles which he claimed to bear; and there was no difficulty whatever in ascertaining them, for they were given in the Gazette.

The trial Judge thought that the defendant's objection was made out and he directed that the plaintiff should have liberty to amend his plaintiff by amending the description of the defendant, in accordance with the description which had been given to him in the Gazette. The Judge gave the plaintiff a week's time for the purpose, and directed that in default the plaintiff should stand dismissed. The plaintiff declined to amend his plaintiff, and failed to do so. The Judge then rejected the plaintiff under S. 29 of C. P. C. of 1859. On appeal the High Court reversed the order of rejection, holding that, as the identity of the appellant had been ascertained by the imperfect description, the order to reject the plaintiff ought not to have been made.

Held, reversing the High Court, that the Judge of the civil court was competent to pass the orders which he passed; and that he exercised a sound discretion in first requiring the plaintiff to amend his plaintiff, and afterwards in rejecting that plaintiff when the first order had been contumaciously disobeyed (450). **MAHARAJA OF VIZIANAGARAM v. ZEMINDAR OF BOBILI.** (1872) 12 B. L. R. 443 = 2 Suth. 689 = 7 M. J. 340 = 18 W. R. 301 = 3 Sar. 165.

Or. 7, R. (1) (c)—Description of defendant.

—“Honorable” if part of.

The term “honorable” is less matter of description within the meaning of Art. 26 of C. P. C. of 1859 than a mere honorary distinction, applying to those who are members of the Council (450).

Quære, whether the court can insist upon the term “Honorable” being stated in the plaintiff in describing the defendant (450). **MAHARAJA OF VIZIANAGARAM v. ZEMINDAR OF BOBILI.** (1872) 12 B. L. R. 443 = 18 W. R. 301 = 3 Sar. 165 = 2 Suth. 689 = 7 M. J. 340.

—Titles—Description by—Necessity—Other description indicating clearly identity of defendant not enough.

It is not the true construction of the Act in question (C. P. C. of 1859, S. 26) to say that where a man has titles, the claim to which titles cannot rationally be disputed, and by which he is generally known, all that the Code requires is that he should be described in such a way that the identity of the defendant may be ascertained (450). **MAHARAJA OF VIZIANAGARAM v. ZEMINDAR OF BOBILI.**

(1872) 12 B. L. R. 443 = 18 W. R. 301 = 3 Sar. 165 = 2 Suth. 689 = 7 M. J. 340 =

—Titles—Description by—Wanton refusal of plaintiff as regards—Duty of Court in case of.

If a plaintiff from animosity, from pique, or anything in fact but a *bona fide* dispute as to the right to a title, obstinately refuses to give his adversary that title by which he is generally recognised, the Court ought not to permit or sanction that species of insult, as insult, no doubt, it would be treated not only in India but even in other countries (449). **MAHARAJA OF VIZIANAGARAM v. ZEMINDAR OF BOBILI.** (1872) 12 B. L. R. 443 = 18 W. R. 301 = 2 Suth. 689 = 7 M. J. 340 = 3 Sar. 165.

C. P. C. (ACT V OF 1908)—(Contd.)**Or. 7 R. (1) (c)—Description of defendant—(Contd.)**

—Titles if part of.

Upon the proper construction of the Civil Procedure Code of 1859 the description contemplated by the 26th article thereof includes all those titles by which the party is generally known (449). **MAHARAJA OF VIZIANAGARAM v. ZEMINDAR OF BOBILI.** (1872) 12 B. L. R. 443 = 18 W. R. 301 = 2 Suth. 689 = 7 M. J. 340 = 3 Sar. 165.

—O. 7, R. 3—Description of property—Plaint—Body and schedule of—Variation between—Decree for property in case of—Property passing under. See DECREE—PROPERTY SUED FOR—DESCRIPTIONS OF, ETC.

(1880) 7 C. L. R. 404.

—O. 7, R. 6—Limitation—Exemption from law of—Grounds of—Statement in plaintiff of—Necessity.

The appellant comes into court admitting upon the face of his plaintiff that he is out of possession, and has been so for more than 10 years. It lay upon him to establish that he was in possession up to the date on which he alleges that he was dispossessed; or, failing in that, that the date at which he or some former proprietor of his estate was last in possession is consistent with a right to institute the suit. Act No. VIII of 1859, S. 32, shows that the plaintiff is bound to satisfy the Court that his right of action is not barred by lapse of time. (337). (*Sir James W. Colville.*) **RAJAH SAHEB PERHLAD SEIN v. MAHARAJAH RAJENDER KISHORE SINGH.** (1869) 12 M. I. A. 292 = 12 W. R. P. C. 6 = 2 B. L. R. P. C. 111 = 2 Suth. 225 = 2 Sar. 430.

—O. 7, R. 11—Amendment of plaintiff—Order for—Refusal to comply with—Rejection of plaintiff on grounds of—Propriety. See C.P.C. OF 1908, O. 6, R. 18; O. 7, R. 11. (1872) 18 W. R. 301.

—Titles of defendant—Omission to specify—Rejection of plaintiff on ground of—Propriety—Dispute *bona fide* as to existence of titles—Effect.

Quære: whether, if there was a *bona fide* dispute in the suit or otherwise, as to the existence of the title claimed by the defendant, or as to the right of the defendant to bear a particular title, the judge would in every case exercise a sound discretion in rejecting the plaintiff (449). **MAHARAJA OF VIZIANAGARAM v. ZEMINDAR OF BOBILI.**

(1872) 12 B. L. R. 443 = 18 W. R. 301 = 3 Sar. 165.

—O. 7, R. 11; O. 6, R. 17—Plaint not disclosing cause of action—Procedure proper on. See C.P.C. OF 1908, O. 6, R. 17; O. 7, R. 11. (1888) 15 I. A. 119 (122) = 15 C. 533 (537-8).

—O. 7, R. 11; O. 6, R. 18—Amendment of plaintiff—Order for—Refusal wanton to comply with—Rejection of plaintiff on ground of. See C. P. C. OF 1908, O. 6, R. 18; O. 7, R. 11. (1872) 12 B. L. R. 443 (450).

—O. 7, R. 11 (a)—Cause of action—Plaint if discloses—Question as to—Points to be considered in case of.

In a case in which the question is whether or not a plaintiff discloses any cause of action, the court has nothing to do with the question whether the cause of action, if any is stated, be well founded, or what may be the merits of the case (121). (*Sir Robert P. Collier.*) **TIRU KRISHNAMA CHARIAR v. KRISHNASWAMI TATA CHARIAR.**

(1879) 6 I. A. 120 = 2 M. 62 (63) = 6 C. L. R. 201 = 4 Sar. 28 = 8 Suth. 620

—Plaint not disclosing cause of action—Procedure proper on—Amendment of plaintiff—Rejection of it—Dismissal of suit. See C.P.C. OF 1908, O. 6, R. 17; O. 7, R. 11 (a). (1888) 15 I. A. 119 (122) = 15 C. 533 (537-8).

—Plaint not disclosing cause of action as regard some of the items claimed—Rejection of entire plaintiff in case of.

The circumstance that a plaintiff does not disclose a good cause of action as regards some of the items claimed therein

C. P. C. (ACT V OF 1908), Or. 7 R. 11 (a)—(Contd.)

will not justify the rejection of the whole plaint, if it discloses a good cause of action in respect of other items claimed (124). (*Sir Robert P. Collier.*) **TIRU KRISHNAMA CHARIAR v. KRISHNASWAMI TATA CHARIAR.**

(1879) 6 I.A. 120 = 2 M. 62 (66) = 6 C.L.R. 201 = 4 Sar. 28 = 3 Suth. 620.

—*Rejection of plaint on ground that it does not disclose cause of action—Nature of proceeding.*

The rejection of a plaint under S. 32 of C. P. C. of 1859 as containing no cause of action is a proceeding equivalent to what in England would be called judgment on demurrer (121). (*Sir Robert P. Collier.*) **TIRU KRISHNAMA CHARIAR v. KRISHNASWAMI TATA CHARIAR.**

(1879) 6 I. A. 120 = 2 M. 62 (63) = 6 C.L.R. 201 = 4 Sar. 28 = 3 Suth. 620.

—**O. 7, R. 11 (a) and R. 13—Rejection of plaint on ground that it does not disclose cause of action—Effect—Fresh suit in respect of same cause of action—Not barred.**

Where a plaint is rejected under S. 53 of C.P.C. of 1882 on the ground that it is defective as not setting forth a good cause of action, the plaintiff can, under S. 56 of the same Code, present a fresh plaint in respect of the same cause of action on finding himself in a position at any future time to make averments which will give relevancy to his action. (*Lord Watson.*) **GUNGA NARAIN GUPTA v. TILUCKRAM CHOWDHRY.**

(1888) 15 I. A. 119 (122) = 15 C. 533 (537-8) = 5 Sar. 168.

—**O. 7, R. 11 (c)—Appeal or plaint presented with deficient court-fee—Procedure in case of—Opportunity to party to make up deficiency—Deficiency subsequently made up by him—Date of presentation of appeal or plaint in case of.** See C.P.C. OF 1908, S. 149.

—**O. 7, R. 13 and 11 (a)—Rejection of plaint on ground that it does not disclose cause of action—Effect—Fresh suit in respect of same cause of action—Not barred.** See C. P. C. OF 1908, O. 7, R. 11 (a) AND R. 13—REJECTION OF PLAINT ON GROUND THAT IT DOES NOT DISCLOSE CAUSE OF ACTION. (1888) 15 I.A. 119 (122) = 15 C. 533 (537-8).

—**O. 7, R. 14 (1)—Document not filed with plaint and not relied upon as basis of claim but treated only as a piece of evidence—Decree on foot of—Validity.**

The respondents sued the appellant and one M alleging that they (respondents) formed one tavazhi and M another tavazhi of a single undivided Mopla tarwad, of which M was the head. The main defence was that M belonged to a separate tarwad altogether. In proof of their allegation that the division was into tavazhis only, the respondents relied strongly on a razinama or compromise petition, which was mentioned in, but not filed with the plaint. The High Court treated the razinama not merely as evidence, but as creating rights. *Held*, that the High Court erred in doing so.

The plaintiffs did not sue on the razinama. They did not produce it in court when the plaint was presented, nor did they deliver it or a copy thereof to be filed with the plaint, and yet this is what the Code of Civil Procedure, 1882, S. 59, directs as regards a document on which a plaintiff sues. Nor was the document treated otherwise than as a piece of evidence in the trial court. And this is important, for had it been put forward by the plaintiff as creating rights then, a line of defence requiring evidence might have been adopted, which was unnecessary so long as the razinama was used merely as a piece of evidence (143). (*Sir Lawrence Jenkins.*) **SULAIMAN v. BIYATHTHUMMA.**

(1916) 21 M. L. T. 210 = (1917) M. W. N. 213 = 21 C. W. N. 553 = 25 C.L. J. 273 = 19 Bom. L.R. 394 = 39 I. C. 243 = 1 P.L.W. 210 = 32 M. L. J. 137.

—**O. 7, R. 14 (2)—List of documents required by—Documents to be included in—Horoscope made by witness**

C. P. C. (ACT V OF 1908), Or. 7, R. 14 (2)—(Contd.)

and to be referred to for refreshing his memory not one of.

To prove the date of birth and the age of the plaintiff in a suit, one of his witnesses produced an almanack and horoscope. Objection was taken to this document on the ground that it was not entered in the list of documents as required by O. 7, R. 14, C.P.C., and it was rejected by the trial judge. *Held*, that he erred in doing so.

The document was not one to be relied upon as a probative document in itself, but it was a record made by the witness at the time, to which he was entitled to refer for the purpose of refreshing his memory (286-7). (*Lord Phillimore.*) **BANWARI LAL v. MAHESH.**

(1918) 45 I. A. 284 = 41 A. 63 (66) = 21 O.C. 228 = 23 C.W.N. 577 = (1919) M. W. N. 490 = 49 I.C. 540.

—**O. 7, R. 18—Document not mentioned in plaint—Rejection of—Propriety—Document proved satisfactorily and brought home to party affected.**

The plaintiff claimed to be the rightful shebait of a consecrated picture or idol, to which peculiar sanctity was attached by the Bulow Acharjee sect or community of Vaishnavites; and as incident thereto he claimed the things which had been offered to the idol, and the possession of a temple in Calcutta in which the idol had for some years been located. His claim was disputed by P, the principal defendant. The Calcutta worship was founded by the plaintiff's grandfather in 1825, and the grandfather himself died in 1826. The plaintiff, as the founder's heir, would presumably be entitled to the shebaitship of the Thakoor; but it was alleged as against his right that his family had never intervened in the affairs of the Thakoor since 1825. To refute that allegation, the plaintiff filed a document which showed that one S, a defendant in the suit and a partisan of the principal defendant, P, had, in the year 1878, through the agency of his jemadar, accepted the appointment of ordinary officiating priest of the Thakoor from the plaintiff. Some of the learned Judges of the High Court rejected that document, because it was not mentioned in the plaint, and because its custody was not clearly accounted for. Its execution in the presence of several people was, however, positively deposed to by four witnesses, all vigorously cross-examined, and all totally unshaken in cross-examination. Further the person who could contradict it with effect, S, was in court when the evidence against him was given, but he did not come forward to say a word about it.

Held, that it was carrying mere suspicion too far when it was allowed to get rid of a document so proved, and so allowed to pass by the person most nearly concerned in it (145). (*Lord Hobhouse.*) **GOSSAMEE SREE GREEDHAR REEJEE v. RUMANLOLLJEE GOSSAMEE.**

(1889) 16 I. A. 137 = 17 C. 3 (21) = 5 Sar. 350.

—*Document not produced with plaint—Admission of—Impropriety in—No reversal of decree on mere ground of.*

S. 39 of the Code of Civil Procedure of 1859 does not make the admission of any documentary evidence that is not brought in at the time of filing the plaint so improper as to be a ground of appeal against the ultimate determination of the suit by the court which has admitted it. The admission amounts at the most only to an irregularity (82-3). (*Sir James Colville.*) **GOSHAIN TOTA RAM v. RAJAH RICKMUNEE BULLUB.**

(1869) 13 M. I. A. 77 = 3 B. L. R. P. C. 34 = 2 Suth. 253 = 2 Sar. 487 = 12 W. R. 32.

—*Document not produced with plaint—Admission of—Objection to—P. C. appeal—Maintainability in.* See P. C.—APPEAL—EVIDENCE—DOCUMENT—PRODUCTION OF—DELAY IN. (1869) 13 M. I. A. 181 (198).

—**O. 8, R. 5—Plaint—Allegations in—Admission in written statement of.** See PRACTICE—PLEADINGS—ADMISSION IN.

C. P. C. (ACT V OF 1908)—(Contd.)

—O. 8, R. 6—Counter-claim—Person not a defendant to suit—Counter claim by.

Held, that a counter-claim was bad, inasmuch as the person, who counter-claimed, was not a defendant to the suit in which he preferred the counter-claim. (*Sir John Edge.*) *MA HNIT v. HASHIM EBRAHAM METER.*

(1919) 18 A.L.J. 335 = 32 C.L.J. 214 = 27 M.L.T. 190 = 22 Bom. L. R. 531 = 55 I. C. 793 = 38 M. L. J. 353 (360).

—Set-off—Accounts—Suit for—Plea of set-off in—Right of.

Quære, whether where the claim is not for the recovery of money, but for an account, a set-off can be pleaded in answer to such a claim (56). (*Lord Monkswell.*) *NAN KARAY PHAW v. KO HTAW AH.*

(1886) 13 I. A. 48 = 13 C. 124 (135) = 4 Sar. 702.

—Set-off—Award—Mutual claims under—Equitable set-off in respect of—Right of.

In an award by which the plaintiffs and defendants, who were members of an undivided Hindu family became divided, the arbitrator had found certain sums due to the defendants and had declared that they should be paid out of the joint income.

In a suit by the plaintiffs for their share of the receipts under a certain usufructuary mortgage by some of the defendants previously to the award alleging that the award had omitted to deal with them, *held*, that the defendants were entitled to an equitable set-off in respect of the amounts declared due and payable to them against the plaintiff's claim for their share of the joint income. (*Mr. Ameer Ali.*) *THAKUR SHEO NARAIN SINGH v. THAKUR BISHUNATH SINGH.*

(1914) 18 C. W. N. 426 = 17 O. C. 33 = 1 O. L. J. 159 = 22 I. C. 315 = 27 M. L. J. 128.

—Set-off—Question of—Issue not raised or even applied for on—P. C. appeal—Maintainability for first time in. (*Lord Monkswell.*) *NAN KARAY PHAW v. KO HTAW AH.*

(1886) 13 I. A. 48 = 13 C. 124 (135) = 4 Sar. 702.

—Set-off—Unascertained sums—Set-off of one against another—Direction in decree for—Validity. See DECREE—UNASCERTAINED SUMS.

(1871) 14 M. I. A. 377 (385-6).

—O. 9, Rr. 3 and 8—Dismissal of suit under R. 3 or 8—Test.

Where the question was whether an order dismissing a suit in a case in which the defendant appeared and the plaintiff did not was an order under S. 110 or S. 114 of the Code of 1859, and the record of the case maintained by the Court stated in one place that the suit had been dismissed on default and in another that the decree was in favour of the defendant, *held*, that the order was one under S. 114 and not under S. 110 and that a fresh suit in respect of the same cause of action was barred (74-5). (*Sir Richard Couch.*) *THAKUR SHANKAR BAKSH v. DYA SHANKAR*

(1887) 15 I. A. 66 = 15 C. 422 (430) = 5 Sar. 107.

—O. 9, R. 8—Dismissal of suit under—Appeal from.

Quære, whether an appeal lies against a dismissal of a suit regularly made under S. 102 of C. P. C. of 1882. (*Sir Arthur Wilson.*) *KANHAYA LAL v. NATIONAL BANK OF INDIA, LTD., DELHI.*

(1910) 37 I. A. 80 (85) = 37 C. 426 (438) = 8 M. L. T. 1 = 11 C. L. J. 449 = 14 C. W. N. 594 = 12 Bom. L. R. 430 = 6 I. C. 592 = 20 M. L. J. 470.

—Dismissal of suit under, in a case in which it could not have been dealt with under—Appeal from.

Where a suit was dismissed under S. 102, C. P. C. of 1882, in a case in which it could not have been dealt with under that section, *held*, that an appeal lay from the decree

C. P. C. (ACT V OF 1908), Or. 9 R. 8—(Contd.)

of dismissal. (*Sir Arthur Wilson.*) *KANHAYA LAL v. NATIONAL BANK OF INDIA, LTD., DELHI.*

(1910) 37 I. A. 80 = 37 C. 426 = 8 M. L. T. 1 = 14 C. W. N. 594 = 12 Bom. L. R. 430 = 11 C. L. J. 449 = 6 I. C. 592 = 20 M. L. J. 470.

—Suit for two separate claims—Dismissal of, on merits with regard to one—Abandonment by plaintiff of other—Default of appearance at enquiry with regard to latter—Dismissal of whole suit for default on ground of—Propriety.

In a suit for (1) the amount which plaintiff had paid to release certain property from attachment at the instance of the defendant, and (2) damages on the ground of the illegality of the attachment, the trial Judge held that the claim relating to the sum paid to release the attachment was unsustainable, dismissed the suit with costs in so far as it related to the claim to recover the said sum, and directed the case to proceed on the question of damages. The plaintiff thereupon petitioned that a decree might be drawn up embodying the dismissal of his claim for the money paid. That petition was dismissed, and thereupon the plaintiff absolutely withdrew from the claim for damages, but not from that for the recovery of the money paid.

The trial Judge took evidence bearing upon the claim for damages, and the defendant gave evidence upon all the issues which had been raised, the plaintiff not appearing. In the result he dismissed the whole case for default under S. 102 of C. P. C. of 1882.

Held, that the case was one not proper to be dealt with under S. 102 of C. P. C. of 1882.

As to the principal claim of the plaintiff, that relating to the money paid to release the attachment, there was in substance a clear decision of the Judge adverse to the plaintiff; after which, in substance, no question as to that claim remained open in the court of first instance. As to the second claim, that for damages, the plaintiff having unconditionally abandoned his claim, there remained nothing in substance to be tried. (*Sir Arthur Wilson.*) *KANHAYA LAL v. NATIONAL BANK OF INDIA, LTD., DELHI.*

(1910) 37 I. A. 80 (85) = 37 C. 426 (437-8) = 8 M. L. T. 1 = 11 C. L. J. 449 = 14 C. W. N. 594 = 12 Bom. L. R. 430 = 6 I. C. 592 = 20 M. L. J. 470.

—O. 9, Rr. 8 and 3—Dismissal of suit under R. 3 or 8—Test. See C.P.C. OF 1908, O. 9, RR. 3 AND 8.

(1887) 15 I. A. 66 (74-5) = 15 C. 422 (430).

—O. 9, Rr. 8 and 9—Dead plaintiff—Suit of—Dismissal for default of—Propriety—Restoration of suit at instance of Legal Representative—Inherent power as to.

Rules and orders dealing with the case of non-appearance of a suitor are inapplicable to the situation which arises when the suitor is dead. The principle of forfeiture of right in consequence of a default in procedure by a party to a cause is a principle of punishment in respect of such default and can have no application to a dead person who cannot be said to commit default by not appearing.

When a suit was called on for hearing plaintiff was not present and the suit was accordingly dismissed for default. At the time the plaintiff was dead, a fact not known to the Court. Subsequently within six months of the death (the period limited by Art. 176 of the Limitation Act of 1908), application was made by the plaintiff's son under O. 22, R. 9 to have his name substituted in place of his deceased father. The Court granted the application and directed the suit to proceed.

Held, in view of the death of the plaintiff subsequently made known to the Court, the order of dismissal for default was wrong and to prevent an abuse of the process of the Court it had ample power both under S. 151, C.P.C., and under its inherent powers to set the matter right.

C. P. C. (ACT V OF 1908), O. 9 R. 8 & 9—(Contd.)

(Lord Shaw.) DEBI BAKSH SINGH v. HABIB SHAH.
 (1913) 40 I. A. 151 = 35 A. 331 = 11 A.L.J. 625 =
 17 C.W.N. 829 = 18 C.L.J. 9 = 15 Bom. L.R. 640 =
 14 M. L. T. 33 = (1913) M. W. N. 566 =
 19 I.C. 526 = 25 M.L.J. 148.

—Dismissal for default—Cause of action not in existence at date of—Fresh suit in respect of.

The dismissal of a suit in terms of S. 102 of C. P. C. of 1882 was plainly not intended to operate in favour of the defendant as *res judicata*. It imposes, however, when read along with S. 103, a certain disability upon the plaintiff whose suit has been dismissed. He is thereby precluded from bringing a fresh suit in respect of the same cause of action (157). He is not precluded from bringing a fresh suit in respect of a cause of action which did not exist at the time when the previous suit was dismissed. Such cause of action cannot but be regarded as other than a new cause of action subsequently arising (158). (Lord Watson.) MUS-SUMMAT CHAND KOER v. PARTAB SINGH.

(1888) 15 I.A. 156 = 16 C. 98 (101-2) = 5 Sar. 243.

—Hindu Law—Widow—Alienation intended by—Reversioner's suit to restrain—Dismissal for default—Alienation actually made by her subsequently—Suit by him for declaration of invalidity of—Not barred. See HINDU LAW—REVERSIONER—PRESUMPTIVE REVERSIONER—WIDOW—ALIENATION BY—DECLARATION OF INVALIDITY OF—MAINTAINABILITY.

(1888) 15 I.A. 156 (158) = 16 C. 98 (102).

—O. 9, R. 9—Cause of action—Identity—Reliefs prayed for different—Effect.

In a suit brought in 1883 to redeem a mortgage made in 1853 of certain villages in Oudh subsequently included in the talukdari sanad of the mortgagee, it appeared that in 1864 the plaintiff's ancestor had sued in the Settlement Court to redeem the same mortgage, and that that suit had been dismissed under S. 114 of Act VIII of 1859. Held, that the causes of action in the two suits were the same and the suit was barred under S. 114. The fact that in the former suit the plaintiff asked for sub-proprietary right, and in the latter for the superior proprietary right does not make any difference as regards the cause of action. It is not part of the cause of action. It is the manner in which the redemption of the mortgage was to be given. (Sir Richard Couch.) THAKUR SHANKAR BAKSH v. DYA SHANKAR.

(1887) 15 I.A. 66 (76) =
 15 C. 422 (431) = 5 Sar. 107.

—Plaintiff—Failure to adduce evidence after settlement of issues—Dismissal of suit for—Effect.

In execution of a decree for mesne profits and costs of suit an order was issued for attachment of the interests of the judgment-debtors in mahal U, in satisfaction of those mesne profits and costs of suit. In the course of the proceedings the respondents applied to have a 2 gunda, 2 kauri, 2½ daut share, which they alleged to belong to them, struck out of the inventory; but their objection was over-ruled and the property sold in execution. The respondents then brought a regular suit for relief against the attachment and sale, in which they alleged that their share of the mahal was ancestral property, and that neither they nor their ancestors were judgment-debtors in the decree executed, or in any way liable under it. That suit was resisted by the appellant. After adjustment of issues, the action was dismissed with costs, because of the respondents' failure to adduce evidence in support of their allegations, and that order was by the respondents allowed to become final.

Held, that the severest penalty attaching to the dismissal of the suit was in any case that the respondents could not bring another suit for the same relief, that they were barred

C. P. C. (ACT V OF 1908), O. 9, R. 9—(Contd.)

from seeking relief against the attachment and sale of their interest in mahal U (155).

None of the questions, either of fact or law, raised by the pleadings of the parties, was heard or determined by the Court which dismissed the suit; and its decree does not constitute *res judicata* within the meaning of the C.P.C. It must fall within one or other of the sections of Chapter VII of the Code of 1882; in the present case it is immaterial to consider which (155). (Lord Watson.) MAHARAJA RADHA PARSHAD SINGH v. LAL SAHAB RAI.

(1890) 17 I.A. 150 = 13 A. 53 (61-2) = 5 Sar. 600.

—O. 9, R. 13—Application under—Order rejecting—Appeal from—Order in, setting aside order below and remanding "case" for disposal on merits—Ex parte decree itself if set aside by.

In a case in which the Court below dismissed an application under S. 108 of C.P.C. of 1882 to set aside an *ex parte* decree, without investigating whether the defendant had reasonable cause for his non-appearance, the High Court, on appeal, set aside that order, and remanded the case, to the Court below under S. 562 of C.P.C. of 1882 to be disposed of on the merits.

Held, on a construction of the order of the High Court, that its effect was not to set aside the *ex parte* decree itself, and to remand the original suit to be disposed of on the merits, but that its effect was merely to set aside the order of the Court below rejecting the application to set aside the *ex parte* decree and to remand that application to the Court below to be disposed of on the merits (33-4). (Lord Robertson.) RAI RADHA KISHAN v. COLLECTOR OF JAUNPORE.

(1900) 28 I.A. 28 =

23 A. 220 (225-6) = 5 C.W.N. 153 =

3 Bom. L. R. 78 = 7 Sar. 800 = 11 M.L.J. 65.

—Application under—Order rejecting—Suit subsequent to set aside decree on ground of fraud—Maintainability. See EXECUTION SALE—SETTING ASIDE OF, AND OF DECREE—SUIT FOR

(1902) 29 I. A. 99 = 29 C. 395.

—Application under—Order rejecting—Suit subsequent to set aside decree and execution sale on ground of fraud—Maintainability—Fraud not set up or relied on in application under R. 13.

The appeal arose out of a suit brought by the plaintiff-respondent to set aside an *ex parte* decree obtained against him by the defendants-appellants and a sale in execution thereof, as being fraudulent and void.

The plaintiff stated that he had never been served with a summons, nor with any of the processes necessary for the execution of the decree. The fraud alleged consisted in making false returns of service of summons of the processes in execution of the decree, and in not giving a proper description and valuation of the property sold, in consequence of which a low price only was obtained for it.

The defendants pleaded that the suit was not maintainable, *inter alia*, on the ground that the plaintiff had already, on the grounds for setting aside the decree and sale stated in the plaint, applied to set aside the decree under S. 108 of C. P. C. of 1882, and to set aside the sale in execution of the decree under S. 311 thereof, that those applications had been rejected, and that the plaintiff had not appealed, as he might have done, from the orders rejecting them.

There was, however, nothing before their Lordships except the bare fact that the plaintiff endeavoured to get an *ex parte* decree set aside under S. 108 of C. P. C. of 1882, under which the court might try whether the summons was served or whether the plaintiff was prevented by any sufficient cause from appearing. There was nothing to show as to what went on before the court upon that occasion, and it was impossible to say that the matter

C. P. C. (ACT V OF 1908), O. 9, R. 13—(Contd.)

alleged in the suit as fraudulent matter came in any way before the Court under the application made under S. 108 of C. P. C. of 1882.

Held, affirming the High Court, that the suit was maintainable. (*Lord Hobhouse*). RADHA RAMAN SHAHA v. PRAN NATH ROY.

(1901) 28 C. 475 =

5 C. W. N. 757 = 8 Sar. 107.

—Decree ex parte against some defendants only—Application by them to set aside—Setting aside of entire decree on—Propriety.

In a suit to enforce a mortgage, the plaintiff claimed a decree against all the defendants (mortgagors) jointly, the debt being a joint mortgage debt, and he obtained on 25-8-1900, what purported to be a judgment in accordance with his claim. But it subsequently appeared that, by reason of non-service of process on one of the defendants, the judgment ought not to have been given, and accordingly the Court reopened the matter by setting aside the judgment so far as it affected the one defendant who had not been served, and directed another inquiry to ascertain whether that defendant had any defence. *Scemle*, it might have been more in accordance with strict procedure if the Court had set aside the whole judgment and had proceeded to re-try the case as against all the defendants (43). (*Lord Mersey*). ASHFAQ HUSAIN v. GAURI SAHAL.

(1911) 38 I. A. 37 = 33 A. 264 (270-1) =

(1911) 2 M. W. N. 177 = 15 C. W. N. 370 =

8 A. L. J. 332 = 13 C. L. J. 351 = 9 M. L. T. 380 =

13 Bom. L. R. 367 = 4 Bur. L. T. 121 = 9 I. C. 975 =

21 M. L. J. 1140.

—Mortgage—Suit to enforce—Ex parte decree against all defendants in—Setting aside of, as against some—Retrial and second decree against all—Effect—First decree if merged in second. *See* MORTGAGE—SUIT TO ENFORCE—DECREE IN—Ex parte DECREE AGAINST, ETC.

(1915) 42 I. A. 171 (175-6) = 37 A. 485 (494).

—O. 11, R. 21—Partnership action—Non-production of account books for inspection in spite of order therefor—Decision in favour of opposite party on ground of—Propriety.

Quere, whether a partnership action can be decided in favour of one of the partners mainly upon the ground that the other partner, in spite of the order of the Court, failed to produce any of his books of account for inspection.

Where the decision of the case turned really upon the construction of two documents, *held* that the suspicion attaching to the conduct of the partner failing to produce his books could not alter conclusions. (*Lord Sumner*).

AHMED KHAN v. ALI EBRAHIM.

(1924) 27 Bom. L. R. 746 =

A. I. R. 1925 P. C. 177 (179).

—O. 13, R. 2—Documents not in possession or power of party at date of first hearing and of whose very existence he was not then aware—Production in evidence at a late stage of—Rule not a bar to.

The rule as to exclusion of documentary evidence, laid down in O. 13, R. 2 only comes into operation when the documents on which the parties rely should have been, but were not, produced at the first hearing of the suit. Accordingly, the rule does not include a party from producing in evidence at a late stage of the proceedings a document which was not in his possession or power at the date of the first hearing and of whose very existence he was not then aware. (*Sir John Wallis*). KUMAR GOPIKA RAMAN ROY v. ATAH SINGH.

(1929) 27 A. L. J. 246 =

33 C. W. N. 463 = 49 C. L. J. 327 = 29 L. W. 674 =

10 P. L. T. 301 = 114 I. C. 561 = A. I. R. 1929 P. C. 99 =

56 M. L. J. 562 (569).

C. P. C. (ACT V OF 1908), O. 13, R. 2—(Contd.)

—Documentary evidence not produced at first hearing—Admission in evidence of—Discretion of Court as to.

Order 13, R. 1 of C. P. C. of 1908 requires the parties or their pleaders to produce at the first hearing of the suit all the documentary evidence of every description in their possession or power on which they intend to rely. But it does not exclude the discretion of the Court to receive any such documentary evidence at any subsequent stage.

In the case before their Lordships the examination in Court of the plaintiffs' witnesses commenced on June 16, 1910; on June 18 the plaintiffs applied for a summons against the defendants for the production of certain account-books; but the Judge declined to issue summons at that stage. The plaintiffs' case was closed on June 26, and on the following day the defendants commenced to examine their witnesses. On the same day they produced the same account-books and they were admitted in evidence. It appeared that the said account-books had been produced and filed in Court in previous litigations. *Held*, that there was no objection to the reception of the account-books for non-compliance with the provisions of the Code. (*Mr. Ameer Ali*). IMAMBANDI v. MUTSADDI.

(1918) 45 I. A. 73 (80-1) = 45 C. 878 (888-9) =

20 Bom. L. R. 1022 = 22 C. W. N. 50 = 28 C. L. J. 409 =

5 Pat. L. W. 276 = 16 A. L. J. 800 =

24 M. L. T. 330 = (1919) M. W. N. 91 = 47 I. C. 513 =

35 M. L. J. 422.

—Leave to produce documents under—Refusal of, in case of official records of undoubted authenticity—Propriety.

Even where the rules of exclusion under O. 13 apply, leave under R. 2 of that order should not ordinarily be refused where the documents are official records of undoubted authenticity, which may assist the Court to decide rightly the issues before it. (*Sir John Wallis*). KUMAR GOPIKA RAMAN ROY v. ATAL SINGH.

(1929) 27 A. L. J. 246 = 33 C. W. N. 463 =

49 C. L. J. 327 = 29 L. W. 674 = 10 P. L. T. 301 =

114 I. C. 561 = A. I. R. 1929 P. C. 99 =

56 M. L. J. 562 (569).

—O. 13, R. 4—Document admitted in evidence—Endorsement of judge on, as to party by whom it was proved or admitted—Absence of—Rejection of document by Privy Council on ground of.

Their Lordships feel bound to criticize adversely a practice which is as illegal as it is slovenly and embarrassing. By S. 141 of the Code of Civil Procedure, 1877, repeated in the Code of 1882, and practically re-enacted in O. 13, R. 4, under the Code of 1908, a presiding Judge must endorse with his own hand a statement that a document proved or admitted in evidence was proved or admitted by the person against whom it was used. This course was in many instances not followed at the hearing of these two cases, with the result that embarrassing and perplexing controversies arose on the hearing of these appeals as to whether or not certain documents prints of which were bound up in the record, had been given in evidence. Their Lordships, with a view of insisting on the observance of the wholesome provisions of these statutes, will, in order to prevent injustice, be obliged in future on the hearing of Indian Appeals to refuse to read or permit to be used any document not endorsed in the manner required (236-7). (*Lord Atkinson*). SADIK HUSAIN KHAN v. HASHIM ALI KHAN.

(1916) 43 I. A. 212 = 38 A. 627 (663-4) =

(1916) 2 M. W. N. 577 = 21 M. L. T. 40 =

6 L. W. 378 = 21 C. W. N. 133 = 25 C. L. J. 363 =

14 A. L. J. 1248 = 18 Bom. L. R. 1037 = 19 O. C. 192 =

1 Pat. L. W. 157 = 36 I. C. 104 = 31 M. L. J. 607.

C. P. C. (ACT V OF 1908)—(Contd.)

—O. 14—Issues. See PRACTICE—ISSUES.

—O. 17, R. 2—*Appearance — Party not present—Pleader of, reporting no instructions—Effect.*

A suit which had been adjourned several times before came on for decision on 19-3-1896. On that date, the presiding Judge recorded that "Defendant No. 1 is to-day absent. No one appears for him. His pleader informs the Court that he has no instructions to proceed with the case." The Court proceeded as in his absence, heard evidence for the plaintiff, and decided the issues, giving decree for the claim with costs.

On an application under O. 9, R. 13 to set aside the decree, the first Court rejected the application in the view that the applicant (1st defendant) had in fact appeared, and that the decree was therefore not *ex parte*. On appeal, the High Court held the case came under O. 9, R. 13. Their Lordships, on further appeal, proceeded on the view that the decree was an *ex parte* decree (32, 33-4). (*Lord Robertson*). RAI RADHA KISHAN v. COLLECTOR OF JAUNPORE.

(1900) 28 I. A. 28 = 23 A. 220 (225-6) = 5 C.W.N. 153 = 3 Bom. L. R. 78 = 7 Sar. 800 = 11 M. L. J. 65.

—Hearing—Meaning—of Interlocutory applications—Hearing of, if included.

In the view of the Judges of the High Court the "hearing" mentioned in O. 17, R. 2 of C. P. C. of 1908 only occurs when the Judge is taking the evidence or hearing arguments or otherwise coming to the final adjudication of the suit, with perhaps one extension to the occasion when issues are to be settled; and was not meant to extend to occasions when interlocutory orders were being sought. It is unnecessary to determine whether the word "hearing" should or should not have this particular limitation. (*Lord Phillimore*.) LACHMI NARAIN MARWARI v. BALMAKUND MARWARI. 1924 51 I.A. 321 (325) = 4 P. 61 =

29 C.W.N. 391 = A.I.R. 1924 P.C. 198 = 20 L.W. 491 =

35 M. L. T. 143 = 26 Bom. L. R. 1129 =

22 A. L. J. 990 = 5 Pat. L. T. 623 = 40 C. L. J. 439 =

1 O. W. N. 629 = 10 O. & A. L. R. 1033 =

(1924) M. W. N. 707 = 81 I. C. 747 = 47 M. L. J. 441.

—Partition suit—Preliminary decree—Enquiry directed by—Non-appearance of plaintiff at—Dismissal of suit for—Jurisdiction—Proper order in such a case.

In a partition suit, the High Court, on appeal, made a preliminary decree and remitted the suit to the Sub-Judge in order that the necessary steps for effecting the partition of the undivided property and that the valuation of the elder brother's share might be taken. The Sub-Judge fixed, after notice, a day for hearing the parties. On that day neither the plaintiff nor his pleader appeared; the defendants or some of them, were represented, but took no steps. The Sub-Judge dismissed the suit for want of further prosecution.

Held that the case did not come under O. 17, R. 2 of C. P. C. of 1908, that the sub-Judge had no jurisdiction to dismiss the suit under that rule, and that his order was properly set aside in revision by the High Court.

After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. The parties have, on the making of the decree, acquired rights or incurred liabilities which are fixed, unless or until the decree is varied or set aside.

If the Sub-Judge had made an order adjourning the proceedings *sine die*, with liberty to the plaintiff to restore the suit to the list on payment of all costs and court-fee if any thrown away, it would have been a perfectly proper order. (*Lord Phillimore*).

LACHMI NARAIN MARWARI v. BALMAKUND MARWARI. (1924) 51 I. A. 321 (325) =

4 P. 61 = 29 C. W. N. 391 = A. I. R. 1924 P. C. 198 =

20 L. W. 491 = 35 M. L. T. 143 = 26 Bom. L. R. 1129 =

C. P. C. (ACT V OF 1908), O. 17 R. 2—(Contd.)

22 A. L. J. 990 = 5 Pat. L. T. 623 = 40 C. L. J. 439 =

1 O. W. N. 629 = 10 O. & A. L. R. 1033 =

(1924) M. W. N. 707 = 81 I. C. 747 = 47 M. L. J. 441.

—O. 17, R. 2 and 3—See UNDER C. P. C. OF 1859—SS. 109, 110, 111.

—O. 18, R. 1—*Right to begin—Advantage or not—Litigants' view as to.*

In general litigants consider that they gain an advantage by having the first word and the last (761). (*Lord Sumner*). EAST INDIAN RAILWAY CO. v. KIRKWOOD.

(1919) 48 C. 757 = 15 L. W. 248 =

A. I. R. (1922) P. C. 195 = 67 I. C. 921 (P.C.)

—O. 20, R. 12—Mesne Profits. See MESNE PROFITS.

—O. 20, R. 14—*Pre-emption—Suit by several co-sharers against stranger-purchaser for—Decree in—Form and effect of—Plaintiffs rival claimants for pre-emption and seeking adjudication on their rival claims—Plaintiffs not such and not seeking such adjudication—Distinction.*

When several co-sharers desire to exercise their right of pre-emption against a stranger-purchaser, and there are differences between them as to their shares or priorities, they may join as plaintiffs in a suit for pre-emption against the stranger-purchaser, and may obtain in that suit a decision not only as to their right to pre-empt, but also as to their rival claims and a decree, as provided in O. 20, R. 14 (2) of C. P. C., in accordance with which each pre-empting plaintiff will be entitled in default of the others to pre-empt alone. On the other hand, two or more co-sharers may simply sue the stranger-purchaser for pre-emption without asking the Court to adjudicate on their rival claims, and may obtain a decree for possession on depositing the pre-emption money in Court. The effect of that decree is to establish, as against the defendant, the right of each of the plaintiff co-sharers to pre-empt him and to entitle them to possession on depositing the pre-emption money, leaving them to adjust their shares and priorities among themselves, these being matters in which the defendant has no concern so long as the pre-emption money is secured. (*Sir John Wallis*.) MD. WAJID ALI KHAN v. PURAN SINGH.

(1928) 56 I. A. 80 = 51 A. 267 = 27 A. L. J. 85 =

33 C. W. N. 318 = 29 L. W. 423 =

(1929) M. W. N. 220 = 114 I. C. 601 =

49 C. L. J. 141 = A. I. R. 1929 P.C. 58 =

56 M. L. J. 304 (309).

—O. 21, R. 2 (1)—*Certification of payment under—If an application under Art. 181 of Limitation Act. See LIMITATION ACT OF 1908, ART. 181—APPLICATION UNDER—CERTIFICATION OF PAYMENT UNDER O. 21, R. 2 (1) OF C. P. C.*

(1928) 56 I. A. 30 = 3 Luck. 684.

—Certification of payment under—If a "step-in-aid" under Art. 182 (5) of Limitation Act. See LIMITATION ACT OF 1908—ART. 182 (5)—STEP-IN-AID—CERTIFICATION OF PAYMENT UNDER O. 21, R. 2 (1) OF C. P. CODE.

(1928) 56 I. A. 30 = 3 Luck. 684.

—Certification of payment under—Procedure for. See C. P. C. OF 1908—O. 21, R. 2, SUB-RULES (1) AND (2).

(1928) 56 I.A. 30 = 3 Luck. 684.

—O. 21, R. 2, sub-Rules (1) and (2)—*Certification of payment under—Procedure for—Distinction.*

The terms of R. 2 (1) of O. 21 do not provide for any application being made by the decree-holder. The decree-holder would comply with the terms of the rule if he were to certify to the court that money payable under the decree had been paid to him out of Court, and it would then rest with the court to record the payment in accordance with the provisions of the rule. Sub-rule (2) of O. 21 does contemplate an application by the Judgment-debtor,

C.P.C. (ACT V OF 1908), O. 21, R. 2(1) &(2)—(Contd.)

Difference between the procedures under the two sub-rules pointed out. (*Sir Lancelot Sanderson*). RAJAH SHRI PRAKASH SINGH *v.* ALLAHABAD BANK, LTD.

(1928) 56 I. A. 30 = 3 Luck. 684 = 33 C.W.N. 267 = 29 L. W. 161 = 27 A.L.J. 33 = 6 O.W.N. 29 = 31 Bom. L. R. 289 = 114 I. C. 581 = A.I.R. 1929 P.C. 19 = 56 M.L.J. 233.

—O. 21, R. 2(2)—Certification of payment under—Procedure for. See C. P. C. OF 1908, O. 21, R. 2, SUB-RULES (1) AND (2). (1928) 56 I. A. 30 = 3 Luck. 684.

—O. 21, R. 6—Decree—Transmission for execution. See also C. P. C. OF 1908, S. 39.

—O. 21, R. 6 (a)—Copy of decree to be executed—Non-transmission of—Attachment by Court of transfer in case of—Validity.

Quere, whether an attachment made by a court to which a decree is transmitted for execution would be one made without valid authority because a copy of the decree was not sent by the court which transmitted the decree to the court to which it was transmitted (541). (*Sir Montague E. Smith*). SARODA PROSAUD MULLICK *v.* LUCHMEEPUR SINGH DOOGUR.

(1872) 14 M. I. A. 529 = 17 W. R. 289 = 10 B.L.R. 214 = 2 Suth. 560 = 3 Sar. 77.

—Copy of decree to be executed—Non-transmission of—Onus of proof of, on party objecting to validity of attachment by Court of transfer on ground of such non-transmission.

The party impeaching the validity of an attachment made by a court to which a decree is transmitted for execution on the ground that it had no authority to do so because a copy of the decree was not sent to it is bound to prove that the copy of the decree was not in fact transmitted (541). (*Sir Montague E. Smith*). SARODA PROSAUD MULLICK *v.* LUCHMUPUT SINGH DOOGUR.

(1872) 14 M.I.A. 529 = 17 W. R. 289 = 10 B. L. R. 214 = 2 Suth. 560 = 3 Sar. 77.

—Copy of decree to be executed—Transmission of—Presumption as to—*Maxim omnia proesumuntur rite esse acta*—Applicability—Certificate admittedly sent.

Where objection was taken to the validity of an attachment made on transmission of a decree for execution on the ground that no copy of the decree was sent along with the order of transmission (though it was admitted that a certificate of non-satisfaction was sent), *held*, that the court to which the transmission was made having acted on the certificate by attaching the property and by afterwards selling under that attachment, the *maxim "omnia proesumuntur rite esse acta,"* prevailed until the contrary was shown (541). (*Sir Montague E. Smith*). SARODA PROSAUD MULLICK *v.* LUCHMEEPUR SINGH DOOGUR.

(1872) 14 M. I. A. 529 = 17 W. R. 289 = 10 B. L.R. 214 = 2 Suth. 560 = 3 Sar. 77.

—O. 21, R. 8—Decree—Transmission of, to District Court for execution—Transfer of decree by that Court to Sub-Court—Validity of.

Section 287 of C. P. C. of 1859 enacts ; "The copy of any decree, or of any order for execution, when filed in the Court to which it shall have been transmitted for the purpose of being executed as aforesaid, shall for such purpose have the same effect as a decree or order for execution made by such Court, and may, if the Court be the principal Civil Court of original jurisdiction in the district, be executed by such Court, or any Court subordinate thereto to which it may entrust the execution of the same."

The District Judge of S, to whom a decree was transmitted for execution by the District Judge of G, instead of executing the decree himself, referred it to the Sub-Judge of S for the purpose of being executed.

C. P. C. (ACT V OF 1908), O. 21, R. 8—(Contd.)

Held that, under the very words of S. 287, the Judge of S had a perfect right to entrust the execution of the decree to the Sub-Judge (171). (*Sir Barnes Peacock*). PULUK-DHARI ROY *v.* RAJAH RADHA PERSHAD SINGH.

(1881) 8 I. A. 165 = 8 C. 28 = 4 Sar. 279. —O. 21, R. 10; S. 38—Execution of decree—Jurisdiction of original Court as regards—Decree transmitted by it to another Court for execution and not re-transmitted by latter Court—Effect. See LIMITATION ACT OF 1908. ART. 182 (5)—PROPER COURT.

(1916) 43 I.A. 238 = 39 M. 640.

—O. 21, R. 15—Decree—Execution in part by one of plaintiffs only—Permissibility—Purchase of interest of other plaintiff by defendant.

Their Lordships are unable to subscribe to the doctrine that a decree can only be executed as a whole and not partly by one of the plaintiffs—a doctrine which would lead to the consequence that a defendant could prevent the execution of a decree by buying the interest of one of the plaintiffs (17).

Under a decree of Her Majesty in Council each of two plaintiffs was entitled to possession of half of the estate in the possession of the defendant. The share of one of the plaintiffs in the decree was purchased by the defendant. *Held* that the other plaintiff was entitled to execute the decree to the extent of his or her interest in it (17). (*Sir Robert P. Collier*). HURRISH CHUNDER CHOWDHRY *v.* KALI SUNDAR DEBIA.

(1882) 10 I. A. 4 = 9 C. 482 (494) = 12 C. L. R. 511 = 4 Sar. 407.

—O. 21, R. 16—Assignment of decree—Agreement for—Execution of decree—Right of, of assignee of decree after such agreement and before transfer of decree by assignment in writing.

After an agreement to assign a decree and before the transfer of the decree by an assignment in writing, the duty of keeping the decree alive is that of the assignor and not of the assignee. Before the transfer of the decree by an assignment in writing the latter cannot by any application to the Court keep the decree alive (112). (*Sir John Edge*). JATINDRA NATH BASU *v.* PEYER DEYE DEBI.

(1916) 43 I.A. 108 = 43 C. 990 (1000) = 24 C.L.J. 67 = 20 C. W. N. 866 = 20 M.L.T. 25 = (1916) 1 M.W.N. 403 = 3 L.W. 553 = 18 Bom. L. R. 509 = 14 A. L. J. 527 = 34 I.C. 69 = 31 M. L. J. 248.

—Assignment of decree—Written instrument—Necessity.

A transfer of a decree can, by reason of S. 232 of C.P.C. of 1882, be effected only by an assignment in writing (112). (*Sir John Edge*). JATINDRA NATH BASU *v.* PEYER DEYE DEBI.

(1916) 43 I.A. 108 = 43 C. 990 (999) = 24 C.L.J. 67 = 20 C.W.N. 866 = 20 M.L.T. 25 = (1916) 1 M. W. N. 403 = 3 L. W. 553 = 18 Bom. L.R. 509 = 14 A.L.J. 527 = 34 I.C. 69 = 31 M. L. J. 248.

—Joint decree—Execution in part by one of decree-holders—Right of—Purchase by defendant of the interest of the other—Effect.

Their Lordships are unable to subscribe to the doctrine that a decree can only be executed as a whole and not partly by one of the plaintiffs—a doctrine which would lead to the consequence that a defendant could prevent the execution of a decree by buying the interest of one of the plaintiffs (17).

The effect of a judgment of the Queen in Council was that each of two plaintiffs was entitled to recover a moiety of certain property in the possession of the defendant. It appeared that the defendant had purchased the share of one of the plaintiffs. On an application by the other plaintiff for execution of the decree as far as the other moiety was concerned, *held* that she could execute the decree in

C. P. CODE (ACT V OF 1908), O. 21, R. 16—(Contd.)

part according to the extent of her interest in the property under the decree (17-8). (*Sir Robert P. Collier*). HURRISH CHUNDER CHOWDHRY *v.* KALI SUNDARI DEBIA.

(1882) 10 I.A. 4 = 9 C. 482 (494) =
12 C.L.R. 511 = 4 Sar. 407.

—**O. 21, R. 18—Cross-decrees for unequal amounts—Execution of decree for smaller amount—Sale in—Validity of—Bona fide purchaser—Rights of.**

A *bona fide* purchaser at an execution sale is not affected by the fact that the execution at which the sale was held was issued contrary to the provisions of S. 246 of C.P.C. of 1877, which provides that in the case of cross-decrees for unequal sums, the person entitled to apply for execution is only the person holding the decree for the larger sum.

Where, therefore, a Court issued execution at the instance of the holder of the decree for the smaller sum, contrary to the provisions of the said section, the property of the holder of the decree for the larger sum was sold in execution, and the sale was subsequently confirmed, *held* that the sale to a *bona fide* purchaser was not invalid, and could not be set aside in a suit brought against him by the holder of the decree for the larger sum (111). (*Sir Barnes Peacock*). REWA MAHTON *v.* RAM KISHEN SINGH.

(1886) 13 I.A. 106 = 14 C. 18 (24-5) = 4 Sar. 746.

—**O. 21, R. 22—Execution proceeding—Insolvency of judgment-debtor pending and vesting of his property in Official Assignee—Notice to Official Assignee under R. 22 in case of—Form proper of.**

In a case in which, after the attachment of property in execution of decree, the judgment-debtor was adjudicated an insolvent and an order was made vesting his property in the Official Assignee under the Indian Insolvency Act, 1848, the judgment-creditors applied to the Judge in the execution case for, and obtained, an order for the issue and service on the Official Assignee of a notice calling upon him to show cause why he should not be substituted in the suit for the judgment-debtor.

Held that that was not a proper notice under S. 248 of C.P.C. of 1882 (255).

A notice under that section should have called upon the Official Assignee to show cause why the decree should not be executed against him. If he had been served with such a notice, he would and could have shewn good cause why the decree should not be executed, the property having under the Act and vesting order been transferred to him for the benefit of the creditors of the insolvent generally (255). (*Lord Parker*). RAGHUNATH DAS *v.* SUNDAR DAS KHETRI. (1914) 41 I. A. 251 = 42 C. 72 (81) = 1 L.W. 567 = 16 M. L. T. 353 = (1914) M. W. N. 747 = 18 C. W. N. 1058 = 16 Bom. L.R. 814 = 20 C. L. J. 555 = 13 A. L. J. 154 = 24 I. C. 304 = 27 M. L. J. 150.

—Execution proceeding—Insolvency of judgment-debtor pending. *See also* EXECUTION SALE—NULLITY—IRREGULARITY—INSOLVENCY OF JUDGMENT-DEBTOR.

—**O. 21, R. 32—Decree executable under—Declaratory decree—Test.**

In a suit by the respondents who were officiating priests in a temple, against the appellant for the purpose of establishing their right to perform certain offices at the shrine and to receive certain offerings from the votaries, a decree was made by which the claim of the respondents was allowed, and the appellant was ordered to deliver to the respondents certain articles necessary for the performance of the offices in question, and the right of the respondents to the offerings claimed was decreed. It was contended that the decree was merely a declaratory one, which could not be executed under S. 260 of C.P.C. of 1882.

C. P. CODE (ACT V OF 1908), O. 21, R. 32—(Contd.)

Held, over-ruling the objection, that the decree was one which could be executed under S. 260 of C.P.C. of 1882 (92). (*Lord Morris*). KISHORE BUN MOHANT *v.* DWARKANATH ADHIKARI. (1894) 21 I.A. 89 = 21 C. 784 = 6 Sar. 429.

—Execution of decree under—Application for—Dismissal of, on ground of failure to give opportunity to obey decree—Fresh application after giving such opportunity—Maintainability.

An application for leave to execute a decree under S. 260 of C.P.C. of 1882 was dismissed on the ground that the applicant had not given notice to the defendant, and so afforded him an opportunity of obeying the decree. On a subsequent application made for execution of the same decree, alleging that the applicant had, since his prior petition, served the judgment-debtor with notice, and so afforded him an opportunity to obey the decree, *held* that it was not *res judicata* by reason of the dismissal of the prior petition (91). (*Lord Morris*). KISHORE BUN MOHANT *v.* DWARKANATH ADHIKARI.

(1894) 21 I.A. 89 = 21 C. 784 = 6 Sar. 429.

—Execution of decree under—Application for—Maintainability—Opportunity to obey decree—Failure to give—Effect.

A decree was made establishing the right of the respondents, who were officiating priests in a temple, to perform certain offices at the shrine and to receive certain offerings from the votaries, and ordering the appellant to deliver to the respondents certain articles necessary for the performance of the offices in question.

The respondents applied for leave to execute the decree under S. 260 of C. P. C. of 1882, but did not show that there had been a demand made by them on the appellant, and that an opportunity had thus been given him of complying with the decree as required by S. 260.

Held that the application was not maintainable and was liable to be dismissed (91). (*Lord Morris*). KISHORE BUN MOHANT *v.* DWARKANATH ADHIKARI.

(1894) 21 I.A. 89 = 21 C. 784 = 6 Sar. 429.

—Execution of decree under—Application for—Objection to, on ground of failure to give opportunity to obey decree—Maintainability of in Privy Council appeal for first time.

An objection to an order of the High Court allowing execution of a decree executable under S. 260 of C. P. C. of 1882, on the ground that notice had not been given to the defendant allowing him an opportunity of obeying the decree, was not allowed to be taken before the Privy Council in a case in which the application for execution alleged the giving of such notice and opportunity, the defendant never traversed that allegation, and the giving of such notice and opportunity was taken for granted throughout the trial (92). (*Lord Morris*). KISHORE BUN MOHANT *v.* DWARKANATH ADHIKARI. (1894) 21 I. A. 89 = 21 C. 784 = 6 Sar. 429.

—Restitution of conjugal rights—Decree against wife for—Enforcement of—Mode of—Mahomedan wife.

From some passages it might be inferred that in the event of disobedience the wife was to be given bodily into her husband's hands. Whether this could be done under the new Act of Procedure, which now regulates the Civil Courts of India, may well be doubted. Disobedience to the order of a court directing the wife to return to co-habitation would seem to fall within S. 200 of the Code of 1859 and to be enforceable only by imprisonment, or attachment of property, or both (609). (*Sir James W. Colville*). MOONSHEE BUZLOOR RUHEEM *v.* SHUMSOONISSA BEGUM.

(1867) 11 M. I. A. 551 = 8 W. R. P. C. 3 = 2 Suth. 59 = 2 Sar. 259.

C. P. CODE (ACT V OF 1908)—(Contd.)

—**O. 21, R. 35 (3)**—Possession and Mesne Profits—Decree for—Execution of—Lessee of property pending suit—Removal of—Permissibility. *See* C. P. C. OF 1908, O. 22, R. 10—ASSIGNMENT. (1922) 49 I. A. 220 (225)=1 P. 581 (587).

—**O. 21, Rr. 41 to 54**—Attachment in—Meaning—Order for attachment—De facto attachment.

The proposition that a property is in law attached whenever an order for attachment is made is untenable. The order is one thing, the attachment is another. No property can be declared to be attached unless first the order for attachment has been issued, and secondly, in execution of that order the other things prescribed by the rules in the code have been done.

Under the Civil Procedure Code in India the most anxious provisions are enacted in order to prevent a mere order of a court from effecting attachment, and plainly indicating that the attachment itself is something different from the mere order, and is something which is to be done and effected before attachment can be declared to have been accomplished. (*Lord Shaw*). MUTHIAH CHETTI v. PALANIAPPA CHETTI. (1928) 55 I. A. 256 =

51 M. 349 = 26 A. L. J. 616 = 32 C. W. N. 821 =

48 C. L. J. 11 = 5 O. W. N. 579 = 28 L. W. 1 =

109 I. C. 626 = 30 Bom. L. R. 1353 =

A. I. R. 1928 P. C. 139 = 55 M. L. J. 122.

—**O. 21, R. 46 (1) (a)**—Debt—Attachment of—Creditor's right to sue for debt—Effect on.

An order of Court restraining a creditor from receiving a particular debt, and his debtor from paying that debt to him or to any one else, is no bar to a suit by the creditor for the recovery of that debt. S. 268 of C.P.C. of 1882 means only that the debt is not to be realised by the judgment-debtor (creditor), and not that he is to refrain from, in the ordinary course of law, putting his claim into court, and asserting his right to such money as may be due to him. S. 268 relates to attachment after decree, but the same rule must apply to all attachments couched in similar terms (43). (*Lord Hobhouse*). BETI MAHARANI v. COLLECTOR OF ETAWAH. (1894) 22 I. A. 31 = 17 A. 198 (210-1) = 6 Sar. 561.

—**O. 21, R. 54**—Attachment—Formalities for—Non-observance of—Invalidity of attachment on ground of—Plea of—Onus of Proof in case of. *See* EJECTMENT SUIT—ONUS OF PROOF IN—MORTGAGE PENDING ATTACHMENT. (1880) 7 I. A. 157 (160) = 6 C. 129 (134).

—Attachment—Formalities for—Non-observance of—Invalidity of attachment on ground of—Plea of—Privy Council appeal—Maintainability for first time in. *See* P. C.—APPEAL—NEW POINT—PERMISSIBILITY—ATTACHMENT—FORMALITIES FOR. (1880) 7 I. A. 157 (160-1) = 6 C. 129 (134).

—**O. 21, R. 58**—Claim—Order disallowing—Order rejecting application for postponement of sale if an—Suit to set aside order—Limitation.

An application by the purchasers of certain property from A for the postponement of the sale thereof in execution of a decree obtained by a third party against A was refused on the ground that the deed under which the applicants claimed had not been registered.

Held that the order refusing to postpone the sale was not an order under S. 246 of C. P. C. of 1859, but was a mere refusal to order a postponement of the sale under S. 247 of that Code, and that a suit by the applicants to set aside the execution sale instituted more than a year after the date of the said order was not barred by limitation under S. 246 of

C. P. CODE (ACT V OF 1908), O. 21, R. 58—(Contd.)

C. P. C. of 1859 (218). (*Sir Barnes Peacock*). SAH MUKHUN LALL PANDAY v. SAH KOONDUN LALL. (1875) 2 I. A. 210 = 15 B. L. R. 228 = 24 W. R. 75 = 3 Sar. 509 = 3 Suth. 170.

—Investigation under—Extent of, necessary.

The Code does not prescribe the extent to which the investigation should go; and though in some cases it may be very proper that there should be as full an investigation as if a suit were instituted for the very purpose of trying the question, in other cases it may also be the most prudent and proper course to deliver an opinion on such facts as are before the court at the time, leaving the aggrieved party to bring the suit which the law allows to him. Their Lordships do not desire to pronounce any opinion as to the extent of the investigation which is required under S. 278 of C. P. C. of 1882 (126). (*Lord Hobhouse*). SARDHARI LAL v. AMBIKA PERSHAD. (1888) 15 I. A. 123 = 15 C. 521 (526) = 5 Sar. 172.

—Mortgage decree—Claim to property attached in execution of—Order allowing—Setting aside of—Necessity—Binding character of order if not set aside.

L, a mortgagee of the suit property which belonged to one S, obtained a decree under S. 88 of the Transfer of Property Act for the sale of the property if the decretal money should not be paid to him by S within four months from the date of the decree. The suit property had already been attached by K in execution of a money decree which he had obtained against S. Fearing that he might not realise anything if he waited for the 4 months allowed by the decree, L applied, within a few days of the passing of the decree for sale, for an order of attachment of the suit property, and it was accordingly attached subsequently. K who had meanwhile purchased the property in execution of his decree, put in a petition of objection to the attachment of the suit property, which L had obtained. To that petition L and S were parties, and on it the Sub-Judge made an order dated 14-9-1886, the effect of which was that the suit property should not be sold under the decree for sale which L had obtained. L did not appeal against that order, which, therefore, became final.

In a subsequent suit between persons claiming under K and those claiming under L relating to the title to the suit property, the District Judge held that the order of 14th September 1886 was made without jurisdiction, as L's decree was a decree for sale under the Transfer of Property Act, and that notwithstanding the order of 14th September, 1886, L's decree was binding on the property in suit.

Held, that the order of 14th September, 1886, not having been appealed against and having been allowed to become final, was binding upon L and upon those who claimed under him (279).

If appears to their Lordships to be unnecessary to consider whether that order should or should not have been made. The petition of objection by K was a petition which the Sub-Judge had to consider and dispose of, and any party to that proceeding who was dissatisfied with the order which the sub-Judge might make could have appealed from it (279). (*Sir John Edge*). SARJU PRASAD MISSIR v. MAKSUDAN CHOWDHURY. (1922) 27 C. W. N. 275 = 31 M. L. T. 219 (P. C.) = A. I. R. 1922 P. C. 341 = (1922) M. W. N. 793 = 73 I. C. 882 = 21 A. L. J. 195.

—Procedure under—Permissive or Exclusive—Wrongful attachment in execution—Payment of amount of decree under protest—Suit for recovery of amount paid—Right of.

It was contended that in case the property of a stranger is seized under an attachment, the Code of Civil Procedure requires him to proceed under the group of sections commen-

C. P. CODE (ACT V OF 1908) O. 21, R. 58—(Contd.)

cing with S. 278 (of C. P. C. of 1882), and that this is his only remedy. The procedure referred to is, however, merely permissive. It is analogous to the procedure by interpleader, which in England would be open in similar cases to parties owning the goods seized. But the fact that such a procedure is open to him if he chooses to adopt it interferes in no way with his right to take any other alternative, as, for instance, to pay the sum demanded under protest and to sue for the recovery of the same (64). (*Lord Moulton*.) **SETH KANHAYA LAL v. NATIONAL BANK OF INDIA, LTD.**

(1913) 40 I.A. 56=40 C. 598 (610)=
17 C.W.N. 541=(1913) M.W.N. 406=
13 M. L. T. 406=11 A.L.J. 413=17 C.L.J. 478=
15 Bom. L. R. 472=184 P.L.R. 1913=
18 I.C. 949=25 M.L.J. 104.

—O. 21, R. 63—Attachment before judgment—Claim in case of—Order disallowing—Suit under R. 63 to set aside—Right of.

Where a claim was preferred, under S. 278 of C. P. C. of 1882, to goods attached before judgment, and it was disallowed, and the claimant filed a suit to establish his right to those goods, their Lordships observed that the suit was authorised by S. 283 of C. P. C. of 1882 (26). (*Lord Watson*). **KISSORYMOHUN ROY v. HURSOOK DASS.**

(1889) 17 I. A. 17=17 C. 436 (441)=5 Sar. 472.

—Attachment ordered but not *de facto* made—Claim to—Order disallowing—Suit to set aside—Limitation. See LIMITATION ACT OF 1908—ART. 11 (1).

(1928) 55 I.A. 256=51 M. 349.

—Claim suit under, regarding property A—Dismissal of—Attachment subsequent of property B—Claim suit fresh in respect of that property—Maintainability—Res judicata.

In execution of a decree an order was issued from the Shahabad court for attachment of the interest of the judgment-debtors in Mahal U. The respondents applied to have a share of that Mahal, which share they alleged to belong to them, struck out of the inventory; but their objection was over-ruled, and the property sold in execution. The respondents then brought a regular suit for relief against the attachment and sale. That suit was resisted by the appellant. After adjustment of issues that suit was dismissed, because of the respondent's failure to adduce evidence; and the respondents took no steps to set aside that order.

Subsequently the appellant instituted proceedings for execution in the Court of Gazipur against taluk N, the property of the judgment-debtors situated in that district. The respondents preferred a claim to that property. The appellant resisted the claim contending that, under Ss. 13 and 43 of C. P. C. of 1882, the claim put forward by the respondents was no longer cognizable, inasmuch as it had already been adjudicated upon in the regular suit before the Shahabad Court. And the Sub-Judge of Gazipur upheld the appellants' contention and disallowed the respondents' claim.

Held, that, assuming that by reason of the dismissal of the prior suit by the Shahabad court, the respondents were barred from seeking relief against the attachment and sale of their interest in Mahal U, the decree dismissing that suit did not disable them from claim relief against the attachment and sale of their interest in taluk N, or in any other property which was not included in the judicial sale of mouzah U (155).

None of the questions, either of fact or law, raised by the pleadings of the parties, were heard or determined by the Judge of the Sahabad Court, and his decree dismissing the suit does not constitute *res judicata* within the meaning of the C. P. C. (155). (*Lord Watson*). **MAHARAJA RADHA PARSHAD SINGH v. LAL SAHAB RAI.**

(1890) 17 I.A. 150=13 A. 53 (61-2)=5 Sar. 600.

C. P. CODE (ACT V OF 1908), Or. 21, R. 63—(Contd.)

—Postponement of sale—Application for—Order rejecting—Suit to set aside—Limitation. See C.P.C. OF 1908, O. 21, R. 58—CLAIM—ORDER DISALLOWING.

(1875) 2 I.A. 210 (218).

—Suit under—Court-fee payable on plaint in.

Property which the appellant had purchased from the 2nd respondent was attached by the 1st respondent in execution of a decree which he had obtained against the 2nd. A claim to the property preferred by the appellant was dismissed by the executing court, and he thereupon instituted a suit for a declaration of his right to the attached property, and for an injunction restraining the 1st respondent from executing his decree. The cause of action in the suit was stated to be the order rejecting the claim.

Held, that the suit was of the nature described in S. 283 of C. P. C. of 1882, and that, for purposes of Court-fee, it was governed by Art. 17 (1) of Schedule II to the Court Fees Act, 1870 (24-5).

The circumstance that, instead of asking the Court to alter or set aside the decree which is the cause of action, the appellant asked from the court the several decrees set out above is merely a verbal or formal difference, and S. 283 of C. P. C. of 1882, under which the action is brought, recognises such a suit as not merely an appropriate but the only mode of obtaining review in such cases. (*Lord Robertson*). **PHUL KUMARI v. GHANSHYAM MISRA.**

(1907) 35 I.A. 22=35 C. 202 (206)=
2 M.L.T. 506=5 A.L.J. 10=12 C.W.N. 169=
10 Bom. L. R. 1=14 Bur. L. R. 41=17 M. L. J. 618.

—Suit under—Nature of.

Misled by the form of the action directed by S. 283 of C. P. C. of 1882, both parties have treated the action as if it were not simply a form of appeal, but as if it were unrelated to any decree (the claim order) forming the cause of action (25). (*Lord Robertson*). **PHUL KUMARI v. GHANSHYAM MISRA.** (1907) 35 I.A. 22=35 C. 202 (206-7)=

2 M.L.T. 506=5 A.L.J. 10=12 C.W.N. 169=
10 Bom. L.R. 1=14 Bur. L.R. 41=17 M. L. J. 618.

—Suit under—Onus of Proof in.

In a suit under S. 283 of C. P. C. of 1877, it requires some strong evidence to overturn the decision of the Judge of the execution court, who, upon hearing the evidence, came to a conclusion against the plaintiff in the suit under S. 283 (155). (*Sir Barnes Peacock*). **MITCHELL v. MATHURA DASS.**

(1885) 12 I. A. 150=
8 A. 6 (11)=4 Sar. 663.

—Suit under—Onus of Proof in—Claimant unsuccessful—Suit by.

In a suit under O. 21, R. 63, C. P. C. of 1908 to set aside certain orders for attachment before judgment by the creditors of a person who, the plaintiff alleged, had already conveyed to him by an usufructuary mortgage the properties attached in consideration of a debt owing to plaintiff from that person, *held* that the onus lay on the plaintiff of establishing that the transaction set up by him was entered into in good faith. (*Mr. Ameer Ali*). **SETH GHUNSHAM DAS v. UMA PERSHAD.**

(1919) 23 C. W. N. 811=
(1919) M. W. N. 513=10 L. W. 511=
21 Bom. L. R. 472=17 A. L. J. 410=
15 N. L. R. 68=50 I. C. 264=
36 M. L. J. 483 (490).

—Suit under—Onus of proof in—Claimant unsuccessful ostensible owner under duly registered deed and deed of transfer—Suit by.

The plaintiffs, who were the ostensible owners of certain property, being owners in respect of duly executed and re

C. P. CODE (ACT V OF 1908), Or. 21, R. 63—(Contd.)

gistered deed of transfer, put in a claim under O. 21, R. 58, C.P.C., objecting to the attachment thereof in execution of a decree against their transferor. Their claim was disallowed and they accordingly instituted a suit under O. 21, R. 63 to establish their right. *Held* that the plaintiffs being the ostensible owners of the property under a duly registered deed and a deed of transfer, obviously the party claiming to attach that property for somebody else's debt, not their debt, but the debt of the original debtor must show that the sale was a fraudulent one. (*Viscount Dunedin.*) *V. E. A. R. M. FIRM v. MAUNG BA KYIN.* (1927) 5 R. 852 = 4 O.W.N. 926 = 27 L.W. 447 = A. I. R. 1927 P.C. 237 = 32 C. W. N. 28 = 46 C. L. J. 349 = 105 I.C. 788 = 29 Bom. L. R. 1481 = 53 M.L.J. 388.

—*Suit under—Onus of proof in—Decree-holder—Suit by.*

In a suit by a decree-holder for a declaration that the suit property was the property of his judgment-debtor and was liable to be attached and sold in execution of his decree as such and that an alleged sale thereof to the defendant was only a sham and benami transaction brought about collusively and fraudulently to delay or defraud the creditors of the judgment-debtor, *held*, that the burden of proof lay upon the plaintiff, and, none the less so, because he alleged fraud and collusion (413-4).

Held, further, on the evidence, reversing the High Court, that the decree-holder did not discharge the burden of proof which was upon him. (*Lord Phillimore.*) *SETH MANIKLAL MANSUKBHAI v. RAJA BIJOY SINGH DUDHORIA.* (1920) 25 C. W. N. 409 = 62 I.C. 356 = (1921) M.W.N. 80.

—*Suit under—Value of, for purposes of jurisdiction.*

The value of an action must mean the value to the plaintiff.

In a suit brought under S. 283 by an unsuccessful claimant, the value of the action is the value of the property claimed by the plaintiff or the amount of the execution debt, whichever is less (26-7), (*Lord Robertson.*) *PHUL KUMARI v. GHANSHYAM MISRA.* (1907) 35 I. A. 22 = 35 C. 202 (207) = 2 M. L. T. 506 = 7 C.L.J. 36 = 12 C. W. N. 169 = 10 Bom. L. R. 1 = 5 A.L.J. 10 = 14 Bur. L. R. 41 = 17 M. L. J. 618.

—**O. 21, R. 68—Time of sale—Sale fixed to take place "at monthly sales," naming day, place and hour of commencement of such sales—Absence of presiding officer from station—Sale held four days later in consequence, but in course of monthly sales—Effect.**

An execution sale was held on 16th May, 1903, but, as there were not sufficient bidders present, a fresh proclamation was ordered to issue, fixing 13th July, 1903, for the sale. In the proclamation it was notified that "in the absence of any order of postponement the sale would be held at the monthly sale, commencing at 6 o'clock in the morning of the 13th of July, 1903."

The presiding officer was, however, absent from the station from 13th to 16th July. On the 17th an application was made to him for a postponement, which was rejected. The property, however, was not sold until the 20th.

Held, that the Sub-Judge did not act in contravention of the provisions of the C.P.C. in holding the sale on the 20th of July.

On the 16th of May the sale was postponed to the 13th of July, the day on which the monthly sales were to commence; those sales did not actually begin until the 17th, owing to the absence from the station of the presiding officer, and the sale was held on the 20th in the course of the monthly sales. (*Mr. Ameer Ali.*) *RANG LAL SINGH*

C. P. CODE (ACT V OF 1908), Or. 21, R. 68—(Contd.)

v. RAVANESHWAR PERSHAD SINGH.

(1911) 38 I. A. 200 = 39 C. 26 = 10 M.L.T. 161 = (1911) 2 M. W. N. 108 = 13 Bom. L.R. 823 = 14 C. L. J. 334 = 8 A. L. J. 1173 = 12 I. C. 174 = 16 C. W. N. 1.

—**O. 21, Rr. 68, 67—Posting of proclamation in Court-house preceding posting of same in villages—Sale within 30 days of latter date though more than 30 days from former date—Effect—Validity of sale in such a case.**

In execution of a mortgage decree a proclamation of sale was issued from the Judge's Court on 13th February, 1890, the sale being announced to take place on the 20th of March following. The proclamation of sale was posted in the Court-house on 15th February, 1890, by the officer who on the 18th and 19th of February, posted the proclamation in the villages to be sold. In pursuance of the proclamation the villages in question were sold on 20th of March, 1890.

The question was whether the provisions of S. 290 of C.P.C. of 1882 which provided that no sale should take place "until after the expiration of at least thirty days . . . , calculated from the date on which the copy of the proclamation has been fixed up in the Court-house of the Judge ordering the sale," had been complied with.

Held, that the sale was in contravention of the provisions of S. 290 read with S. 289 of C.P.C. of 1882 (181).

Although the *terminus a quo* under S. 290 is the fixing up in the Court-house, and although that took place more than 30 days before the sale, yet the provision of S. 289 prescribes that the posting in the villages should precede the fixing up in the Court-house, and consequently the *terminus a quo*, from which the period of thirty days should run, became at the best the 19th of February, which would be short of the thirty days required to intervene before the sale (181). (*Lord Morris.*) *TASSADUK RASUL KHAN v. AHMAD HUSSAIN.* (1893) 20 I.A. 176 = 21 C. 66 = 6 Sar. 324 = R. & J.'s No. 131.

—**Proclamation and sale—Interval between—Provision as to—Non-compliance with—Validity of sale—Effect on.**

It was contended that the non-compliance with the interval of thirty days between proclamation and sale provided for by S. 290 of C.P.C. of 1882 made the execution sale a nullity. Their Lordships cannot accede to that contention. The non-compliance with the provisions for posting was only a material irregularity (182). (*Lord Morris.*) *TASSADUK RASUL KHAN v. AHMAD HUSSAIN.*

(1893) 20 I.A. 176 = 21 C. 66 = 6 Sar. 324 = R. & J.'s No. 131.

—**O. 21, R. 69—Fresh proclamation under—Necessity—Stay of sale—Order for—Order subsequent setting aside—Necessity in case of.**

In execution of a money decree properties were advertised for sale on 20th February, 1897. On 11th February, 1897, the Court executing the decree ordered a postponement of sale, and in accordance therewith the execution case was, on 16th February, 1897, struck off the file of the Collector's office, whither it had been sent for execution. On 19th February, 1897, the order of postponement was set aside; and on 22nd February, 1897, in consequence of notice received of the order setting aside the order of postponement, the case was brought forward "in continuation of the sale proceedings in other cases." The sale was commenced, but adjourned till the following day. On the 23rd, the sale was concluded in favour of the decree-holders who had obtained leave to bid.

Quære, whether the case came within S. 291 of C.P.C. of 1882, and whether when the stay of proceedings was removed a fresh proclamation was necessary under the terms

C. P. CODE (ACT V OF 1908), Or. 21, R. 69—(Contd.)

of that section. (*Lord Macnaghten.*) GAJRAJMATI TEORAIN *v.* SAIYID AKBAR HUSSAIN.

(1906) 34 I. A. 37 (40) = 29 A. 196 = 2 M. L. T. 47 = 5 C.L.J. 138 = 11 C. W. N. 393 = 9 Bom. L. R. 83 = 17 M. L. J. 112.

—*Fresh proclamation under — Omission to issue — Validity of sale in case of — No prejudice to judgment-debtor — His remedy in case of.*

The omission to issue a fresh proclamation in cases in which such fresh proclamation is necessary under S. 291 of C. P. C. of 1882 does not render the sale void. The omission is only an irregularity, and, where it has involved no loss to the debtor, it is not competent for him to impeach the sale by regular suit on that ground.

The only course open to the judgment-debtor is to object to the confirmation of the sale. (*Lord Macnaghten.*) GAJRAJMATI TEORAIN *v.* SAIYID AKBAR HUSSAIN.

(1906) 34 I. A. 37 (40-1) = 29 A. 196 = 2 M.L.T. 47 = 5 C.L.J. 138 = 11 C.W.N. 393 = 9 Bom. L.R. 83 = 17 M.L.J. 112.

—**O. 21, R. 71—Deposit of 25 per cent.—Default by purchaser to pay balance—Re-sale in consequence of—Deficiency in price at—Decree-holder's right to proceed against deposit in court for balance due to him.**

On a sale held in execution of a decree the purchaser paid the 25 per cent. deposit required by the Code, but defaulted to pay the balance of the purchase-money within the prescribed period. In consequence, the property was, after a fresh proclamation, re-sold, but the price fetched at the re-sale was much below the original sale price and was not sufficient to meet the claims of the decree-holder. After the re-sale, the decree-holder applied for payment of the balance that remained due to him by attaching the said deposit which remained in court and had not been forfeited to the Government.

Held, that the decree-holder had a right to proceed against the said deposit. (*Sir John Edge.*) NEELAKANTA-GIRJI *v.* VENKATACHALLAM.

(1924) 22 L. W. 1 = 27 Bom. L. R. 806 = A. I. R. 1925 P. C. 61 = 86 I. C. 373 = 48 M. L. J. 335.

—**O. 21, R. 72—Decree-holder—Purchase by, without permission or after refusal thereof—Void or voidable.**

Held that, upon the true construction of S. 294 of C.P.C. of 1882, a purchase by a decree-holder who has not obtained permission is not void nor a nullity, but is only to be avoided on the application of the judgment-debtor or some other person interested, and the fact that the decree-holder had applied for permission and had been refused cannot make any difference (722).

It would be injurious to those interested in the sale if a decree-holder who had been forced up in the bidding to give a large sum of money could escape from fulfilling his contract by getting the sale declared a nullity, and it would make all titles under such sales insecure, if at later periods they were liable to be treated as nullities.

A decree-holder who had applied for permission and had been refused is still a decree holder who has not obtained permission to bid. He is that and nothing more (317-8). (*Lord Phillimore.*) RAI RADHA KRISHNA *v.* BISHESHAR SAHAY.

(1922) 49 I. A. 312 = 1 Pat. 733 (739) = 21 A. L. J. 23 = 37 C. L. J. 430 = 25 Bom. L. R. 680 = 27 C. W. N. 294 = 9 O. & A. L. R. 194 = 16 L. W. 190 = 3 Pat. L. T. 529 = 31 M. L. T. 209 (P. C.) = (1922) P. C. 336 = 67 I. C. 914 = 44 M. L. J. 718.

—*Leave to bid—Decree-holder applying for—Duty of.*

Referring to the obligations attaching to an applicant for leave to bid, the High Court observed that "there was a duty incumbent on the appellant" (decree-holder apply-

C. P. CODE (ACT V OF 1908), Or. 21, R. 72—(Contd.)

ing for leave to bid) "to disclose all the circumstances within his knowledge bearing on the question of the expediency of his being allowed leave to bid." Their Lordships observed that taking the remark as a general one it required qualification, and that the view of the High Court as to the obligations attaching generally to applicants for leave to bid were unduly onerous, at least to decree-holders at arms' length with their debtors. (*Lord Hobhouse.*)

MAHOMED MEERA RAVUTHAR *v.* SAVVASI VIJAYA RAGHUNADHA GOPALAR. (1899) 27 I. A. 17 (27,29) =

23 M. 227 (236-7) = 4 C. W. N. 228 =

2 Bom. L. R. 640 = 7 Sar. 661 = 10 M. L. J. 1.

—*Leave to bid—Decree-holder obtaining—Position and duty of.*

Leave to bid puts an end to the disability of the decree-holder and puts him in the same position as any other purchasers though like all other purchasers he is bound to abstain from breaches of trust and from intimidation or falsehood in keeping off bidders.

The view that "when liberty is given to a decree-holder to bid at the sale of the judgment-debtor's property, he is bound to exercise the most scrupulous fairness in purchasing that property, and if he or his agent dissuades others from purchasing at the sale, that, of itself, is a sufficient ground why the purchase should be set aside" is too sweeping in its terms. (*Lord Hobhouse.*) MAHOMED MEERA RAVUTHAR *v.* SAVVASI VIJAYA RAGHUNADHA GOPALAR.

(1899) 27 I. A. 17 (23) = 23 M. 227 (232-3) =

4 C. W. N. 228 = 2 Bom. L. R. 640 =

7 Sar. 661 = 10 M. L. J. 1.

—*Leave to bid—Fraud upon Court in obtaining—Question as to—Circumstances to be considered.*

In order to judge whether a decree-holder applying for leave to bid has misled the court, all material circumstances attending the application should be known. It is material to know whether the application was made *ex parte* or on notice. It is important to know every incident bearing on the application to the court: the precise dates of the application, of the order, and of the agreements alleged to have been concealed by him; the proceedings in court; the parties present; the state of their knowledge, and so forth (27, 29). (*Lord Hobhouse.*) MAHOMED MEERA RAVUTHAR *v.* SAVVASI VIJAYA RAGHUNADHA GOPALAR.

(1899) 27 I. A. 17 (27-29) = 23 M. 227 (237) =

4 C. W. N. 228 = 2 Bom. L. R. 640 =

7 Sar. 661 = 10 M. L. J. 1.

—*Leave to bid—Grant of—Conditions — English practice—Applicability.*

In the case in I. L. R. 16 C. 132, the Calcutta High Court dwelt on the necessity of great caution in granting leave to bid; indeed, it laid down such conditions as would make the granting of leave a very rare thing, instead of being, as their Lordships believe it is, a very common thing. These conditions are drawn from English practice, partly from cases in which the applicant was a trustee or solicitor for the debtor, and they are applicable to a system under which the decree-holder has the conduct of the sale. Doubtless the conduct of the sale gives opportunities for influencing its course one way or another, which do not follow on the mere leave to bid. (*Lord Hobhouse.*) MAHOMED MEERA RAVUTHAR *v.* SAVVASI VIJAYA RAGHUNADHA GOPALAR. (1899) 27 I. A. 17 (28) = 23 M. 227 (237-8) =

4 C. W. N. 228 = 2 Bom. L. R. 640 =

7 Sar. 661 = 10 M. L. J. 1.

—*Leave to bid—Order refusing—Appeal from.*

No appeal lies from an order refusing to give a decree-holder permission to purchase at a sale held in execution of

C. P. CODE (ACT V OF 1908), Or. 21, R. 72—(Contd.)

his decree. (*Lord Macnaghten.*) KOTHA HNYIN v. MA HNIN I. (1911) 38 I. A. 126 = 38 C. 717 = 15 C. W. N. 862 = (1911) 2 M. W. N. 449 = 13 Bom. L. R. 694 = 14 C. L. J. 241 = 8 A. L. J. 1117 = 6 L. B. R. 26 = 11 I. C. 545 = 4 Bur. L. T. 257.

—Mortgagee decree-holder—Purchase of mortgaged property by, with leave to bid—Purchase by him without such leave—Effect—Distinction.

Leave to bid puts an end to the disability of the mortgagee, and puts him in the same position as any independent purchaser. Purchase of the equity of redemption at a judicial sale by a mortgagee who had obtained leave to bid would have the same effect against the mortgagor as the purchase of the mortgaged property (114). (*Lord Watson.*) MAHABIR PERSHAD SINGH v. MACNAGHTEN.

(1889) 16 I. A. 107 = 16 C. 682 (692) = 5 Sar. 345.

—Pleader of judgment-debtor acquiring decree by transfer benami in name of his wife—Leave to bid to pleader's wife—Grant of—Propriety.

Had the Judge been told that the lady, who applied for leave to bid, really held the decree benami for her husband, who was a pleader and who had had no business to acquire the decree by a transfer, their Lordships cannot doubt that the leave to bid would have been refused. (*Lord Dunedin.*) NAGENDRABALA DAS v. DINANATH MAHISH.

(1923) 51 I. A. 24 (27-8) = 51 C. 209 =

A I. R. 1924 P. C. 34 = (1924) M. W. N. 155 =

22 A. L. J. 177 = 19 L. W. 349 = 33 M. L. T. 472 =

10 O. & A. L. R. 408 = 26 Bom. L. R. 515 =

2 Pat. L. R. 96 = 29 C. W. N. 491 = 81 I. C. 752 =

46 M. L. J. 532.

—O. 21, R. 72 (3)—Application under—Grounds of—Decree-holder's purchase without permission or after refusal of permission if and when one of.

If an application were made under the last paragraph of S. 294 of C. P. C. of 1882, the conduct of the decree-holder in purchasing at the execution sale notwithstanding that he had applied for permission and had been refused might be one of the points which the court would take into consideration in determining whether it would avoid the sale or not. It is doubtful even then whether it would be of any importance. The question would not be whether the decree-holder had been contumacious but whether the property had been really realised to the best advantage. If it had not, the court would set the sale aside; if it had, then it mattered not that the decree-holder bought without permission or that he had applied and been refused (318). (*Lord Phillimore.*) RAI RADHA KRISHNA v. BISHESHAR SAHAY.

(1922) 49 I. A. 312 =

1 Pat. 733 (739-40) = 21 A. L. J. 23 =

37 C. L. J. 430 = 25 Bom. L. R. 680 = 27 C. W. N. 294 =

9 O. & A. L. R. 194 = 16 L. W. 190 = 3 Pat. L. T. 529 =

31 M. L. T. 209 (P. C.) = A. I. R. (1922) P. C. 336 =

67 I. C. 914 = 44 M. L. J. 718.

—O. 21, R. 79 (3)—Debt—Execution sale of—Suit by certified purchaser at, for recovery of debt—Benami title of third person—Plea by debtor of—Maintainability.

Where debts due to the judgment-debtor have been sold and delivered to the certified purchaser, the debtors may well be prevented from setting up the benami title of a third person in actions brought by the holder of the certificate of sale, for they are by S. 265 of C.P.C. of 1859 prohibited from paying to any one except the certified purchaser, and they could not, therefore, set up title in another. Besides, when suing them, the certified purchaser is only reducing into possession the very thing he purchased (526).

C.P. CODE (ACT V OF 1908), O. 21, R. 79 (3)—(Contd.)

(*Sir Montague E. Smith.*) MUSSUMAT BUHUNS KOWUR v. LALLA BUHOOREE LALL. (1872) 14 M.I.A. 496 = 18 W. R. 157 = 10 B. L. R. 159 = 2 Suth. 575 = 3 Sar. 69.

—O. 21, R. 84—Deposit by purchaser—Insistence on, before acceptance of bid and knocking down of estate—Propriety—Insistence with a view to find out whether bid was a real or a sham one.

The suit was to set aside an auction sale made under a decree of the Civil Court on the ground that the Collector improperly insisted upon a production of the deposit before the estate had been knocked down, and that the effect of the proceeding was to deter bidders, and so diminish the amount for which the estate was sold. It appeared that on several preceding occasions, when sales were attempted, the highest bidders had turned out to be unable, or unwilling, to complete them, and so they had been rendered illusory. On the occasion in question, the Collector, therefore, wanted to satisfy himself of the trustworthiness of a bidder, before he concluded the sale in his favour. His proceeding was not shown to have deterred persons really wishing to buy from offering their biddings, or in any way to have damped the sale.

Held that, though ordinarily the payment of the deposit could not be required before the acceptance of the bidding, and the knocking down of the estate, the Collector was bound to satisfy himself reasonably that the persons who professed to be bidders were real bidders, and that the course which he took for that purpose was perfectly justifiable (341).

The procedure of the Collector might be unusual; but the circumstances were unusual, as practices had been suffered before in this case, which had made the sales under the order of the Court mere mockeries, available only for the purpose of defeating the course of justice (341). (*Sir John Coleridge.*) RAJAH MUHESH NARAIN SING v. KISHANUND MISR. (1862) 9 M.I.A. 324 =

5 W. R. 7 = Marsh. 592 = 2 I. J. 51 = 1 Suth. 488 =

1 Sar. 862.

—O. 21, R. 90—Application under—Grounds not raised in—Appeal—Maintainability for first time in.

The principal irregularity complained of in an application to set aside an execution sale under S. 311 of C.P.C. of 1877 was that no notification of the sale was properly published. The Court found that the proclamation had been published and dismissed the application. The applicant did not take any objection to the form of the proclamation, and did not state that there was an irregularity in not having stated all that was required by the Code, and, amongst other things, the revenue which was assessed upon the estate. The applicant appealed to the High Court but did not take the objection even in the memo. of appeal to that Court. At the hearing of the appeal, objection was taken whether by the applicant or by the High Court itself was not clear—that the amount of revenue had not been stated in the proclamation, and that Court gave effect to the objection, and, reversing the Court below, set aside the sale on that ground.

Held, that the objection could not be taken for the first time in the Court of appeal (29-30).

The objection, if it had been properly taken in the first instance, would have been good to this extent, that not stating the amount of revenue was an irregularity; but even then there would have been something more to be proved than the mere irregularity—it would have been necessary to go on and show that substantial damage had been sustained by the applicant in consequence of that irregularity. No evidence was given upon that subject before the lower Court, though by S. 311 of C.P.C. of 1882 the onus lay upon the applicant to prove to the satisfaction of the Court

C. P. CODE (ACT V OF 1908), O. 21, R. 90—(Contd.)

that he had sustained substantial damage in consequence of the irregularity; nor was there any finding of the lower Court upon it, because the question was never raised (30). (*Sir Barnes Peacock.*) **OLPHERTS v. MAHABIR PERSHAD SINGH.** (1882) 10 I. A. 25 = 9 C. 656 (661-2) = 11 C. L. R. 494 = 4 Sar. 417.

—An application under S. 311 of C. P. Code of 1882 to set aside a sale, at which the decree-holder had himself purchased, alleged a number of irregularities in publishing or conducting the sale and that the decree-holder had not obtained leave to bid but did not allege that, if he had obtained such leave, he had done so by committing a fraud upon the Court. The trial Court found against the alleged irregularities and that the allegation as to not obtaining leave was false. The High Court, on appeal, held, on the strength of an alleged admission made before them, that the decree-holder had in obtaining leave committed a fraud upon the Court, and set aside the sale on that ground.

Held, that in view of the pleadings and the case on which the parties went to trial, the High Court ought not to have set aside the sale on that ground.

It is very important that one who seeks to set aside a purchase completed under the sanction of the Court, should state the grounds on which he claims to impeach it, and should not be allowed after trial of the case to rely on other grounds which have not been the subject of trial or adjudication in the Court which takes the evidence (25). In this case a controversy raised about the propriety of proceedings during a sale has been treated as if it were a question whether a fraud was committed on the Court prior to the sale (29). (*Lord Hobhouse.*) **MAHOMED MEERA RAVUTHER v. SAVVASI VIJAYA RAGHUNADHA GOPALAR.** (1899) 27 I. A. 17 =

23 M. 227 (234 5, 238) = 4 C. W. N. 228 = 2 Bom. L. R. 640 = 7 Sar. 661 = 10 M. L. J. 1.

—Application under—Order rejecting—Review of.

S. 376 of C. P. C. of 1859 speaks merely of decrees, and not of orders (236).

Quære, whether there can be a review of a judgment rejecting an application by the judgment-debtor under S. 256 of C. P. C. of 1859 to set aside an execution sale (236). (*Sir Barnes Peacock.*) **GIRDHARI SINGH v. HURDEO NARAIN SINGH.** (1876) 3 I. A. 230 =

26 W. R. (P. C.) 44 = 3 Sar. 637 = 3 Suth. 294 = Bald. 12.

—Application under—Rejection of—Suit subsequent to set aside decree and execution sale on ground of fraud—Maintainability. *See* EXECUTION SALE—SETTING ASIDE OF, AND OF DECREE—SUIT FOR. (1902) 29 I. A. 99 = 29 C. 395.

—Application under—Right to make—Auction-purchaser—Application by, on ground of fraud of judgment-debtor—Right of.

S. 311 of C. P. C. of 1882 is limited strictly to the decree-holder or any person whose immoveable property has been sold. An execution purchaser being neither, he has no right to apply under that section to have the execution sale set aside on the ground that he had been induced by the fraud of the judgment-debtors to pay a larger sum for the property purchased than he would have had to pay if he had not been so deceived. (*Lord Hannen.*) **BIRJ MOHUN THAKOOR v. RAI UMA NATH CHOWDHRY.** (1892) 19 I. A. 154 = 20 C. 8 = 6 Sar. 245.

—Application under—Right to make—Minor—Sale of property of—Mother and natural guardian of minor—Court of Wards in management of estate of minor with the exception of property in question—Right of, to apply.

C. P. CODE (ACT V OF 1908), O. 21, R. 90—(Contd.)

Objection was taken to the competency of an application to set aside an execution sale of a minor's property under S. 311 of C. P. C. of 1882 made by the mother and the natural guardian of the minor on the ground that she was not entitled to act for him. At the time the Court of Wards had taken charge of the other properties of the minor but had not decided to take charge of the property in respect of which the application was made; indeed, they ultimately declined to take charge of the same. The Court Nazir who had acted as guardian *ad litem* in the suit for the minor had refused to act for him when the decree was transferred for execution to another court which held the sale.

Held, that the application was competent and could not be objected to (150). (*Lord Moulton.*) **TEKAIT KRISHNA PRASAD SINGH v. MOTICHAND.** (1913) 40 I. A. 140 = 40 C. 635 (648-9) = 17 C. W. N. 637 = 17 C. L. J. 573 = (1913) M. W. N. 487 = 11 A. L. J. 517 = 15 Bom. L. R. 515 = 14 M. L. T. 37 = 19 I. C. 296 = 25 M. L. J. 140.

—Grounds for setting aside sale under—Agreement between persons not to bid not one.

An agreement between persons not to bid is no ground for setting aside an execution sale under O. 21, R. 90 of C. P. C. of 1908, or even for opening the biddings. (*Lord Hobhouse.*) **MAHOMED MEERA RAVUTHER v. SAVVASI VIJAYA RAGHUNADHA GOPALAR.**

(1899) 27 I. A. 17 (24) = 23 M. 227 (233) = 4 C. W. N. 228 = 2 Bom. L. R. 640 = 7 Sar. 661 = 10 M. L. J. 1.

—Inadequacy of price—Not by itself ground for setting aside sale.

Inadequate price of itself is not a sufficient ground for setting aside a sale under S. 311 of C. P. C. of 1882, unless there is irregularity (28). (*Sir Barnes Peacock.*) **OLPHERTS v. MAHABIR PERSHAD SINGH.**

(1882) 10 I. A. 25 = 9 C. 656 (660) = 11 C. L. R. 494 = 4 Sar. 417.

—Injury by reason of irregularity—Assumption without evidence of—Propriety—C. P. C., O. 21, R. 68—Non-compliance with provisions of—Injury by reason of. *See* C. P. C. OF 1908, O. 21, R. 90—IRREGULARITY—C. P. C., O. 21, R. 68. (1893) 20 I. A. 176 (182) = 21 C. 66.

—Injury by reason of irregularity—Assumption without evidence of—Propriety—Description of property—Inadequacy in—Injury by reason of.

Under S. 311 of C. P. C. of 1882 a sale cannot be set aside on the ground of irregularity without proof by the applicant that substantial injury has resulted from the irregularity.

Where, therefore, in a case in which no evidence had been adduced, the High Court assumed that irregularity consisting in the inadequate description of the property must have resulted in the inadequacy of price fetched at the sale, and set aside the sale on that ground, *held* that it erred in making such an assumption and in setting aside the sale on the basis thereof.

If, in the opinion of the High Court, the Sub-Judge was wrong in not receiving evidence, they ought to have sent the case back to him to take that evidence. (*Sir Richard Couch.*) **ARUNACHELLAM v. ARUNACHELLAM.**

(1888) 15 I. A. 171 (174-5) = 12 M. 19 (23, 25-6) = 5 Sar. 265.

—Injury by reason of irregularity—Assumption without evidence of—Propriety—Revenue assessed on estate—Non-statement of, in sale proclamation—Injury by reason of.

The High Court, having held that the non-statement of the amount of revenue in the proclamation was an irregularity, proceeded to try the question whether the irregularity

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had caused substantial injury to the applicant. They say :—
“ But it may be reasonably supposed that the non-specification of the Government revenue in the sale proclamations published is one of the causes which caused the diminution in the price.” There was no evidence at all on the subject.

It appears to their Lordships that the High Court could not, without evidence and upon a mere supposition, properly find that the non-statement of the revenue in the proclamation did cause an injury to the applicant by causing an inadequate price to be bid at the sale (30). (*Sir Barnes Peacock*). **OLPHERTS v. MAHABIR PERSHAD SINGH.**

(1882) 10 I. A. 25 = 9 C. 656 (661-2) = 11 C. L. R. 494 = 4 Sar. 417.

—Injury by reason of irregularity—Proof of—Necessity.

In all cases of irregularity under S. 311 of C. P. C. of 1882 evidence must be given of substantial injury having resulted from such irregularity (182). (*Lord Morris*). **TASSADUK RASUL KHAN v. AHMAD KHAN.**

(1893) 20 I. A. 176 = 21 C. 66 = 6 Sar. 324 = R. & J's No. 131.

—Injury by reason of irregularity—Proof of—Onus on applicant.

Under S. 256 of C. P. C. of 1859 the judgment-debtor is bound to show that some material irregularity in publishing or conducting the sale had taken place, and that he had sustained substantial injury by reason thereof (235). (*Sir Barnes Peacock*). **GIRDHARI SINGH v. HURDEO NARAIN SINGH.**

(1876) 3 I. A. 230 = 26 W. R. (P. C.) 44 = 3 Sar. 637 = 3 Suth. 294 = Bald. 12.

—By S. 311 of C. P. C. of 1882 the onus lies on the applicant to prove to the satisfaction of the Court that he had sustained substantial damage in consequence of the alleged irregularity (30). (*Sir Barnes Peacock*). **OLPHERTS v. MAHABIR PERSHAD SINGH.**

(1882) 10 I. A. 25 = 9 C. 656 (661-2) = 11 C. L. R. 494 = 4 Sar. 417.

—It lies upon an applicant under O. 21, R. 90 of C. P. C. of 1908 to establish before the court that he had suffered damage by reason of the irregularity alleged before he could start his application for setting aside the sale. (*Lord Buckmaster*). **BALIRAM SINGH v. SETH NARSINGDASS.**

(1923) 18 L. W. 137 = (1923) P. C. 93 = 75 I. C. 546 = L. R. 4 P. C. 197 = 45 M. L. J. 403 (406).

—Injury by reason of irregularity—Proof of—Opportunity to adduce—P. C. appeal—Grant of opportunity for first time in.

An application by the judgment-debtor under O. 21, R. 90 of C. P. C. of 1908 was dismissed by the first court on the ground that no damage was caused by the alleged irregularity. No evidence was, however, taken to prove that the judgment-debtor had, in fact, suffered material damage by reason of the alleged irregularity. The judgment-debtor appealed from the order of the first court on the ground, *inter alia*, that the irregularity complained of had resulted in an inadequate price. Upon the hearing of that appeal, the appellant made no application whatever to be permitted to call evidence to prove that he had, in fact, suffered material damage by what had taken place. He did not ask that the matter should be sent back for hearing upon that head by the first Court, nor, indeed, that the appellate court itself should hear evidence upon it. The appeal was argued on the facts as they stood, and the result was that the appellate court decided that the omission was one which was not likely to have had any effect on the bidding in the auction.

Held, on further appeal to the P. C. by the judgment-debtor, that it was too late for him to contend that the Board should afford him an opportunity to adduce such evidence. (*Lord Buckmaster*). **BALIRAM SINGH v. SETH**

C. P. CODE (ACT V OF 1908), O. 21, R. 90—(Contd.)

NARSINGDAS. (1923) 18 L. W. 137 = (1923) P. C. 93 = L. R. 4 P. C. 197 = 75 I. C. 546 = 45 M. L. J. 403 (405-6).

—Irregularity—Attachment—Publication of, not proper—Irregularity if an.

Quære, whether the notice of attachment not having been properly published would affect the sale, or be an irregularity in conducting the sale (29). (*Sir Barnes Peacock*). **OLPHERTS v. MAHABIR PERSHAD SINGH.**

(1882) 10 I. A. 25 = 9 C. 656 (660) = 11 C. L. R. 494 = 4 Sar. 417.

—Irregularity—C. P. C., O. 21, R. 68—Non-compliance with provisions of—Setting aside of sale on ground of—Injury by reason of non-compliance—Proof of—Necessity—Presumption of—Propriety.

The appeal arose out of an application by the respondents, who were judgment-debtors of the appellant, to set aside an execution sale of certain villages belonging to them. The principal ground relied upon by the respondents for setting aside the sale was, that the provisions of S. 290 of C. P. C. of 1882 had not been complied with by the decree-holder (appellant). The application by the respondents was made under S. 311 of C. P. C. of 1882. They, however, gave no evidence that they sustained substantial injury by reason of the alleged irregularity.

Held, that it was incumbent upon the respondents to prove that they sustained substantial injury by reason of the alleged irregularity, and that in the absence of such evidence the sale could not be set aside (182).

Their Lordships cannot accept the judgment of the Judicial Commissioner that loss is to be inferred from the mere fact that a sale was bad without full compliance with the provisions of S. 290. The section clearly contemplates direct evidence on the subject (182). (*Lord Morris*). **TASSADUK RASUL KHAN v. AHMAD HUSSAIN.**

(1893) 20 I. A. 176 = 21 C. 66 = 6 Sar. 324 = R. & J's No. 131.

—Irregularity—Incumbrances on estate—Non-statement of, in sale proclamation—Irregularity if an. *See* Under this rule—IRREGULARITY—VALUE OF ESTATE—UNDER-STATEMENT FRAUDULENT OF ETC.

(1913) 40 I. A. 140 (147) = 40 C. 635 (642-3).

—Irregularity—Notification of sale—Error in—Application to set aside sale on ground of—Maintainability—Sale pursuant to that notification—Postponement of, at instance of judgment-debtor, conditional on that notification being maintained—Effect.

An execution sale was fixed for the 5th of August, 1872. The judgment-debtor applied to the court to postpone the sale, and stated that he wished to raise the money, and added, “Under such circumstances it is prayed that a postponement of one month be granted, the attachment and the notification of sale being maintained.” Upon that petition an order was passed which was as follows: “It is ordered that the postponement be granted; that in case of non-payment of the decretal amount the property of the judgment-debtor be sold, without the issue of a second notification of sale, on the 2nd September, 1872; and that a copy of the notification be suspended in a conspicuous place of the Court-house.”

Held, that the judgment-debtor could not thereafter properly take objection to that notification by stating that there was an error in it in regard to the Government revenue payable upon the estate or in any other matter (240).

The judgment-debtor's application for postponement of the sale, subject to the attachment and the notification of sale being maintained, amounted to an admission on his part that the notification was correct, or that at any rate there was no such mistake or irregularity as would be likely to

C. P. CODE (ACT V OF 1908), O. 21, R. 90—(Contd.)

mislead (240). (*Sir Barnes Peacock.*) GIRDHARI SINGH *v.* HURDEO NARAIN SINGH.

(1876) 3 I. A. 230 = 26 W. R. P. C. 44 = 3 Sar. 637 =
3 Suth. 294 = Bald. 12.

——*Irregularity—Revenue assessed upon estate—Omission to mention, in sale proclamation—Irregularity if an.*

Not stating the amount of revenue in the sale proclamation is an irregularity; but to have a sale set aside on that ground the applicant must go further and show that substantial damage had been sustained by him in consequence of that irregularity (30). (*Sir Barnes Peacock.*) OLPHERTS *v.* MAHABIR PERSHAD SINGH.

(1882) 10 I. A. 25 = 9 C. 656 (661-2) =
11 C. L. R. 494 = 4 Sar. 417.

——*Under O. 21, R. 66 of C.P.C. of 1908 it is plain that the proclamation should contain the statement as to the revenue assessed upon the estate, and this Board, in L.R. 10 I.A. 25, have held that that is a material matter, and that its omission is the omission of a matter which would enable the judgment-debtor to base an application for setting aside the sale if he could comply with the other condition that the Code provides. (Lord Buckmaster.) BALIRAM SINGH *v.* SETH NARSINGDAS.*

(1923) 18 L. W. 137 =
(1923) P. C. 93 = L. R. 4 P. C. 197 = 75 I. C. 546 =
45 M. L. J. 403 (404).

——*Irregularity—Revenue assessed upon estate—Under-statement of—Irregularity if an.*

Not specifying the amount of the revenue correctly as required by S. 249 of C.P.C. of 1859 was an irregularity for which the sale might have been set aside under S. 256 thereof, provided the judgment-debtor satisfied the court that he had sustained a substantial injury in consequence of it (239).

It is a mistake to suppose that an under-statement of the Government revenue payable on the estate is an error in favour of the judgment-debtor, for, if the Government revenue were stated to be much less than it really was, the purchaser might be led to suppose that the estate was a much less valuable one (239-40). (*Sir Barnes Peacock.*) GIRDHARI SINGH *v.* HURDEO NARAIN SINGH.

(1876) 3 I. A. 230 = 26 W. R. P. C. 44 = 3 Sar. 637 =
3 Suth. 294 = Bald. 12.

——*Irregularity—Setting aside of sale on ground of—Condition—Injury substantial consequent upon it—Proof of—Necessity.*

Irregularity alone is not a ground for setting aside a sale under S. 311 of C. P. C. of 1882. There must be some substantial injury in consequence of the irregularity, and that must be proved by the applicant (28). (*Sir Barnes Peacock.*) OLPHERTS *v.* MAHABIR PERSHAD SINGH.

(1882) 10 I. A. 25 = 9 C. 656 (659-60) =
11 C. L. R. 494 = 4 Sar. 417.

——*Irregularity—Value of estate—Mis-statement as to, in sale proclamation—Irregularity if an.*

The munsif considered that the misrepresentation in the proclamation of sale of the value of the property was not a material irregularity for which a sale could be set aside. His reason was that no rule required that the value of the property should be mentioned in the proclamation; and that as the entry was uncalled for and not legally obligatory, to give a wrong value is no reason for setting aside a sale.

This is a very mistaken view. It is true that the misstatement is something more grave than an ordinary irregularity of procedure, but the fact that it is so, and that it was made gratuitously by the decree-holder and the court, does not prevent it from being "a material irregularity in publishing or conducting" the sale, such as to bring the case within the special remedy provided by S. 311 of C. P.

C. P. CODE (ACT V OF 1908), O. 21, R. 90—(Contd.)

C. of 1882. Whatever material fact is stated in the proclamation (and the value of the property is a very material fact) must be considered as one of those things "which the court considers material for the purchaser to know" and it is enacted in terms (though express enactment is hardly necessary for such an object) that those things shall be stated as fairly and accurately as possible (150).

(*Lord Hobhouse.*) SAADATMAND KHAN *v.* PHUL KUAR.
(1898) 25 I. A. 146 = 20 A. 412 = 2 C. W. N. 550 =
7 Sar. 380.

——*Irregularity—Value of estate—Under-statement fraudulent of, in sale proclamation—Incumbrances on estate—Omission to state—Irregularities if.*

While the order for proclamation of sale in execution of a decree directed that the sale proclamation should be served on each of 109 mauzas by announcement to the public with beat of drum and that a copy of the proclamation should be affixed at a conspicuous place on each property, the proclamation was in fact read out without beat of drum in one only of the mauzas and the copy of the proclamation was affixed to a tree in that village alone. Further the Schedule of the property attached to the proclamation did not contain a statement of the incumbrance to which the property was liable. Again, the value of the property was fraudulently under-estimated, property worth nearly 2 lacs being stated to be of the value of Rs. 2,000 only, the amount of tax due from the property. Notice of none of the proceedings in the attachment was served at any time on any person representing the infant representative of the judgment-debtor, who died pending attachment. And there were no bidders present at the sale except the decree-holder and the Collector, and the decree-holder himself purchased the property for Rs. 2,020.

Held, that the matters set forth above constituted material irregularities in the publishing or conducting of the sale and that the judgment-debtor having sustained injury the sale ought to be set aside (147). (*Lord Moulton.*) TEKAIT KRISHNA PRASAD SINGH *v.* MOTICHAND.

(1913) 40 I. A. 140 = 40 C. 635 (642-3) =
17 C. W. N. 637 = 17 C. L. J. 573 =
(1913) M. W. N. 487 = 11 A. L. J. 517 =
15 Bom. L. R. 515 = 14 M. L. T. 37 =
19 I. C. 296 = 25 M. L. J. 140.

——*Irregularity known to judgment-debtor and not objected to by him—Application to set aside sale on ground of—Maintainability—Estoppel.*

A judgment-debtor cannot lie by and afterwards take advantage of any misdescription of the property attached, and about to be sold, which he knows well (174).

Where, therefore, the judgment-debtors, knowing what the description of the property was in the proclamation of sale, allowed the whole matter to proceed until the sale was completed, and then applied for setting aside the sale on account of misdescription of property in the sale proclamation, held, reversing the High Court which gave effect to the objection, that it could not be allowed (174). (*Sir Richard Couch.*) ARUNACHELLAM *v.* ARUNACHELLAM.

(1888) 15 I. A. 171 = 12 M. 19 (25) = 5 Sar. 265.

——**O. 21, R. 91—Applicability—Fraud of judgment-debtor—Purchaser induced to pay more by—Judgment-debtor having saleable interest.**

S. 313 of C.P.C. of 1882, no doubt, applies to the execution purchaser, but its scope is limited to the case of a person whose property is purported to be sold, and who had no saleable interest therein. The section is, therefore, inapplicable to an application by the purchaser to set aside the execution sale on the ground that he had been induced by the fraud of the judgment-debtors to pay a larger sum for the property purchased than he would have had to pay if he

C. P. CODE (ACT V OF 1908), O. 21, R. 91—(Contd.)

had not been so deceived. (*Lord Hannen.*) **BIRJ MOHUN THAKOOR v. RAI UMA NATH CHOWDHRY.**

(1892) 19 I. A. 154 = 20 C. 8 = 6 Sar. 245.

—O. 21, R. 92—Confirmation of sale—Duty of court.

When the court rejects an application under S. 256 of C. P. C. of 1859, and treats the objections as insufficient, it ought to proceed under S. 257 to pass an order confirming the sale (236). (*Sir Barnes Peacock.*) **GIRDHARI SINGH v. HURDEO NARAIN SINGH.** (1876) 3 I. A. 230 = 26 W. R. P. C. 44 = 3 Sar. 637 = 3 Suth. 294 = Bald. 12.

—Where there has been an order for sale, and the property has been put up for sale, under S. 312 of C. P. C. of 1882, if no such application as is mentioned in S. 311 is made, there is only one duty left to the court, namely, to pass an order confirming the sale as regards the parties to the suit and the purchaser. (*Lord Hannen.*) **BIRJ MOHUN THAKOOR v. RAI UMA NATH CHOWDHRY.**

(1892) 19 I. A. 154 = 20 C. 8 = 6 Sar. 245.

—Refusal to confirm sale—Grounds of—Sale at low price if one of.

The fact that an execution sale had been effected at a low price would in itself be no ground for refusing to confirm the sale (238). (*Sir Barnes Peacock.*) **GIRDHARI SINGH v. HURDEO NARAIN SINGH.** (1876) 3 I. A. 230 = 26 W. R. P. C. 44 = 3 Sar. 637 = 3 Suth. 294 = Bald. 12.

—Refusal to confirm sale—Improper order of—Remedy in case of—Mandamus proceeding in High Court.

Where the lower court, after rejecting the objections to an execution sale, refuses to confirm the sale, it is competent to the High Court, by a proceeding in the nature of a mandamus, to order the lower court to do that which it ought to have done, namely, having rejected the objections to the sale, to confirm it (238). (*Sir Barnes Peacock.*) **GIRDHARI SINGH v. HURDEO NARAIN SINGH.**

(1876) 3 I. A. 230 = 26 W. R. P. C. 44 = 3 Sar. 637 = 3 Suth. 294 = Bald. 12.

—Refusal to confirm sale—Improper order of—Remedy in case of—Revision to High Court.

Where in a case in which the Sub-Judge ought to have passed an order confirming an execution sale, he refused to do that, and set aside the sale, and directed the purchase-money to be refunded on certain terms, *held*, that, in so doing, he declined to exercise a jurisdiction which he had, and exercised one which did not belong to him, and that consequently his judgment was liable to be reviewed by the High Court under S. 622 of C. P. C. of 1882. (*Lord Hannen.*) **BIRJ MOHUN THAKOOR v. RAI UMA NATH CHOWDHRY.** (1892) 19 I. A. 154 = 20 C. 8 = 6 Sar. 245.

—Refusal to confirm sale—Improper order of—Revision against—Reversal of order and confirmation of sale in—Meaning and effect of—Confirmation of sale by High Court itself or direction to court below to confirm it.

In a case in which the executing court set aside a sale on the ground of material irregularity, and subsequently refused to confirm the sale and to issue a certificate of sale to the auction-purchaser, the High Court, in revision, reversed the order of the court below, and confirmed the sale.

Held, that the real meaning of the order of the High Court was that the sale was to be confirmed by the officer who ought to confirm it, namely, by the court below, which ought to have confirmed the sale when it disallowed the objections (241).

The High Court must not be taken, by reason of the said order, to have itself confirmed the sale. (*Sir Barnes Peacock.*) **GIRDHARI SINGH v. HURDEO NARAIN SINGH.**

(1876) 3 I. A. 230 = 26 W. R. P. C. 44 = 3 Sar. 637 = 3 Suth. 294 = Bald. 12.

C. P. CODE (ACT V OF 1908)—(Contd.)**—O. 21, R. 93—Interest on purchase-money—Purchaser's right to.**

Where an execution sale at which the decree-holder himself purchased the property was set aside for irregularity, *held*, that the decree-holder-purchaser was not entitled to interest on his purchase-money, because (1) the purchase-money was not actually paid, but was set off against the amount due under the decree; (2) the decree itself had not allowed interest; and (3) the sale was set aside owing to his own fault. (*Lord Macnaghten.*) **PRAG NARAIN v. KAMAKHIA SINGH.** (1909) 36 I. A. 197 = 31 A. 551 = 6 M. L. T. 303 = 10 C. L. J. 257 = 14 C. W. N. 55 = 11 Bom. L. R. 1200 = 3 I. C. 798 = 13 O. C. 180 = 19 M. L. J. 599.

—Interest on purchase-money—Purchaser's right to—Security bond on execution of which money was paid not providing for interest—Effect.

Where proceedings to set aside an execution sale are taken both under O. 21, R. 90, and under O. 21, R. 91 of C. P. Code of 1908, and the sale is duly set aside, O. 21, R. 93 of the Code applies, and the Court has power to order interest to be paid on the purchase-money paid out to the purchaser.

Quere, whether S. 144 of C.P. Code of 1908 also applies to such a case.

The fact that the security bond on the execution of which the money was paid out to the decree-holder did not reserve interest does not deprive the Court of its power to order interest to be paid. The only effect of the omission is that the security does not extend to interest. (*Viscount Cave.*) **MAHARAJ BAHADUR SINGH v. FORBES.**

(1920) 48 I. A. 24 = 13 L. W. 217 = (1921) M. W. N. 26 = 19 A. L. J. 101 = 33 C. L. J. 176 = 23 Bom. L. R. 727 = 25 C. W. N. 366 = 6 P. L. J. 129 = 30 M. L. T. 187 = 59 I. C. 782 = 40 M. L. J. 141.

—O. 21, R. 94—Certificate of sale—Construction of—Other documents—Reference to—Permissibility.

Certificates of sale are documents of title which ought not to be lightly regarded or loosely construed. The object of a sale certificate would be defeated if it were possible to change its plain meaning by reference to other documents. (*Lord Buckmaster.*) **RAMABHADRA NAIDU v. KADIRIYA-SAMI NAICKER.** (1921) 48 I. A. 155 (161) = 44 M. 483 (489, 488) = (1921) M. W. N. 374 = 14 L. W. 125 = 30 M. L. T. 34 = 24 Bom. L. R. 692 = 63 I. C. 708 = (1922) P. C. 252.

—Certificate of sale—Cure by, of irregularities in sale.

The irregularities, if any, in an execution sale are cured by the certificate of sale (196). (*Sir Robert P. Collier.*) **RAI BALKRISHNA v. MUSST. MASUMA BIBI.**

(1882) 9 I. A. 182 = 5 A. 142 (157) = 13 C. L. R. 232 = 4 Sar. 398.

—Certificate of sale—Nature of—Statutory evidence of transfer.

Section 259 of C.P. Code of 1859, requiring the Court to grant a certificate to the person declared to be the purchaser of land at the sale, and directing that such certificate shall be taken and deemed to be a valid transfer of the debtor's right and interest, does no more than create statutory evidence of the transfer, in place of the old mode of transfer by bill of sale (523). (*Sir Montague E. Smith.*) **MUSSUMAT BUHUNS KOWUR v. LALLA BUHOOREE LALL.** (1872) 14 M. I. A. 496 = 18 W. R. 157 = 10 B. L. R. 159 = 2 Suth. 575 = 3 Sar. 69.

—Purchaser's rights and obligations—Commencement of sale—Confirmation of sale—Date of.

A sale in execution of a mortgage decree, at which the mortgagee himself purchased, was held on 19th March,

C. P. CODE (ACT V OF 1908), O. 21, R. 94—(Contd.)

1900. It was confirmed on 23rd April, 1900, the certificate issued on that date that the mortgagee "has been declared the purchaser at sale by public auction on 19th March, 1900, . . . and that the said sale has been duly confirmed by this Court on 23rd April, 1900."

Held, that the sale became a legal fact as and from 19th March, 1900, and not merely as and from 23rd April, 1900, and that as and from 19th March, 1900, the mortgagee-purchaser became entitled to all the rights attaching to the property, such as, the right to any accretions thereto between that date and the date of confirmation, and subject to all the obligations which arose during the same period, such as, revenue in respect of the property falling into arrear subsequent to 19th March, 1900 (233-4). (*Lord Shaw.*) **BHAWANI KUMAR v. MATHURA PRASAD SINGH.**

(1912) 39 I.A. 228 = 40 C. 89 (101-2) = 16 C.W.N. 985 = 12 M.L.T. 352 = (1912) M.W.N. 944 = 14 Bom. L. R. 1046 = 16 C. L. J. 606 = 16 I. C. 210 = 23 M.L.J. 311.

—O. 22, Rr. 1 and 11—Plaintiff-appellant—Death of—Substitution of defendant as his legal representative—Propriety of—Substitution made at his own instance—Reversal of decree on ground of. *See* APPEAL—PARTIES—SUBSTITUTION—PLAINTIFF-APPELLANT—DEATH OF. (1862) 9 M. I. A. 287 (302).

—O. 22, R. 3 (1)—Hindu Law—Reversioner—Presumptive reversioner—Widow—Adoption or alienation by—Suit to set aside—Death of plaintiff pending—Right of next reversioner to continue suit. *See* HINDU LAW—REVERSIONER—PRESUMPTIVE REVERSIONER—WIDOW—ADOPTION OR ALIENATION BY—SUIT TO SET ASIDE—NATURE OF—REPRESENTATIVE SUIT, ETC.

(1915) 42 I.A. 125 (129-30) = 38 M. 406 (411-2).

—Sole plaintiff—Death before hearing of—Dismissal of suit for default—Restoration—Application by his legal representatives—Maintainability. *See* C.P. CODE OF 1908, O. 9, RR. 8 AND 9—DEAD PLAINTIFF.

(1913) 40 I. A. 151 = 35 A. 331.

—O. 22, R. 3 (2)—Order abating suit—Notice to opposite party of—Necessity.

An order abating the suit may be said to be really tantamount to a judgment in favour of the defendant and should not be pronounced *ex parte* without notice to the opposite side. (*Lord Dunedin.*) **BRIJ INDAR SINGH v. KANSI RAM.**

(1917) 44 I.A. 218 (227-8) = 45 C. 94 = 26 C.L.J. 572 = 22 C.W.N. 169 = 19 Bom. L.R. 866 = 126 P.W.R. 1917 = 104 P.R. 1917 = 3 Pat. L.W. 313 = 22 M.L.T. 362 = 6 L.W. 392 = 15 A.L.J. 777 = 42 I.C. 43 = 33 M.L.J. 486.

—O. 22, Rr. 3 (2) and 4—Order abating suit under—Setting aside of—Application under R. 9 (2)—Maintainability—Order on—Appeal against. *See* C. P. CODE OF 1908, O. 22, RR. 9 (2), 3 (2) and 4.

(1917) 44 I.A. 218 (227-8) = 45 C. 94.

—O. 22, R. 4; S. 107 (2)—Partnership—Dissolution and accounts—Suit for—Decree for payment of money in—Appeal against—Respondent's death pending—Omission to bring his legal representatives on record—Abatement of appeal.

In a suit which was in substance one for taking the accounts and winding up the affairs of a partnership, which had subsisted between the plaintiff and the several defendants to the suit, a final decree was made, by which it was ordered that a sum of money should be contributed in certain proportions by the plaintiff and *R* and *B*, two of the defendants, and certain other parties, and that out of that sum a named sum should be paid to *A*, one of the defendants, and other payments be made to other parties. *R* and *B* and the plaintiff respectively appealed to the High

C. P. CODE (ACT V OF 1908), O. 22, R. 4; S. 107 (2)—(Contd.)

Court. *A* died pending the appeal, leaving a will, probate of which was granted to his son, nearly two months before the expiration of the period allowed for bringing the son on record as legal representative of *A*. And yet no application was made for the purpose until long after the expiration of the said period. Applications made after the said period were rejected by the High Court, and the appeals themselves, when they came on for hearing, were held to have abated.

Held, that the High Court had no option but to decide as they did. (*Lord Davey.*) **RAJ CHUNDER SEN v. GANGADAS SEAL.** (1904) 31 I.A. 71 = 31 C. 487 =

8 C. W. N. 442 = 1 A. L. J. 145 = 8 Sar. 623 = 14 M. L. J. 147.

—O. 22, Rr. 4 (3) and 11—Pre-emption—Suit by co-sharers against stranger-purchaser for—Decree for plaintiffs in—Appeal by defendant against—Abatement of, as against one of plaintiffs—Whole appeal if abates by reason of.

Where two or more co-sharers simply sue the stranger-purchaser for pre-emption, without asking the Court to adjudicate on their rival claims, and obtain a decree for possession on depositing the pre-emption money in court, and the defendant files an appeal from such a decree making all the plaintiffs respondents, and one of the respondents dies before the hearing of the appeal, and his legal representatives are not brought on record within the time limited by law, and the appeal abates as against him under the provisions of O. 22, R. 4 (3) read with R. 11, the abatement of the appeal as against the deceased plaintiff does not make it impossible to proceed effectively with the hearing of the appeal as against the surviving plaintiffs and render the judgment and decree of the appellate court passed in the absence of the representatives of the deceased plaintiff a complete nullity. (*Sir John Wallis.*) **MD. WAJID ALI KHA N v. PURAN SINGH.** (1928) 56 I. A. 80 =

29 L.W. 423 = (1929) M. W. N. 220 = 114 I.C. 601 = 27 A. L. J. 85 = 33 C. W. N. 318 = 49 C. L. J. 141 = A. I. R. 1929 P.C. 58 = 56 M. L. J. 304.

—O. 22, Rr. 9 (2), 3 (2) and 4—Order abating suit under Rr. 3 (2) and 4—Setting aside of—Application under R. 9 (2)—Maintainability—Order on—Appeal against.

The remedy by review given by S. 371 of the Code of 1882 against an abatement order is available to a plaintiff whether such order is passed under S. 368 or S. 366 of the Code. The appeal allowed by S. 588 is intended for other matters than abatement. (*Lord Dunedin.*) **BRIJ INDAR SINGH v. KANSI RAM.** (1917) 44 I. A. 218 (227-8) =

45 C. 94 = 26 C. L. J. 572 = 22 C. W. N. 169 = 19 Bom. L. R. 866 = 126 P.W.R. 1917 = 104 P.R. 1917 = 3 Pat. L.W. 313 = 22 M.L.T. 362 = 6 L.W. 392 = 15 A.L.J. 777 = 42 I. C. 43 = 33 M. L. J. 486.

—O. 22, Rr. 9 and 11—Appeal—Abatement of—Setting aside of—Discretion of High Court as to—P. C.'s interference with.

In this case the application for revivor of an appeal to the High Court was not made until after the expiry of 6 months and it was accordingly rejected by the High Court on the ground that it had been made out of time. On an application, however, of the Collector (appellant), supported by an affidavit explaining the delay, the learned Judges of the High Court recalled their order of abatement, re-admitted the appeal, and after a full hearing made the order which was the subject of the appeal to the P. C.

It was argued before their Lordships that the High Court proceeded on insufficient grounds in allowing the appeal to be revived after it had abated.

C. P. CODE (ACT V OF 1908), O. 22, R. 9 and 11
—(Contd.)

Held, that the matter was within the discretion of the learned Judges, and that the discretion had not been wrongly exercised (313-4). (*Mr. Ameer Ali.*) **HAKIM SHIAM SUNDAR LAL v. SECRETARY OF STATE FOR INDIA IN COUNCIL.** (1919) 12 L.W. 311 = 57 I.C. 156.

—**O. 22, R. 10**—Applicability of, after final decree. See C.P.C. OF 1908, O. 1, R. 8—FINAL DECREE.

(1914) 41 I.A. 251 (255) = 42 C. 72 (81).

—*Assignment—Lease of property pending suit for recovery of its possession and for mesne profits if an—Execution of decree—Removal of lessee in—Permissibility.*

The High Court appear to consider that in an action to recover possession of land where the defendant while he is in possession has granted leases, proceedings in execution may involve removal of the tenants, and that for such a purpose a lease may be considered an assignment within the meaning of O. 22, R. 10 of C.P.C. of 1908. It is unnecessary to express any opinion whether that view is right or not. (*Lord Phillimore.*) **MANINDRA CHANDRA NANDI v. RAM LAL BHAGAT.** (1922) 49 I.A. 220 (225) =

1 P. 581 (587) = 31 M.L.T. 131 =

27 C.W.N. 29 = 24 Bom. L.R. 1251 = 16 L.W. 905 =

20 A.L.J. 988 = 36 C.L.J. 542 =

A. I. R. 1922 P. C. 304 = 68 I. C. 973 =

43 M. L. J. 589.

—*Mesne profits—Assessment of—Proceedings for—Parties to—Lessee pendente lite of suit property. See C. P.C. OF 1908, S. 47—EXECUTION PROCEEDING—SEPARATE SUIT—REMEDY APPROPRIATE—POSSESSION AND MESNE PROFITS.* (1922) 49 I. A. 220 (223, 227) =

1 Pat. 581 (586).

—*Mesne profits—Assessment of—Proceedings for—Parties to—Sureties for profits payable under decree. See MESNE PROFITS—ASSESSMENT OF—PROCEEDINGS FOR—PARTIES TO—PROFITS RECOVERABLE UNDER DECREE.* (1919) 46 I. A. 228 = 42 A. 158 (166).

—*Mortgage suit—Death of mortgagor pending—Devolution of interest on son, an undischarged insolvent—Mortgagee's remedy in case of—Continuation of suit against receiver in insolvency.*

Where, pending a suit to enforce a mortgage, the mortgagor dies, and his interest devolves on his son, an undischarged insolvent, the mortgagee becomes entitled to continue the suit by leave of the Court against the Receiver in insolvency, O. 22, R. 10 (192-3). (*Lord Salvesen.*) **KALA CHAND BANERJEE v. JAGANNATH MARWARI.**

(1927) 54 I.A. 190 = 54 C. 595 =

29 Bom. L.R. 882 = 101 I. C. 442 =

31 C.W.N. 741 = 25 A.L.J. 621 = 45 C.L.J. 544 =

39 M.L.T. 5 = 26 L.W. 268 = A.I.R. 1927 P.C. 108 =

52 M.L.J. 734.

—**O. 22, R. 11 and 4 (3)**—Appeal—Abatement of, as against one of respondents—Whole appeal if abates by reason of. See C.P.C. OF 1908, O. 22, R. 4 (3); R. 11—PRE-EMPTION. (1928) 56 I.A. 80 = 56 M.L.J. 304.

—**O. 22, R. 12**—Mesne profits—Assessment of—Proceedings for—Execution proceeding or proceeding in suit—Decree under C.P.C. of 1882—Death of parties—Substitution—Necessity. See MESNE PROFITS—ASSESSMENT OF—PROCEEDINGS FOR—EXECUTION PROCEEDING. (1925) 52 I.A. 188 = 4 Pat. 507.

—**O. 23, R. 1**—Execution proceedings—Applicability to.

S. 373 of C.P.C. of 1882 does not of its own force apply to execution proceedings (49). (*Lord Hobhouse.*) **THAKUR PERSHAD v. SHEIKH FAKIRULLAH.**

(1894) 22 I.A. 44 = 17 A. 106 (111) =

6 Sar. 526 = 5 M. L. J. 3.

C. P. CODE (ACT V OF 1908), O. 23, R. 1—(Contd.)

—*Leave to withdraw suit—Application made for—Dismissal of suit in case of—Liberty to bring fresh suit—Order for—Power to make, in such a case.*

Where no application is made for leave to withdraw a suit, and the suit is, in fact, not withdrawn, but dismissed, the power of the court ceases upon such dismissal, and it has no power to make an order under O. 23 of C.P.C. of 1908 reserving liberty to the plaintiff to bring a fresh suit (105-6). (*Lord Phillimore.*) **FATEH SINGH v. JAGANNATH BAKSH SINGH.** (1924) 52 I. A. 100 = 47 A. 158 =

6 L.R. P.C. 50 = 12 O.L.J. 117 =

2 O. W. N. 25 = 27 O.C. 334 = 27 Bom. L. R. 725 =

29 C. W. N. 749 = 23 A. L. J. 739 = 22 L. W. 58 =

A. I. R. 1925 P.C. 55 = 91 I.C. 280 =

48 M. L. J. 64.

—*Liberty to bring fresh suit—Appeal by defendant—Withdrawal by plaintiff-respondent of suit as regards portion of suit property with such leave—Grant of.*

In an appeal by the defendant the High Court allowed the respondent (plaintiff) to abandon his suit as regards a portion of the suit property, with liberty, if so advised, to institute a fresh suit in regard to it.

On appeal to the Privy Council no exception was taken to the propriety of the course adopted by the High Court. (*Lord Collins.*) **GANPAT RAO v. ANAND RAO.**

(1909) 37 I.A. 39 (45) = 32 A. 148 (151) =

7 M.L. T. 53 = 7 A.L.J. 165 = 12 Bom. L.R. 267 =

11 C.L.J. 281 = 14 C.W.N. 310 = 5 I.C. 689 =

20 M. L. J. 164.

—*Liberty to bring fresh suit—Dismissal of suit with—Jurisdiction—Indian Courts—England—Distinction.*

Their Lordships are not aware of any authority which sanctions the exercise by the country courts of India of that power which Courts of Equity in this country occasionally exercise, of dismissing a suit with liberty to the plaintiff to bring a fresh suit for the same matter (169-70). (*Sir James W. Colville.*) **WATSON & CO. v. COLLECTOR OF RAJSHAHYE.** (1869) 13 M.I.A. 160 =

12 W.R. P.C. 43 = 3 B.L.R. 48 = 2 Suth. 269 =

2 Sar. 500.

—*Liberty to bring fresh suit—Grant of—Grounds.*

What is technically known in England as a non-suit is not known in the country courts of India. There is a proceeding in those courts called a non-suit, which operates as a dismissal of the suit without barring the right of the party to litigate the matter in a fresh suit; but that seems to be limited to cases of misjoinder either of parties or of the matters in contest in the suit; to cases in which a material document has been rejected because it has not borne the proper stamp, and to cases in which there has been an erroneous valuation of the subject of the suit. In all those cases the suit fails by reason of some point of form (170). (*Sir James W. Colville.*) **WATSON & CO. v. COLLECTOR OF RAJSHAHYE.**

(1869) 13 M.I.A. 160 = 12 W.R. P.C. 43 =

3 B. L. R. 48 = 2 Suth. 269 = 2 Sar. 500.

—*Liberty to bring fresh suit—Grant of, in case where plaintiff has failed to prove his case—Power of.*

Their Lordships are aware of no case in which, upon an issue joined, and the party having failed to produce the evidence which he was bound to produce in support of that issue, liberty has been given to him to bring a second suit (170). (*Sir James W. Colville.*) **WATSON & CO. v. COLLECTOR OF RAJSHAHYE.** (1869) 13 M.I.A. 160 =

12 W.R. P.C. 43 = 3 B.L.R. 48 =

2 Suth. 269 = 2 Sar. 500.

—*Liberty to bring fresh suit—Reservation of—Propriety of—Consideration of, in subsequent suit—Power of.*

C. P. CODE (ACT V OF 1908), O. 23, R. 1—(Contd.)

See C. P. CODE OF 1908, S. 11—LIBERTY TO BRING FRESH SUIT. (1869) 13 M.I.A. 160 (171-2).

—Liberty to bring fresh suit—Withdrawal with—Costs on—Discretion as to—Interference on appeal with.

The question as to the terms as to costs upon which a plaintiff ought to be allowed to withdraw the suit with liberty is a matter clearly in the discretion of the Court allowing it and that discretion will not be interfered with by the Privy Council in appeal. (*Lord Collins.*) GANPAT RAO v. ANAND RAO. (1909) 37 I.A. 39 (45) =

32 A. 148 (151) = 7 M. L. T. 53 = 7 A.L.J. 165 = 12 Bom. L.R. 267 = 11 C.L.J. 281 = 14 C.W.N. 310 = 5 I.C. 689 = 20 M.L.J. 164.

—O. 23, R. 3—Adjustment of suit—Company—Manager of—Shareholder's suit for account against—Preliminary decree in—Resolution of Company subsequent to, absolving defendant from liability for suit amount, if an adjustment of suit—Efficacy of.

Respondent, a shareholder in a Limited Company, instituted a suit against the appellant (Chairman of the Board of Directors and the manager of the Company) for an account of the funds belonging to the Company used by the appellant for his own purposes, and for a declaration that a weaving factory erected and worked by him was the property of the Company. The plaintiff charged that that factory was built and erected by the appellant with money belonging to the Company, and that he had worked the same for his own benefit. He asked an account of the profits made by the appellant therefrom and a declaration that such profits also belonged to the Company.

In the suit a preliminary decree was made directing accounts against the defendant and appointing a Commissioner to take the same. Pending an appeal by the defendant against that decree a meeting of the shareholders of the Company was convened and a resolution was adopted at that meeting under which the Company agreed to purchase the weaving factory from the appellant at a price fixed in part payment of his total indebtedness to the Company, and that resolution was subsequently confirmed at a general extraordinary meeting of the Company.

Held that, whatever might have taken place at the shareholders' meeting, the resolution was not an adjustment of the suit which put an end to all further proceeding within the meaning of O. 23, R. 3 of C. P. CODE OF 1908. (*Mr. Ameer Ali.*) SETH KEVALDAS TRIBHOVANDAS v. SAKERLAL BULAKHIDAS. (1923) P.C. 178 =

33 M.L.T. 424 (P.C.) = 28 C.W.N. 930 = 79 I.C. 452 = 45 M.L.J. 763.

—Compromise—Construction—Terms if capable of specific performance against parties—Hindu Law—Joint family—Father—Adopted son—Compromise binding on—Authority to enter into—Proof of.

In a suit brought to enforce a mortgage the alleged adopted son of the mortgagor applied to be added as a party in order that he might raise the question of the validity of the mortgage as against his interest in the joint family property. His application was rejected, and he thereupon instituted a separate suit for the purpose, *inter alia*, against his adoptive father and the mortgagee. That suit resulted in a compromise between the mortgagee and the mortgagor, the adoptive father in his own behalf and on behalf of his adopted son. An application to record the compromise under O. 23, R. 3, C.P. Code, was opposed by the mortgagee on the grounds (1) that the adoptive father had no authority to enter into the compromise on behalf of his adopted son, and (2) that the terms of the compromise were not of a character of which specific performance could be granted.

C. P. CODE (ACT V OF 1908), O. 23, R. 3—(Contd.)

Held, over-ruling both objections, (1) that the father had authority to bind the adopted son to the compromise in respect of his interest in the property, and (2) that the terms agreed to were such as to be susceptible in every detail to an effective order in the nature of specific performance against any party to the compromise who sought to escape from his obligations thereunder. (*Lord Blanesburgh.*) SAIYID MEHDI ALI KHAN v. CHAUDHRI GHANSHIAM SINGH. (1927) 27 L. W. 540 = 29 Bom. L. R. 1376 =

4 O.W.N. 837 = 104 I.C. 375 = 39 M.L.T. 300 = 32 C.W.N. 93 = 46 C.L.J. 209 = A.I.R. 1927 P.C. 204 = 53 M.L.J. 345.

—Compromise of suit—Court having judicial notice of—Duty of—Hearing of suit—Jurisdiction.

Where a Court has judicial notice of a compromise between the parties to a suit pending before it, an essential term of the compromise being that satisfaction should be entered in the suit before it, it has no power to proceed further with the hearing of the suit, and should treat it as satisfied. (*Sir John Edge.*) SOURINDRA NATH MITRA v. HERAMBA NATH BANDOPADHAYA. (1923) P.C. 98 =

L.R. 4 P.C. 133 = (1923) M. W. N. 734 = 33 M. L. T. 294 (P.C.) = 84 I. C. 721 = 45 M.L.J. 453 (458-9, 460).

—Compromise of suit covering matters outside suit—Decree recording—Form of.

A perfectly proper and effectual method of carrying out the terms of S. 375 of C. P. C. of 1882 would be for the decree to recite the whole of the agreement and then to conclude with an order relative to that part that was the subject of the suit, or it could introduce the agreement in a Schedule to the decree, but, in either case, although the operative part of the decree would be properly confined to the actual subject-matter of the then existing litigation, the decree taken as a whole would include the agreement. Where the decree does not, it may be that as a decree it is incapable of being executed outside the lands of the suit, but that does not prevent it being received in evidence of its contents. (*Lord Buckmaster.*) HEMANTA KUMARI DEBI v. MIDNAPUR ZEMINDARI CO.

(1919) 46 I. A. 240 = 47 C. 485 (495-6) = 27 M. L. T. 42 = 17 A. L. J. 1117 = (1920) M.W.N. 66 = 24 C. W. N. 177 = 31 C. L. J. 298 = 11 L. W. 301 = 53 I. C. 534 = 37 M. L. J. 525.

—Defendant—Assignment by, of all right and interest in subject-matter of suit—Compromise between plaintiff and assignee-defendant—Assignor-defendant's right to impeach—Assignor continuing on record after assignment.

Plaintiff and the original defendant (1st defendant) were rival claimants to the office of head of a mutt with two branches, one situated in the Bombay Presidency, and the other in the native state of Kolhapur. The plaintiff sued the original defendant for a declaration that the plaintiff was the owner of the property movable and immovable of the mutt and of the powers and rights of that mutt as the duly appointed head. Pending the suit the original defendant assigned all his interest in the office and properties to one K, and, in answer to interrogatories administered to him by the plaintiff, he stated that he had done so and that he did not legally exist so far as the suit was concerned. Further, the original defendant himself applied to the court on that ground to have his name removed from the suit and to have K substituted as the defendant. The plaintiff, however, insisted upon K's name being added as defendant, and K was accordingly added as D 2. Subsequently, K entered into a compromise with the plaintiff by which K in effect admitted the plaintiff's claim to the office and its endowments, and a decree was passed on foot thereof.

C. P. CODE (ACT V OF 1908), O. 23, R. 3—(Contd.)

Held, that the 1st defendant had no right to impugn the compromise decree either by way of a petition for review thereof or by way of an appeal from it.

The 1st defendant had prior to the compromise admittedly transferred all his rights in the office to the second defendant in whom they were still vested at the date of the compromise decree. The mere fact that the 1st defendant continued on the record did not entitle him to intervene in the contest between the plaintiff and the second defendant, or to object to the admission by the second defendant of the plaintiff's claim to the office and its endowments either absolutely or on terms. If the rights of the public, the institution, or its dependents, including the 1st defendant, are injuriously affected by the compromise, relief may be sought by appropriate proceedings, but the 1st defendant has no right of appeal in this suit (117). (*Sir John Wallis.*)

SHANKAR v. NARSINHA. (1927) 54 I. A. 111 =

51 B. 442 = 4 O. W. N. 428 = 101 I. C. 20 =

31 C. W. N. 649 = 25 L. W. 791 = 29 Bom. L. R. 839 =

45 C. L. J. 420 = A. I. R. 1927 P. C. 57 = 52 M. L. J. 466.

—O. 25, R. 1—*Security for costs—Plaintiff suing for another—Security in case of.*

It is ordinary practice, if the plaintiff is suing for another, to require security for costs, and to stay the proceedings until it is given (48). (*Sir Montague E. Smith.*) RAM COOMAR COONDOO v. CHUNDER CANTO MOOKERJEE.

(1876) 4 I. A. 23 = 2 C. 233 (259) = 3 Sar. 654 = 3 Suth. 361.

—O. 26, Rr. 1-8. See COMMISSION—EVIDENCE AND COMMISSIONER.

—O. 26, Rr. 9 and 10. See LOCAL INVESTIGATION.

—O. 26, Rr. 11 and 12. See ACCOUNTS—COMMISSIONER FOR TAKING AND ALSO COMMISSIONER—PARTNERSHIP.

—O. 29, R. 1—*Corporation—Plaint by—Subscription and verification of—Sufficiency of—Test—O. 6, Rr. 14, 15—Provisions of—Inapplicability of.*

S. 51 of C. P. Code of 1882, which regulates proceedings taken by or on behalf of ordinary plaintiffs, does not apply to proceedings taken by or on behalf of a corporation within S. 435 of that Code. The question whether, in the case of a suit brought by or on behalf of a corporation, the person, who had signed and verified the plaint, was a person duly authorised to do those acts, or either of them, must be decided with reference only to S. 435, which expressly applies to corporations, and the sole question in such a case is whether the person, who signed and verified the plaint, was at the time one of the persons described in S. 435 by the words "other principal officer of the corporation" (142). (*Hon. George Denman.*) DELHI AND LONDON BANK v. OLDHAM.

(1893) 20 I. A. 139 = 21 C. 60 = 6 Sar. 331 = R. & J.'s No. 130 (Oudh).

—*Corporation—Plaint by—Subscription and verification of, by acting manager—Sufficiency of.*

The plaint in a suit filed by a Bank, which was a corporation within S. 435 of C. P. C. of 1882, was signed and verified by "A. Lawson, Acting Manager, Delhi and London Bank, Limited, Lucknow."

The plaintiff Bank had its head office in London, with branch offices at several places in India, including Lucknow. At Lucknow one Langdon was the Manager of the Bank, and he was authorised by power-of-attorney to sue for debts due to the Bank, and to substitute any person for himself. He executed a power-of-attorney as Manager appointing Lawson to be attorney of the Bank at Lucknow; but that power did not expressly authorise Lawson to sue for debts due to the Bank. At the time of his signing and verifying the plaint aforesaid Lawson's position was this:

C. P. CODE (ACT V OF 1908), O. 29, R. 1—(Contd.)

He was acting under the power-of-attorney given by Langdon, and was Accountant to the Company in Lucknow; Langdon, the Manager, was away in Cashmere; B, the leading officer of the Bank in Lucknow, was ill with small-pox; Lawson, having the large powers expressly conferred upon him by the power-of-attorney of November, 1887, was apparently in sole authority; at all events, he was conducting the chief banking business of the branch in Lucknow, and was the person of all others best able to depose to the facts of the case.

Held, reversing the courts below, that Lawson was at the time of the action being brought as he described himself—Acting Manager of the Bank of Lucknow, and that as such he was a "principal officer of the corporation" entitled to subscribe and verify the plaint within the meaning of S. 435 of C. P. C. of 1882, and that the suit was properly instituted (143). (*Hon. George Denman.*) DELHI AND LONDON BANK v. OLDHAM. (1893) 20 I. A. 139 =

21 C. 60 = 6 Sar. 331 = R. & J.'s No. 130 (Oudh).

—O. 32, R. 1—*Idol—Next friend for—Appointment of—Necessity—Litigation between shebaitis affecting interests of idol. See HINDU LAW—RELIGIOUS ENDOWMENT—IDOL—NEXT FRIEND FOR.* (1925) 52 I. A. 245 (261) = 52 C. 809.

—O. 32, R. 2—*Suit without next friend—Dismissal on ground of—Propriety.*

The plaintiff instituted a suit against the present defendants in 1873, but that suit was by a lamentable miscarriage of justice dismissed on the ground that he declared himself to be seventeen years old, and ought until he was eighteen to have sued by his guardian (207). (*Sir Robert P. Collier.*) RAMASWAMI AIYAN v. VENKATARAMAIYAN.

(1879) 6 I. A. 196 = 2 M. 91 (100) = 5 C. L. R. 347 = 4 Sar. 42 = 3 Suth. 663.

—O. 32, R. 3 (3)—*Affidavit in support of petition—Absence of—Validity of appointment—Effect on—Order of appointment on record.*

Where it appeared that, in a suit brought against minors, the court appointed a certain person their guardian *ad litem* and the order of appointment was on the record, *held*, that the absence of an affidavit such as was required by S. 456 of C. P. C. of 1882 at the time the application for the appointment of a guardian was made was not sufficient to justify the conclusion that the minors were not properly represented at the time.

It must be presumed, in the absence of evidence to the contrary, that everything was regularly and properly done. (*Lord Macnaghten.*) MUNNU LAL v. GHULAM ABBAS.

(1910) 37 I. A. 77 = 33 A. 287 = 8 M. L. T. 57 = 11 C. L. J. 557 = 14 C. W. N. 794 = 12 Bom. L. R. 439 = 13 O. C. 123 = 6 I. C. 788 = 20 M. L. J. 591.

—O. 32, Rr. 3 and 4—*Provisions of—Strict compliance with—Necessity.*

Their Lordships desire to impress upon all the courts in India the importance of following strictly the rules as to the appointment of a proper guardian *ad litem* laid down in S. 443 of C. P. C. of 1882 (188). (*Sir Arthur Wilson.*) MUSSAMMAT BIBI WALIAN v. BANKE BEHARI PERSHAD SINGH. (1903) 30 I. A. 182 = 30 C. 1021 (1030-1) =

7 C. W. N. 774 = 5 Bom. L. R. 822 = 8 Sar. 512.

—O. 32, R. 4—*Guardian ad litem—Adverse interest to minor—Person having—Appointment of.*

A person whose interest is adverse to that of the minor cannot be appointed guardian *ad litem* of the minor under S. 457 of C. P. C. of 1882. (*Sir Andrew Scoble.*) MUSSAMMAT RASHID-UN-NISSA v. MUHAMMAD ISMAIL KHAN.

(1909) 36 I. A. 168 (175) = 31 A. 572 (582) = 6 M. L. T. 279 = 10 C. L. J. 318 = 13 C. W. N. 1182 = 11 Bom. L. R. 1225 = 3 I. C. 864 = 19 M. L. J. 631.

C. P. CODE (ACT V OF 1908), O. 32, R. 4—(Contd.)

—*Guardian ad litem—Alienation by a person—Suit impugning—Appointment of that very person as guardian ad litem in.*

In a suit raising the question of the validity of an alienation by a mother of her minor children's interest in property, her interest in the suit is clearly adverse to them. *Quære* as to the propriety of appointing her in the suit as guardian *ad litem* for the minor children in a case in which she admittedly was never appointed under the Guardian and Wards Act a guardian of their property (78-9). (*Mr. Amcer Ali.*) **IMAMBANDI v. MUTSADDI.**

(1918) 45 I. A. 73 = 45 C. 878 (886) =

20 Bom. L. R. 1022 = 22 C. W. N. 50 =

28 C. L. J. 409 = 5 Pat. L. W. 276 = 16 A. L. J. 800 =

24 M. L. T. 330 = (1919) M. W. N. 91 =

47 I. C. 513 = 35 M. L. J. 422.

—*Guardian ad litem—Hindu Law—Adoption—Invalidity of—Declaration of—Adoptive mother's suit for, on ground of natural father's refusal to give boy in adoption—Appointment of natural father as guardian ad litem of boy in.*

A Hindu widow sued the defendant for himself and as guardian of his minor son to set aside two deeds relating to the adoption of the said minor. One of the deeds was a deed by which the defendant agreed to give the said minor to the plaintiff for adoption in the Dattaka form; and the other was a deed by which she agreed to take the said child into adoption. The plaintiff's case was that, notwithstanding the deeds, the defendant refused to give the child, and that therefore the form of adoption had not been complied with.

Held that, if the minor son had been made a co-defendant in such a suit, the father of the minor would not have been a proper guardian *ad litem* for him (163).

If the minor was adopted, the natural father was not his guardian. If the natural father really refused to give the minor in adoption, because he did not desire to have him adopted, he was not the proper person to protect the minor's interest, or likely to make the best case on his behalf in a suit to declare the adoption invalid (163-4). (*Sir Barnes Peacock.*) **SREE NARAIN MITTER v. SREEMUTTY KISHEN SOONDORY DOSSEE.**

(1873) Sup. I. A. 149 =

11 B. L. R. 171 = 19 W. R. 133 = 3 Sar. 203 =

2 Suth. 774.

—*Guardian ad litem—Hindu Law—Adoption—Invalidity of—Declaration of—Natural father's suit for—Appointment of adoptive mother as guardian ad litem of boy in.*

In a suit by the natural father of a minor against a Hindu widow for a declaration that the minor had been validly adopted by the widow, the natural father has no authority to constitute the widow the guardian of the minor (163). (*Sir Barnes Peacock.*) **SREE NARAIN MITTER v. SREEMUTTY KISHEN SOONDORY DOSSEE.**

(1873) Sup. I. A. 149 = 11 B. L. R. 171 =

19 W. R. 133 = 3 Sar. 203 = 2 Suth. 774.

—*Guardian ad litem—Order appointing—Omission to draw up—Irregularity—Reversal of decree on ground of—Conditions.*

A defect in following the rules relating to the appointment of a proper guardian *ad litem* is not necessarily fatal to the proceedings (188).

Where the only defects that could be pointed out were that no formal order appointing the mother of the minors to be their guardian *ad litem* was drawn up, and that no attempt was made to serve the summons in the suit upon the infants personally, or upon their mother, a purdah-nashin lady, before serving it upon the only adult male member and the karta of the family, but there was nothing to show that the interests of the minors were not

C. P. CODE (ACT V OF 1908), O. 32, R. 4—(Contd.)

duly protected, and that the alleged irregularities caused any prejudice to the infants, *held*, that the defects of procedure alleged were at most irregularities which, under S. 578 of C. P. Code of 1882, would not furnish ground for reversing the decree in the suit on appeal therefrom (189). (*Sir Arthur Wilson.*) **MUSSAMMAT BIBI WALIAN v. BANKE BEHARI PERSHAD.**

(1903) 30 I.A. 182 =

30 C. 1021 (1031-2) = 7 C.W.N. 774 =

5 Bom. L.R. 822 = 8 Sar. 512.

—*Next friend—Person having personal interest in institution of suit, and in mode of conducting it—Appointment of.*

It is of the utmost importance that no person should be appointed to institute suits on behalf of infants, of whom even a suspicion can exist, that he may be biassed by any personal interest, either in the institution of the suit or in the mode of conducting it (345).

By a general order made on the Equity Side of the Supreme Court, the Registrar of the Court was directed to institute proceedings, with the previous consent of the Court, in all cases where the property of infants should appear to be unprotected. It appeared that by the practice of the Supreme Court the Registrar, by reason of his office, would both receive fees upon the different proceedings in the suits instituted by him, and a commission upon the monies paid into Court.

Held, that the general order was void as being against public policy.

It is plain that the Registrar has a strong personal interest both in the institution of suits by him as next friend, and in the mode of conducting them, and especially in one of the most delicate points upon which a next friend can be required to exercise a discretion, *viz.*, the propriety or impropriety of requiring the payment of money, or transfer of funds into Court (346). (*Mr. Pemberton Leigh.*) **KERA-KOOSE v. SERLE.**

(1844) 3 M.I.A. 329 =

4 Moo. P.C. 459 = 1 Sar. 286.

—**O. 32, R. 7—Compromise affecting minor—Decree on foot of—Setting aside of—Rights of parties on—Appellate decree—Setting aside of.**

A suit for the recovery of a certain amount brought against *F* and as the guardian of his minor daughter, *M*, was decreed against *F*, and dismissed against *M*. The plaintiff did not appeal from that decree; but *F* did. The appeal was compromised by *F* and the plaintiff on the terms that the estate of the minor, *M*, was to be liable for the suit amount, that the plaintiff was in the first instance to proceed against the same, and that he was to proceed against *F* personally only for the unrealised balance. A decree was passed amending the decree below in accordance with the terms of the said compromise. On an application for review of that decision presented by the minor, after attaining her majority, that decision was, however, set aside.

Held, that the result was to leave the plaintiff exactly where he was after the judgment of the trial Court, a judgment from which he did not appeal, and to which he must again be remitted (43). **UNNODA DABEE v. MARIA LOUISA STEVENSON.**

(1874) 3 Suth. 41 =

22 W. R. 290.

—*Compromise affecting minor—Decree on foot of—Setting aside of—Rights of parties on—Suit—Compromise of.*

Where in a suit on behalf of a minor to set aside compromise decrees passed against him without the leave of the Court, the courts below passed a decree setting aside the decrees in question in their entirety and declared that the result would be that the suits in which such decrees were passed should be decided afresh, *held*, modifying the

C. P. CODE (ACT V OF 1908), O. 32, R. 7—(Contd.)

decree of the courts below, that it was sufficient to declare that the compromises and decrees were not binding on the minor and that he was remitted to his original rights. (*Lord Macnaghten.*) MANOHAR LAL *v.* JADU NATH SINGH.

(1906) 33 I.A. 128 (131-2) =
28 A. 585 (589) = 4 C.L.J. 8 = 8 Bom. L.R. 489 =
10 C.W.N. 898 = 3 A.L.J. 710 = 1 M.L.T. 210 =
9 O.C. 219 = 16 M.L.J. 291.

—Compromise affecting minor—Decree on foot of—Validity against minor of—Minor not represented before Court—Leave of Court not obtained.

F purchased an estate on behalf of his minor daughter M, paid a part of the price, and gave a mortgage-bond for the balance. The vendor brought a suit upon that mortgage-bond against F personally and as the guardian of his daughter, M. The prayer in the plaint was that the defendants might be ordered to pay the amount of the claim; there was nothing in the prayer which sought to affect the estate. The Principal Sudder Ameen held that the minor daughter, M, was in no way responsible for the suit claim, and that F alone was responsible for it, and decreed the suit against F only. The vendor was contented with that decree, and did not appeal from it; but F did upon the ground that he ought not to have been made solely responsible for the suit amount, and that his daughter ought to have been joined in the decree. F proposed to the vendor a compromise of the appeal, which the vendor acquiesced in. The compromise was to the effect that, as the suit debt was obviously contracted by F for the purchase of a putnee exclusively intended for the use and benefit of his minor daughter, and for the security of which debt the half share of the putnee was specially pledged, the decree should be allowed to declare the liability of the property so pledged in the first instance, and the decree-holder should be permitted to proceed against F only for such balance of the decree as might not be satisfied by the sale of the property pledged. The Sudder Court amended the decree below on the lines of the said compromise, and passed a decree in the terms thereof. M, the daughter, on her attaining majority, applied to the High Court, which had succeeded the Sudder Court, for a review of that decision, and the High Court reversed the former order of the Sudder Court, on the ground that the appeal to the Sudder Court was not made by the vendor, but by F himself, and that he had obtained an alteration of the decree in his own favour to the prejudice of his daughter.

Held, that the High Court were right in reversing the former order of the Sudder Court.

The vice of the arrangement of compromise is that it was made without the party who is principally affected by it being sufficiently represented. The appeal to the Sudder Court was really an appeal by F against his co-defendant, his own daughter; and she not being in any way represented before the Court but by himself, he comes to this compromise, and gets the assent of the plaintiff to it. It is plain that the Court exercised no controlling power over it; that they did not consider that they were looking after the interests of the infant, but they base their decree simply upon this compromise (43). UNNODA DABEE *v.* MARIA LOUISA STEVENSON.

(1874) 3 Suth. 41 = 22 W. R. 290.

—Compromise prejudicially affecting minor not properly represented—Decree on foot of—Setting aside of—Review application by minor on attaining majority, i.e., ten years after—Jurisdiction on.

In this case the Sudder Court had passed a decree based upon a compromise prejudicially affecting the estate of a minor. Ten years after, the minor, on attaining age, applied to the High Court (which had succeeded the Sudder Court) for a review of that decision on the ground that she

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(the minor) was not properly represented before the Court, and that the decree had been passed without looking after her interest. The High Court, agreeing with the contention of the minor, reversed the former decree of the Sudder Court (43). UNNODA DABEE *v.* MARIA LOUISA STEVENSON. (1874) 3 Suth. 41 = 22 W. R. 290.

—Compromise affecting minor—Setting aside of—Rights of parties on—Appeal and cross-appeal—Compromise pending—Setting aside of—Revival of appeal and of cross-appeal on. See COMPROMISE—SETTING ASIDE OF—RIGHTS OF PARTIES ON.

(1876) 3 I.A. 291 (297) = 2 C. 184 (196).

—Compromise affecting minor—Setting aside of—Rights of parties on—Decree in minor's favour—Appeal by opposite party against—Compromise pending.

In a suit for partition to which the plaintiff (then a minor) and his father were parties a decree was made making the defendant liable to the plaintiff's branch for a certain sum. Pending an appeal against that decree by the defendant, plaintiff's father acting for himself and for the plaintiff entered into an agreement with the defendant whereby on the latter consenting to withdraw his appeal the plaintiff's father relinquished his claim to the amount. In pursuance of that agreement the plaintiff's father entered up satisfaction.

In a suit brought by the plaintiff on attaining his majority, it was found that the agreement entered into by the father and the satisfaction entered up by him as aforesaid were not binding on the plaintiff.

Held, that the result was that the plaintiff was remitted to his original rights under the original decree the subject of the compromise (138-9). (*Mr. Ameer Ali.*) GANESH ROW *v.* TULJARAM ROW. (1913) 40 I. A. 132 = 36 M. 295 (304) = 17 C.W.N. 765 = 11 A.L.J. 589 = 18 C.L.J. 1 = 15 Bom. L.R. 626 = 14 M.L.T. 1 = (1913) M.W.N. 575 = 10 I.C. 515 = 25 M. L. J. 150.

—Leave of Court under—Application for—Formalities to be adopted on.

When a compromise of a suit is made, it ought to be carried out by proper deeds and filed in Court, particularly where infants are concerned, so as to have the assent of the Court at the time instead of its being totally concealed from it. MOULVIE ABDOL ALI *v.* MOZUFFER HOSSEIN.

(1871) 16 W. R. 22 (26) (P.C.) = 2 Suth. 462.

—Leave of court under—Necessity—Bengal Court of Wards Act (IX of 1879)—Guardian appointed by Court of Wards under—Minor represented by—Compromise affecting.

A guardian appointed under the Bengal Court of Wards Act (IX of 1879) on behalf of minors has power to compromise proceedings in the civil court, to which those infants are defendants, without obtaining the leave of the court for entering into such a compromise under S. 462 of C.P.C. of 1882.

The Court of Wards Act of Bengal is admittedly a local law within the meaning of S. 464 of C.P.C. of 1882, and by the provisions of that law before the passing of the Codes of 1888 and 1890, the guardian so appointed was the only person who could assent to the agreement for the compromise of the litigation, and that agreement, when assented to, was necessarily recorded under S. 375 of C.P.C. of 1882, and there is nothing in the later provisions to take away this power. (*Lord Buckmaster.*) NAKIMO DEWANI *v.* PEMBA DICHEN. (1920) 48 I. A. 27 = 48 C. 469 =

(1921) M. W. N. 115 = 29 M. L. T. 202 =
19 A. L. J. 171 = 33 C. L. J. 211 = 14 L. W. 253 =
23 Bom. L. R. 698 = 25 C.W.N. 797 = 59 I. C. 911 =
40 M. L. J. 201.

C. P. CODE (ACT V OF 1908), O. 32, R. 7—(Contd.)

—Leave of court under—Necessity—Hindu Law—Joint family—Father—Compromise by, affecting minor son party to suit—Father himself guardian *ad litem* of minor—Different guardian *ad litem*—Cases of—Distinction. See HINDU LAW—JOINT-FAMILY—FATHER—COMPROMISE BY—MINOR MEMBERS PARTIES TO SUIT.

(1913) 40 I. A. 132 (138-9) = 36 M. 295 (302-3).

—Leave of court under—Omission to obtain—Invalidity of compromise on ground of—Plea in defence of. See UNDER THIS RULE—LEAVE OF COURT UNDER—OMISSION TO OBTAIN—VALIDITY OF COMPROMISE—EFFECT ON—INVALIDITY OF COMPROMISE, ETC.

(1916) 43 I. A. 99 (103) = 39 M. 409 (413).

—Leave of court under—Omission to obtain—Invalidity of compromise, and of decree on foot thereof, on ground of—Declaration of—Suit for—Minor's right of.

The appellants when minors had been defendants in a pre-emption suit in which the respondent (their guardian *de facto*) was plaintiff, and a second pre-emption suit as to the same property had been instituted in their names by the respondent, he and others being defendants. No guardian *ad litem* was appointed. Under a compromise agreement, to which the sanction of the court had not been obtained, a decree was made in the first suit in favour of the respondent and the appellants' suit was dismissed. The appellants brought the present suit for a declaration that the compromise and decree was not binding upon them. When the suit was commenced the time had elapsed within which they could, under the Limitation Act (1877), s. 7 and Sched. II, Art. 10, have commenced pre-emption proceedings:—

Held, that the appellants (plaintiffs) were entitled to a decree setting aside the decree dismissing the suit instituted on their behalf, and declaring that the agreement of compromise and the decree in the suit of the respondent as against them were not binding upon them or either of them and that they were entitled to such rights as they had before their own suit was dismissed (p. 192). (*Sir John Edge*). PARTAB SINGH v. BHABUTI SINGH.

(1913) 40 I. A. 182 = 35 A. 487 (498-9) =

21 I. C. 288 = 11 A.L.J. 901 = 17 C.W.N. 1165 =

(1913) M.W.N. 785 = 14 M.L.T. 299 = 18 C.L.J. 384 =

15 Bom. L.R. 1001 = 25 M. L. J. 492.

—Leave of court under—Omission to obtain—Validity of compromise—Effect on—Compromise beneficial to minor.

The provision in S. 462 of C. P. C. of 1882, making it necessary to obtain the leave of the court is of great importance to protect the interest of a minor, and a compromise entered into by a guardian *ad litem* without the leave of the court being obtained therefor is within the mischief of the section and invalid, however beneficial it may be to the minor. (*Lord Parmoor*). SUBRAMANIAM CHETTIAR v. RAJAH OF RAMNAD.

(1915) 39 M. 115 (127) =

3 L.W. 149 = 20 C. W.N. 201 = 19 M. L. T. 150 =

14 A.L.J. 153 = (1916) M.W.N. 100 = 23 C.L.J. 337 =

18 Bom. L. R. 360 = 32 I.C. 258 = 29 M.L.J. 856.

—Leave of Court under—Omission to obtain—Validity of compromise—Effect on—Hindu law—Joint family—Father—Compromise by, affecting minor son party to suit.

In a suit for partition to which the plaintiff, his father and the defendant (members of a Hindu joint family) were parties, a decree was made making the defendant liable for Rs. 86,000 to plaintiff's father (as representing plaintiff's branch, though not expressly so stated). Pending appeal against the said decree by the defendant, plaintiff's father acting for himself and for his minor son (the plaintiff) entered into an agreement with the defendant whereby on the latter consenting to withdraw his appeal he relinquished his claim to the amount. The plaintiff's father was himself the guardian *ad litem* of the plaintiff in the suit. Neverthe-

C. P. CODE (ACT V OF 1908), O. 32, R. 7—(Contd.)

less leave of the Court had not been taken for the said agreement.

Held, that the satisfaction entered up by the father in pursuance of the said agreement was not binding on the plaintiff.

Even if he had not expressly purported to act for the minor and had acted in his capacity as father, as he himself was the guardian for the suit he could not bind the minor by any compromise of his without obtaining the leave of the Court. (*Mr. Amcer Ali*). GANESH ROW v. TULJARAM ROW. (1913) 40 I. A. 132 (138-9) = 36 M. 295 (303-4) =

17 C.W.N. 765 = 11 A.L.J. 589 = 18 C.L.J. 1 =

15 Bom. L.R. 626 = 14 M.L.T. 1 =

(1913) M.W.N. 575 = 19 I.C. 515 = 25 M.L.J. 150.

—Leave of Court under—Omission to obtain—Validity of compromise—Effect on—Invalidity of compromise on ground of such omission—Plea in defence of.

A suit was compromised on the terms that the plaintiff should receive a certain sum from the two defendants in full satisfaction of his claim. At the time of the compromise the plaintiff and one of the defendants were minors, and the other defendant was a pardanashin lady. In order to secure the above sum, the defendants, the minor defendant being represented by his grandmother and guardian, entered into a bond by which they jointly agreed to pay the said sum to the plaintiff.

An application was made to the court on behalf of the plaintiff setting out the terms of the compromise and praying that the suit might be dismissed. On this application the minors were represented, and the Court caused inquiries to be made as to whether the pardanashin defendant had entered into it of her free will and considered that it was in her interest. On being satisfied on these questions the court ordered the suit to be struck out. No leave was, however, applied for or granted sanctioning the compromise on behalf of the minors as required by S. 462 of C.P.C. of 1882.

In a suit upon the bond, the minor defendant pleaded that the leave of the court not having been obtained to the compromise on his behalf it was unenforceable against him under S. 462 of C.P.C. of 1882 as also the suit bond.

Held, that the requirements of S. 462 not having been observed in protection of the minor defendant, the High Court had rightly held him not liable to the plaintiff under the bond (103). (*Sir Lawrence Jenkins*). JAMNA BAI v. VASANTA RAO.

(1916) 43 I. A. 99 = 39 M. 409 (413) = 34 I.C. 213 =

14 A.L.J. 534 = 18 Bom. L.R. 432 =

3 L.W. 540 = 24 C.L.J. 74 = 20 M.L.T. 31 =

(1916) 1 M.W.N. 452 = 31 M.L.J. 18.

—Leave of court under—Proof of—Terms of compromise being before court—Description of minor in cause title of suit as minor—Sufficiency of.

Held, that the provision in S. 462 of C.P.C. of 1882 requiring the leave of the court for a compromise on behalf of a minor party to a suit is not complied with by the mere fact that the minor was described in the title of the suit as a minor suing "under the guardianship of his mother" and that the compromise was before the court. There ought to be evidence that the attention of the court was directly called to the fact that the minor was a party to the compromise, and it ought to be shown, by an order on petition, or in some way not open to doubt, that the leave of the court was obtained. (*Lord Macnaghten*). MANOHAR LAL v. JADU NATH SINGH.

(1906) 33 I. A. 128 (131) = 28 A. 585 (588-9) =

4 C.L.J. 8 = 8 Bom. L. R. 489 = 10 C.W.N. 898 =

3 A.L.J. 710 = 1 M.L.T. 210 = 9 O. C. 219 =

16 M.L.J. 291.

C. P. CODE (ACT V OF 1908), O. 32, R. 7—(Contd.)

—In cases to which S. 462 of the Code of Civil Procedure, 1882, applies there ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise, and it ought to be shown, by an order on petition, or in some way not open to doubt, that the leave of the Court was obtained, and it is not sufficient proof that the exigencies of S. 462 were complied with to show that the minor was described in the title of the suit as a minor, and that the terms of the compromise were before the Court (190). (*Sir John Edge.*) PARTAB SINGH v. BHABUTI SINGH.

(1913) 40 I.A. 182 = 35 A. 487 (496) =
21 I. C. 288 = 11 A.L.J. 901 = 17 C.W.N. 1165 =
(1913) M.W.N. 785 = 14 M.L.T. 299 =
18 C.L.J. 384 = 15 Bom. L.R. 1001 = 25 M.L.J. 492.

—Leave of Court under—Proof of—Terms of compromise being before Court—Sufficiency of.

It is not sufficient that the terms of the compromise are before the Court. There ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise, and it ought to be shown by an order on petition, or in some way not open to doubt, that the leave of the Court was obtained. (*Lord Parmoor.*) SUBRAMANIAN CHETTIAR v. RAJAH OF RAMNAD.

(1915) 39 M. 115 (127) = 3 L.W. 149 =
20 C. W. N. 201 = 19 M.L.T. 150 = 14 A.L.J. 153 =
(1916) M.W.N. 100 = 23 C.L.J. 337 =
18 Bom. L.R. 360 = 32 I.C. 258 = 29 M.L.J. 856.

—Leave of Court under—Validity of compromise in case of—Adult members of minor's family joining in compromise—Minor having no separate interest.

The question was whether a compromise of a former litigation instituted for the very same purpose as the suit out of which the appeal arose was binding upon the appellant, the plaintiff.

The suit in which the compromise in question was made had progressed up to a certain stage; it had been opened on behalf of the plaintiff; witnesses had been examined. The appellant, who was then an infant and who was made a party to the suit for the purpose of binding his interest, had no separate interest; the adult members of the family of the appellant, who were presumably competent to judge of their own interests, had taken part in that compromise and assented to it. The compromise was brought to the attention of the Court in which the suit was pending, approved by the Court, and stated solemnly in an order made by the Court to be for the benefit of the appellant.

Held, affirming the Court below, that there was no ground for setting aside the compromise. (*Lord Macnaghten.*) RAMESWAR PERSHAD SINGH v. RAM BAHADUR SINGH.

(1906) 34 C. 70 = 11 C.W.N. 178 =
5 C.L.J. 175 = 2 M.L.T. 165 = 17 M.L.J. 59.

—Leave of Court under—Validity of compromise in case of—Guardian ad litem with adverse interest—Representation of minor in compromise by—Effect.

Quære, whether, in a case in which the terms of a compromise were approved by the next friend of the minor plaintiff and the guardian ad litem of the minor 4th defendant, who were in the same interests as the 5th and 6th defendants, and were further carefully considered and approved by the Court, the compromise would be held to be invalid, as regards the 5th and 6th defendants, on the ground that the person who was appointed their guardian ad litem and who represented them in the compromise, was one whose interest was adverse to theirs. (*Sir John Wallis.*) MUSST. VAISHNO DITTI v. MUSST. RAMESHRI.

(1928) 55 I.A. 407 = 29 Punj. L.R. 654 =
28 L. W. 908 = A. I. R. 1928 P.C. 294 =
55 M. L. J. 746.

C. P. CODE (ACT V OF 1908), O. 32, R. 7—(Contd.)

—O. 32, R. 15—Sanyasi—Person renouncing world and becoming a, and entirely neglecting worldly affairs—Suit on behalf of, by next friend—Maintainability.

The fact that a person had renounced the world and become a sanyasi, devoting himself wholly to spiritual things and entirely neglecting his worldly affairs, would not of itself, however unusual such conduct might be in a man of his position, justify the Court in holding that by reason of unsoundness of mind or mental infirmity he was incapable of protecting his interests, when suing or being sued so as to entitle another to sue as his next friend. (*Sir John Wallis.*) MAHANT RAI v. MT. LACHHMINA.

(1927) 26 L.W. 94 = (1927) M. W. N. 456 =
31 C.W. N. 1087 = 39 M.L.T. 155 =
101 I.C. 363 (2) = (1927) A.I.R. 1927 P.C. 123 (126).

—O. 33—Leave to sue in forma pauperis—Application for—Court fee paid subsequently on—Presentation of plaint in case of—Date of—Fraud in original application—Presence and absence of—Distinction.

A person, being at the time a pauper, presented a petition, under C.P. Code of 1859, for leave to sue as a pauper. There was delay in the proceedings relating to the inquiry into his pauperism, and, pending that inquiry, petitioner presented a petition praying for leave to deposit the amount of the stamps, alleging that he had succeeded in raising a loan of the amount required. On the same day, petitioner, with the permission of the Court, paid the proper stamps into Court, and the petition was thereupon allowed to be numbered and registered as a suit.

Held, that the petition should be considered as a plaint from the date when the pauper petition was filed, and not merely from that on which the proper Court-fee payable on the plaint was paid (134-6).

The intention of C.P. Code of 1859 evidently was that, unless the petition was rejected, as it contained all the materials of the plaint, it should operate as a plaint without the necessity of filing a new one. The case is analogous to that in which a wrong stamp is put upon the plaint originally, and the proper stamp is subsequently affixed (134-5).

Seemle the decision would have been different if there had been a fraud on the part of the plaintiff in filing the petition to be allowed to sue as a pauper (136). (*Sir Montague E. Smith.*) SKINNER v. ORDE.

(1879) 6 I.A. 126 = 2 A. 241 (250-1) =
4 C.L.R. 331 = 4 Sar. 31 = 3 Suth. 627.

—Leave to sue in forma pauperis—Application for—Nature of—Plaint in suit—Application if and when becomes—Rejection of application—Effect.

The portion of the Act (C.P.C. of 1859) which relates to pauper suits requires that the application for leave to sue in forma pauperis when made shall be made by petition, containing the particulars required in regard to plaintiffs, the object being that if the application be ultimately successful, the petition is to be deemed the plaint in the suit. But the application to the Court is really only for permission to sue in forma pauperis. If the application is successful, the petition will be turned into and will become a plaint. If, however, it is unsuccessful and is rejected, it falls to the ground, and never becomes a plaint (238-9). (*Sir Montague E. Smith.*) RANEE KHAJOORONISSA v. RANEE RYE-SOONISSA.

(1875) 2 I.A. 235 = 15 B.L.R. 306 =
24 W.R. 163 = 3 Sar. 526 = 3 Suth. 182.

—Pauper suit—Institution of—Date of—Order directing petition and plaint to be filed—Date of.

In 1847 A presented a petition to the Civil Court of Chittoor for liberty to sue in forma pauperis for recovery of a Polliam. The Court was of opinion that, under Madras Regulation IV of 1831, he could not be permitted to sue

C. P. CODE (ACT V OF 1908), O. 33—(Contd.)

without obtaining the authority of the Government. In May, 1848, A obtained the sanction of the Government, and, in October of that year, he presented a petition for leave to sue *in forma pauperis*, and at the same time presented his plaint. On 13th November, 1848, the plaint and petition were ordered by the Court to be filed.

Semble the suit must be deemed to have commenced on 13th November, 1848, when the plaint and petition were ordered by the Court to be filed (93-4). (*Lord Kingsdown.*)

NARAGUNTY LUCHMEEDAVAMA v. VENGANA NAIDOO.
(1861) 9 M.I.A. 66 = 1 W.R. 30 (P.C.) =
1 Suth. 460 = 1 Sar. 826.

—O. 33, R. 10—*Compromise of suit—Proceedings improper by pauper subsequent to—Costs of—Liability for—Fund payable to pauper under compromise—Payment of costs out of.*

In a suit instituted by the appellant *informa pauperis*, a decided agreement for the settlement of the suit was entered into between the parties. By the agreement the defendants were to pay to the appellant a certain sum of money as a consideration for his relinquishing the suit claim, and entering up a razinama. The appellant, however, improperly refused to enter up the razinama and engaged himself in litigation for the purpose of freeing himself from the obligation to do so, and it was held that the defendants were entitled to recover from the appellant the costs of such proceedings. The question was whether he ought not to be subjected to the payment of such costs by reason of the fact that he sued as a pauper.

Held, that the appellant was liable for costs and that he was liable to pay the same out of the amount stipulated to be paid to him by the agreement of compromise (135-6). (*Lord Langdale.*) MUNNI RAM AWASTY v. SHEO CHURN AWASTY.
(1846) 4 M.I.A. 114 =
7 W.R. 29 (P.C.) = 1 Suth. 166 = 1 Sar. 323.

—Court-fee—Decree for payment of—Sale in execution of—Jurisdiction—Property exonerated by decree—Sale of—Legality.

The wife of a mortgagor brought a suit *in forma pauperis* against her husband and the respondents (mortgagees from the husband) for the amount of her dower, alleging that the said amount was charged on the mortgaged property in priority to the mortgage in favour of the respondents. The suit was decreed with costs against the husband, but dismissed with costs as against the respondents, and it was ordered that the amount of court-fees which would have been paid by the plaintiff had she not been allowed to sue as pauper should be the first charge on the amount decreed to the plaintiff, and should also be recoverable from the husband. In execution of the decree directing the payment of court-fees, the mortgaged property was sold and purchased by the father of the appellants.

Held that the order in pursuance of which that sale was held was without jurisdiction and that the sale passed no property to the person declared purchaser (67).

The validity of the sale cannot be rested on the terms of S. 411 of C. P. C. of 1882. The decree in the wife's suit did not create or purport to create any charge on the mortgaged property in favour of the Government. The Government had no right to attach the property and sell it in execution under that decree, though, of course, such interest, if any, as remained in the mortgagor from whom the court-fees were declared to be recoverable might have been reached by a proper proceeding. The claim to rest the validity of the sale on the prerogative of the Crown is preposterous (67). (*Lord Macnaghten.*) KUNWAR RAGHO PRASAD v. LALA MEWA LAL. (1912) 39 I. A. 62 = 34 A. 223 (232-3) = 14 Bom. L. R. 212 = 15 C. L. J. 327 = 16 C. W. N. 433 = 9 A. L. J. 401 = 15 I. C. 177 = 22 M. L. J. 457.

C. P. CODE (ACT V OF 1908)—(Contd.)

—O. 34, R. 1—Mortgage—Redemption of—Suit for—Parties to. *See* MORTGAGE—REDEMPTION OF—SUIT FOR—PARTIES TO.

—Mortgage—Suit to enforce—Parties to. *See* MORTGAGE—SUIT TO ENFORCE—PARTIES TO.

—Object of.

The object of the provision in O. 34, R. 1, which requires all persons having an interest in the mortgage security to be joined as parties to any suit relating to the mortgage, is that all claims affecting the equity of redemption should be disposed of in one and the same suit (78). (*Lord Sinha.*) PANAGANTI RAMARAVANINGAR v. MAHARAJA OF VENKATAGIRI. (1926) 54 I. A. 68 = 50 M. 180 =

100 I. C. 86 = 25 L. W. 621 = 8 Pat. L. T. 307 = 29 Bom. L. R. 805 = 45 C. L. J. 395 = 31 C. W. N. 170 = A. I. R. (1927) P. C. 32 = 52 M. L. J. 338.

—O. 34, Rr. 2 and 3—Foreclosure decree. *See* MORTGAGE—FORECLOSURE—DECREE FOR.

—O. 34, R. 3 (2)—Proviso—Extension of time for payment—Jurisdiction—Condition precedent to.

In a suit for foreclosure, a decree was passed decreeing the full claim and costs, directing the payment of the same on or before a date specified, and ordering that if such payment was not made on or before that date the defendants should be debarred of all right to redeem. No payment being made by the said date, the plaintiffs applied that the decree should be made final, and that the property should be delivered to them. On the same date as that of the plaintiffs' application the defendants applied for an extension of time for payment. The Judge refused the defendant's application on the ground that no good cause was shown for the extension prayed for, and made a final decree that the defendants should be debarred of all right to redeem the property, and should put the plaintiffs in possession thereof. The plaintiffs then applied for execution of the decree, and were put into possession. Meanwhile the defendants appealed against the order refusing to grant an extension of time. The appellate Court, while agreeing with the court below, that no good cause was shown for the indulgence prayed for, nevertheless granted an extension, and, on the defendants making payment within the time allowed, set aside the final decree of the lower court, and substituted for it a declaration that the mortgage had been redeemed. The appellate court did so on the ground that payment within the time allowed was practically unknown and that the defendants, like most other mortgagors, were under a misconception as to the necessity for payment within the time allowed. No such misconception was ever put forward by the defendants.

Held that, under the circumstances, the appellate court had no powers to overrule the court below and was not justified in granting an extension. (*Lord Carson.*) MOTILAL v. THAKUR UJIAR SINGH.

(1928) 55 I. A. 207 = 55 C. 821 = 26 A. L. J. 600 = 32 C. W. N. 796 = 30 Bom. L. R. 856 = 47 C. L. J. 607 = 28 L. W. 9 = 109 I. C. 467 = I. L. T. 40 C. 153 = 20 N. L. R. 182 = A. I. R. 1928 P. C. 137 = 55 M. L. J. 81.

—O. 34, R. 5—Order absolute under. *See* MORTGAGE—SUIT TO ENFORCE—DECREE IN—ORDER ABSOLUTE.

—O. 34, R. 6—Combined decree—Execution of, against other properties of mortgagor—Limitation—Starting point. *See* MORTGAGE—SUIT TO ENFORCE—DECREE IN—COMBINED DECREE. (1917) 22 C. W. N. 145.

—Personal decree. *See* MORTGAGE—SUIT TO ENFORCE—DECREE IN—PERSONAL DECREE.

—O. 34, Rr. 7 and 8—Redemption suit. *See* MORTGAGE—REDEMPTION OF—SUIT FOR.

C. P. CODE (ACT V OF 1908)—(Contd.)

—O. 34, R. 10—Redemption suit—Costs of. See MORTGAGE—REDEMPTION OF—SUIT FOR—COSTS OF.

—O. 34, R. 14—Applicability—Mortgage money—Suit to recover—Reference to arbitration in—Award made pursuant to—Decree on—Sale of mortgaged property in execution of, and purchase thereof by mortgagee himself—Validity.

In a suit to recover money due under a mortgage, parties presented a petition to the court praying that the points in issue between them should be referred for final disposal to the arbitration of a named person. An order for reference was made accordingly, the arbitrator made an award, a decree was passed in accordance with the award, and in execution thereof the mortgaged property was sold and purchased by the mortgagee decree-holder himself.

On objection taken to the legality of the purchase on the ground that it was in contravention of the provisions of S. 99 of the T. P. Act, held that the principle of the section was inapplicable to the case inasmuch as, by the agreement of the parties to refer the points in issue in the suit to arbitration, the case was taken out of the hand of the court (37). (Lord Davey.) *KHIARAJMAL v. DAIM.*

(1904) 32 I. A. 23 = 32 C. 296 (316) = 9 C. W. N. 201 = 2 A. L. J. 71 = 7 Bom. L. R. 1 = 1 C. L. J. 584 = 8 Sar. 734.

—Principles underlying provision in.

Their Lordships throw no doubt on the principle, which has been acted on in many cases in India, that a mortgagee cannot, by obtaining a money decree for the mortgage debt and taking the equity of redemption in execution, relieve himself of his obligations as mortgagee, or deprive the mortgagor of his right to redeem on accounts taken, and with the other safeguards usual in a suit on the mortgage (37). (Lord Davey.) *KHIARAJMAL v. DAIM.*

(1904) 32 I. A. 23 = 32 C. 296 (316) = 9 C. W. N. 201 = 2 A. L. J. 71 = 7 Bom. L. R. 1 = 1 C. L. J. 584 = 8 Sar. 734.

—Purchase by mortgagee in contravention of—Nullity or Irregularity in procedure only.

A purchase by a mortgagee in contravention of the provisions of S. 99 of the Transfer of Property Act is not a case of nullity for want of jurisdiction, but a case of irregularity in procedure only (37). (Lord Davey.) *KHIARAJMAL v. DAIM.*

(1904) 32 I. A. 23 = 32 C. 296 (316) = 9 C. W. N. 201 = 2 A. L. J. 71 = 7 Bom. L. R. 1 = 1 C. L. J. 584 = 8 Sar. 734.

—O. 38—Attachment before judgment—Abandonment of—Re-attachment after judgment—No abandonment by.

Although where property has been attached before judgment, it is usual to re-attach it after judgment, that proceeding implies no abandonment of the first attachment, which gives the priority of lien (159). (Sir James Colville.) *RAM KRISHNA DAS SURROWJI v. SURFUNNISSA BEGUM.*

(1880) 7 I. A. 157 = 6 C. 129 (133) = 4 Sar. 151 = 3 Suth. 755.

—O. 40, R. 1—Receiver. See RECEIVER.

—O. 41, R. 5—Execution of decree—Jurisdiction of first Court as regards, after appeal.

It was suggested that, after the appeal to the High Court the power to allow or to suspend execution, and, in the latter case, to fix the terms on which execution should be suspended, belonged solely to the appellate court. Their Lordships are by no means clear that this objection is well founded (232). (Sir James W. Colville.) *SADASIVA PILLAI v. RAMALINGA PILLAI.*

(1875) 2 I. A. 219 = 15 B. L. R. 383 = 24 W. R. 193 = 3 Sar. 519 = 3 Suth. 190.

—Execution of decree—Stay of—Appeal by itself not operating as.

C. P. CODE (ACT V OF 1908), O. 41, R. 5—(Contd.)

Execution of a decree is not necessarily suspended by the fact that an appeal has been preferred against it (229). (Sir James W. Colville.) *SADASIVA PILLAI v. RAMALINGA PILLAI.* (1875) 2 I. A. 219 = 15 B. L. R. 383 = 24 W. R. 193 = 3 Sar. 519 = 3 Suth. 190.

—Execution of decree—Stay of—Security bond taken by first court pending appeal as condition of—Jurisdiction of that court to do so—Objection to—Maintainability of, for first time in proceedings to enforce bond.

Pending an appeal against a decree for possession and past profits, the court below ordered a stay of execution of the decree on condition of the defendant giving a security bond undertaking to account also for the future profits not awarded by the decree in the suit itself. The defendant gave such a bond; and execution was accordingly stayed. He took no objection to the jurisdiction of that court either to stay execution or to impose terms as a condition of the stay; and he did not appeal from the order which directed security to be given.

In proceedings taken by the plaintiff to enforce the security bond in execution the defendant, however, objected for the first time that after the appeal the lower court had no power to grant a stay or to impose terms as a condition thereof and that the order requiring security was therefore bad.

Held that the objection came too late, and that it would be in the highest degree unjust to allow such an objection at that stage to prevail against the plaintiff (232). (Sir James W. Colville.) *SADASIVA PILLAI v. RAMALINGA PILLAI.*

(1875) 2 I. A. 219 = 15 B. L. R. 383 = 24 W. R. 193 = 3 Sar. 519 = 3 Suth. 190.

—O. 41, Rr. 5 and 6—Execution of decree pending appeal—Security bond given as condition of—Enforcement of—Mode of—Obligee not named in bond—Charge only created by bond—Bond given by third parties.

Pending an appeal to the Judicial Commissioner against a decree of the Sub-Judge for possession, the Judge ordered, under S. 545 of C. P. C. of 1882, that the successful plaintiff should be let into possession in execution of the decree upon furnishing security to restore the mesne profits, to the extent of one lac of rupees. The appellants entered into a bond which, after reciting the order to furnish security in the amount of one lac of rupees "so that any order that might be passed by the court of the Judicial Commissioner be made binding on the surety for the said sum of one lac," continued "we, the declarants (appellants) furnish security for a lac of rupees, hypothecating the following property therefor and declare that the hypothecated property shall serve as security, and be liable to the extent of a lac of rupees for carrying out the aforesaid purpose."

No obligee was named in the bond. The Judicial Commissioner in the first instance affirmed the Sub-Judge but as the result of a successful appeal to the Privy Council dismissed the suit and directed the Sub-Judge to ascertain the mesne profits due to the defendants. On an application made by the defendants under Ss. 47 and 144 of C. P. C. of 1908, the Sub-Judge made a decree fixing the amount of the mesne profits and declaring the liability of the appellants upon the bond to the amount secured.

Held that, no obligee being named in the bond, the only mode of enforcing it must be by the court making an order in the suit to which the appellants were parties, that the property charged be sold unless before a day named the sureties found the money; and that the Sub-Judge had jurisdiction to declare the appellants' liability on the bond (237-8).

S. 145 of C. P. C. of 1908 has no application to the case—*Quære*: whether it would have been applicable if the sureties had been personally liable (p. 236).

C. P. CODE (ACT V OF 1908), O. 41, Rr. 5 and 6 - (Contd.)

Ss. 47 and 144 of the Code cannot also be relied upon as authorizing the inclusion of the sureties as parties to the application made against the plaintiff because those sections apply only to the parties, and do not apply to sureties (p. 236).

No obligee being named in the bond, a suit to enforce the charge created by it is not the appropriate remedy, because for such a proceeding there must be a mortgagor and a mortgagee (p. 237). (*Lord Phillimore.*) **RAGHUBAR SINGH v. JAI INDRA BAHADUR SINGH.**

(1919) 46 I. A. 228 = 42 A. 158 =
18 A. L. J. 263 = 22 Bom. L. R. 521 = 55 I. C. 550 =
22 O. C. 212 = 38 M. L. J. 302.

—Execution of decree pending appeal—Security bond given as condition of—Forms of, under two Codes.

The Code of 1882 did not provide a special form of security bond to be given during the pendency of an appeal. In the absence of any such special form, the form of such an instrument must vary according to the practice of the court. It appears that in the High Court at Calcutta, in instruments of this nature, the parties bind themselves to some named officer of the court, and that, if the instrument has to be put in suit, either the officer sues or he, under order of the court, assigns the security to the party who wishes to avail himself of it; but this instrument (the one in question before their Lordships) does not purport to bind the sureties to any individual officer or to anyone.

The new Code, that of 1908, provides a special form of security bond (Appendix "G" No. 3.) The form shows that it is intended to be given to someone and not to be a mere undertaking to the court. Whether that someone should be the other party or an officer of the court is not made clear. (*Lord Phillimore.*) **RAGHUBAR SINGH v. JAI INDRA BAHADUR SINGH.**

(1919) 46 I. A. 228 =
42 A. 158 (167-8) = 13 L. W. 82 =
18 A. L. J. 263 = 22 Bom. L. R. 521 = 55 I. C. 550 =
22 O. C. 212 = 38 M. L. J. 302.

—Execution of decree pending appeal—Security bond given as condition of—Liability under—Affirmance of decree on appeal but reversal thereof on further appeal.

Pending an appeal to the Judicial Commissioner against a decree of the Sub-Judge for possession, the Judge ordered, under S. 545 of C. P. C. of 1882, that the successful plaintiff should be let into possession in execution of the decree upon furnishing security to restore the mesne profits, to the extent of one lac of rupees. The appellants entered into a bond which, after reciting the order to furnish in the amount of one lac of rupees "so that any order that might be passed by the Court of the Judicial Commissioner be made binding on the surety for the sum of one lac," continued "we, the declarants (appellants) furnish security for a lac of rupees hypothecating the following property therefor and declare that the hypothecated property shall serve as security and be liable to the extent of a lac of rupees for carrying out the aforesaid purpose."

Held that, on the true construction of the security bond, the appellants became sureties for the restitution of the mesne profits according to the ultimate decision of the Courts, and that their contention that they were only to be liable in the event of the first Court, the Judicial Commissioner, deciding against them, and not liable if that Court decided in their favour though the decree was finally reversed in the Privy Council, was not sound (234-6). (*Lord Phillimore.*) **RAGHUBAR SINGH v. JAI INDRA BAHADUR SINGH.**

(1919) 46 I. A. 228 = 42 A. 158 (164-5) =
18 A. L. J. 263 = 22 Bom. L. R. 521 = 22 O. C. 212 =
13 L. W. 82 = 55 I. C. 550 = 38 M. L. J. 302.

—O. 41, R. 10—Letters Patent appeals—Applicability to—Appeal bound to be rejected for failure to furnish security

C. P. CODE (ACT V OF 1908), O. 41, R. 10—(Contd.)
for costs ordered—Application for leave to continue, in forma pauperis—If can be granted.

Appellant's petition to the High Court on its original Civil Side under the Probate and Administration Act, 1881, was rejected, and she appealed to the High Court in its appellate Jurisdiction under S. 15 of the Letters Patent against the order rejecting her petition. The High Court on its appellate side made an order that the appellant should give security for costs under O. 41, R. 10 (1) of C. P. C. of 1908 within two months from the date of the order. Appellant failed to comply with that order, and, after the expiration of the period fixed by it, petitioned for leave to continue the appeal *in forma pauperis*. The High Court, acting under O. 41, R. 10 of C. P. C., dismissed the application and the appeal. On appeal from the order rejecting appellant's application for leave to continue her appeal to the High Court *in forma pauperis*, *held*, that the High Court acted rightly in rejecting the appeal and the application.

To grant the appellant's application for leave to continue the appeal *in forma pauperis* at that stage would in effect have been to keep alive an appeal which the High Court were, by reason of her default in the matters of security, bound to reject. (*Lord Sumner.*) **SABITRI THAKURAIN v. SAVI.**

(1921) 48 I. A. 76 = 48 C. 481 = (1921) M. W. N. 159 =
33 C. L. J. 307 = 19 A. L. J. 281 = 23 Bom. L. R. 681 =
14 L. W. 362 = 60 I. C. 274 = 40 M. L. J. 308.

—Security for costs—Bond for, given by third party and accepted by Registrar—Objection to authority of third party and to validity of bond taken at hearing of appeal—Procedure in case of.

Where, in a case in which an appellant was ordered to furnish security for costs, a security bond signed by one K acting on behalf of the appellant was accepted by the Registrar but, on objection taken at the time of hearing of the appeal that K had no authority to execute the bond on behalf of the appellant, the appellate Court held that K's authority was not proved and dismissed the appeal on the ground of appellant's failure to furnish the security ordered, *held* that to refuse to hear the appeal merely on the ground of what might have been a mere technicality about the bond was to fail to do justice as between the parties, and that the case must be remitted to the Court below to deal with it again, hear it, and, if necessary, get some formal proof of K's authority. (*Viscount Haldane.*) **KOJO PON v. ATTA FUA.**

(1927) A. I. R. 1927 P. C. 264 =
47 C. L. J. 328 = 107 I. C. 349 (2).

—Security for costs—Failure to furnish—Appeal bound to be rejected for—Leave to continue, *in forma pauperis*—Grant of. See C. P. CODE OF 1908, O. 41, R. 10—LETTERS PATENT APPEALS.

(1921) 48 I. A. 76 = 48 C. 481.

—Security for costs—Failure to furnish—Dismissal of appeal on ground of—Restoration of—Conditions.

On 3rd June, 1882, the High Court made an order directing the appellant to shew cause why the respondent's petition that he might give security for costs should not be granted. That order was not properly served upon the appellant. On the 26th of June, the appellant, knowing nothing about the order, a further order was made by the High Court in these terms: "Appellant has not appeared, and he is hereby required to deposit security to the extent of Rs. 2,500 within 6 weeks from this date", viz., by the 8th of August. On the 5th of August the appellant presented a petition shewing cause why he should not be ordered to give security, and on the 14th of August another order was made by the High Court, which was simply in these terms: "Security has not been filed within the time prescribed by the Court. The appeal is, therefore, of necessity struck

C. P. CODE (ACT V OF 1908), O. 41, R. 10—(Contd.)

off the file with costs." Whether the Court considered the merits of the cause then for the first time shewn by the appellant, did not appear; but if they did, he was not allowed any time at all to tender his security. On the 9th September the appellant presented a petition in which he stated the non-service of the original order to shew cause of the 3rd of June, and his ignorance of it until he got information in time to file his petition on the 5th of August; and he prayed for the restoration of the appeal. On that petition an order was made dated the 13th of September, 1882; but the terms of that order did not appear, nor did it appear with certainty upon what proceedings that order was made. On the 27th of November, 1882, the appellant again petitioned the High Court, and in that petition he stated that "in obedience to the order of the Court, dated the 13th of September, 1882, the petitioner submits herewith two security bonds for Rs. 2,500, as detailed below, and prays that proper order may be made for the restoration of the appeal to its original number of file." Upon that petition the High Court made an order dated the 29th of November which was as follows: "The petitioner's appeal was not dismissed under Ss. 556 or 557 of C.P. Code. This petition, therefore, is not entertainable under S. 558 of that Code, and it is inapplicable to an order made, as ours was made, under S. 549 of the Code." The effect was to maintain in full force the order of the 14th of August, by which the appeal was struck off the file.

Held that the appellant must be allowed to give security for the costs mentioned in the order of the 3rd of June, 1882, of such nature as should be satisfactory to the High Court, and within such reasonable time as should be fixed by that Court; and that upon his giving such security his appeal should be restored to the files of that Court.

The case has never been fully considered by the High Court. The question is, first, whether the appellant should give security; and their Lordships assume that on the 13th of September he was ordered to give security after hearing him; and next, whether, on giving security, the appeal should be restored to the file. That seems never to have been considered by the High Court, because they held that the petition of the 27th of November, which was to restore after tendering security, was not entertainable and could not be listened to. (*Lord Hobhouse*). **KUAR BALWANT SINGH v. KUAR DOULUT SINGH.**

(1886) 13 I.A. 57 = 8 A. 315 = 4 Sar. 707.

—Security for costs—Failure to furnish—Dismissal of appeal on ground of—Reversal of decree of, on appeal—Appellate order in case of—Form of.

Where the decree of the High Court dismissing an appeal for failure to furnish security for costs within the time allowed was found to be erroneous and was reversed, *held* that the proper order to be made by Privy Council in such a case was one allowing the appellant to furnish the security required by the order of the High Court, for the non-compliance of which his appeal was dismissed by the High Court, within such reasonable time as should be fixed by that Court, and directing that on his giving such security his appeal should be restored to the files of that Court and then heard by it (4). (*Sir Richard Couch*.) **BUDRI NARAIN v. SHEO KOER.**

(1889) 17 I.A. 1 = 17 C. 512 = 5 Sar. 493.

—Security for costs—Order requiring—Right of appeal if affected by. See DECREE—APPEAL—RIGHT OF—LIMITING OR TAKING AWAY OF.

(1921) 48 I.A. 76 (83-4) = 48 C. 481 (489).

—Security for costs—Time for furnishing—Extension of—Discretion of High Court as to—Privy Council's interference with.

C. P. CODE (ACT V OF 1908), O. 41, R. 10—(Contd.)

In a case in which the High Court ordered that the plaintiff-appellant should furnish security, under S. 549 of C. P. Code of 1882, to the satisfaction of the Sub-Judge "for costs of the appeal and in the original suit," the plaintiff furnished security within the time fixed by the order of the High Court. That security was found, after the expiry of the time so fixed, to be insufficient, and the Sub-Judge refused either to extend the time for furnishing security or to allow other security to be given in lieu. The High Court on appeal confirmed that order.

Held that the High Court had a discretion to enlarge the time allowed for finding security, and to accept other security in lieu thereof, or to refuse to do either, and that, as it had, in the exercise of its discretion, refused to do either, its order could not be interfered with in appeal. (*Lord Watson*.) **RAJAB ALI v. AMIR HOSSEIN.**

(1889) 17 C. 1 = 5 Sar. 389.

—Where, after considering all the evidence and the facts before them, the High Court thought the case was not one in which they should enlarge the time allowed for giving security for costs, and dismissed the appeal, under S. 549 of C.P. Code of 1882, *held* that the case was not one with which the Privy Council ought to interfere. (*Sir Barnes Peacock*.) **MOHANT MODHUSUDAN DAS v. KRISHNA PRAPANNA.** (1889) 17 I.A. 9 = 17 C. 516 = 5 Sar. 496.

—Security for costs—Time for furnishing—Extension of—Power of—Appellate Court—Order of, requiring security to be furnished to satisfaction of court below—Security furnished in time found after expiry thereof to be insufficient—Power of lower Court to extend time or to accept new security.

Pending an appeal against a decree dismissing a suit, the High Court made an order, on 11th March, 1885, that the plaintiff should within one month furnish security, under S. 549 of C. P. C. of 1882, to the satisfaction of the Sub-Judge "for costs of the appeal and in the original suit."

The plaintiff accordingly, on 2-4-1885, filed a security bond executed by one B, hypothecating certain properties. The defendants objected to the security, alleging that the property tendered as security was not the property of B.

On 17-6-1885, the Sub-Judge found that the security, in reference to title, was insufficient, and rejected it. He also refused to allow other security to be given in lieu, as the time fixed by the appellate court for filing security had then expired.

On appeal the High Court held that the Judge had no discretion to enlarge the time allowed for finding security, or to accept another security in lieu of the bond which had been filed by the plaintiff upon 2-4-1885.

Held, that the High Court erred in so deciding. (*Lord Watson*.) **RAJAB ALI v. AMIR HOSSEIN.** (1889) 17 C. 1 = 5 Sar. 389.

—Security for costs—Time for furnishing—Extension of—Power of—Security tendered in time found to be insufficient after expiry thereof—Extension in case of.

Where an order is made calling upon the appellant to furnish security for costs within a certain time, and he tenders, within the time allowed, such security, but that security is on inquiry found, after the expiration of the time allowed, to be insufficient, the Court has power, under S. 549 of C. P. C. of 1882, to enlarge the time for giving security. The reasonable construction of the section is that the application to the Court, to enlarge the time for giving security may be made either before or after the expiration of the time within which the security has been ordered to be furnished, and the Court may thereupon enlarge the time according to any necessity which may arise where it is just and proper that they should do so. If ultimately the order is not

C. P. CODE (ACT V OF 1908), O. 41, R. 10—(Contd.)

complied with, and the security is not furnished, the appeal may be dismissed (3-4). (*Sir Richard Couch.*) **BUDRI NARAIN v. SHEO KOER.** (1889) 17 I. A. 1 = 17 C. 512 = 5 Sar. 493.

—O. 41, R. 17—Non-appearance of appellant—Dismissal of appeal for.

It is the duty of a person who has a case in the paper (notice-board or cause-list) to be present, prepared to support it by counsel or in person. On his failure to do so, the case is properly dismissed. (*Lord Macnaghten.*) **ZAHUR-UD-DIN v. NUR-UD-DIN.** (1903) 14 M. L. J. 7.

—Non-appearance of appellant—Procedure in case of.

The safer and better course seems to be, that where the appellant does not appear, and there are no means of knowing the grounds of his appeal, the order should be to dismiss without affirming (222). (*Lord Brougham.*) **RAJUNDER NARAIN RAE v. BIJAI GOVIND SING.** (1839) 2 M. I. A. 181 = 1 Moo. P. C. 117 = 1 Sar. 175.

—O. 41, R. 19—Non-appearance—Appeal dismissed for default for—Restoration of—Application for—Order rejecting—Reversal in appeal of—Costs of application to restore and of appeal—Order as to.

In reversing an order of the Sudder Court refusing to re-admit an appeal dismissed for default of prosecution, their Lordships affirmed the order of the Court below directing the appellant to pay the costs of the application to restore the appeal, but gave him the costs of the appeal to the Privy Council. (*Lord Justice Knight Bruce.*) **ANUNDMOYEE DOSSEE v. POORNOO CHUNDER ROY.** (1861) 9 M. I. A. 26 = 1 Sar. 820.

—Non-appearance—Appeal dismissed for default for—Restoration of—Grounds.

Where, in a case in which the appellant does not appear, an order of dismissal instead of affirmance is made, he could not be let in to renew his appeal without satisfying the Court as to the grounds of default, and complying with such conditions as should be prescribed (222). (*Lord Brougham.*) **RAJUNDER NARAIN RAE v. BIJAI GOVIND SING.** (1839) 2 M. I. A. 181 = 1 Moo. P. C. 117 = 1 Sar. 175.

—Non-appearance—Appeal dismissed for default for—Restoration of—Grounds—Expectation that previous case will take whole day—Non-appearance on ground of.

The fact that a party waited in Court till nearly 4 o'clock, and then went away because he came to the conclusion that the case before his would last the day is no reason whatever for his non-appearance when the case was called. (*Lord Macnaghten.*) **ZAHUR-UD-DIN v. NUR-UD-DIN.** (1903) 14 M. L. J. 7.

—Non-appearance—Appeal dismissed for default for—Restoration of—Grounds—Unavoidable accident—Non-appearance on ground of—What amounts to.

Act XVI of 1845, Amending Act XXIX of 1841 empowered the Sudder Court to re-admit an appeal dismissed for want of prosecution, if the appellant satisfied the Court that the dismissal was "occasioned by the default of his Vakeel, or by unavoidable accident."

An appeal was preferred to the sudder Court, but, owing to the absence from illness of the appellants' Mookhtar, the written reasons of appeal were not lodged within the time prescribed, and the appeal was dismissed. The evidence showed that there had been no wilful delay, and that the appellant was ignorant of the fact of the reasons of appeal not having been filed.

Held that the case was one of "unavoidable accident", and was within the provisions of S. 1 of Act XVI of 1845, and that the appeal ought to have been re-admitted. (*Lord Justice Knight Bruce.*) **ANUNDMOYEE DOSSEE v. POORNOO CHUNDER ROY.** (1861) 9 M. I. A. 26 = 1 Sar. 820.

C. P. CODE (ACT V OF 1908), O. 41, R. 10—(Contd.)**—O. 41, R. 20—Person interested in result of appeal—Plaintiff's appeal against some defendants—Other defendants against whom suit was dismissed and against whom right to appeal has become barred if interested in result of.**

The addition of a respondent whom the applicant has not made a party to the appeal is expressly dealt with in O. 41, R. 20 of C. P. C. Giving the words "he is interested in the result of the appeal" in the rule their natural meaning, it is impossible to say that a defendant against whom the suit has been dismissed, and as against whom the right of appeal has become barred, is interested in the result of the appeal filed by the plaintiff against the other defendants. (*Sir John Wallis.*) **CHOCKALINGAM CHETTI v. SEETHAI ACHE.** (1927) 55 I. A. 7 = 6 R. 29 = 27 L. W. 1 = (1928) M. W. N. 20 = 4 O. W. N. 1231 = 32 C. W. N. 281 = 47 C. L. J. 136 = I. L. T. 40 R. 18 = 30 Bom. L. R. 220 = 107 I. C. 237 = 26 A. L. J. 371 = A. I. R. (1927) P. C. 252 = 54 M. L. J. 88.

—Respondent—Addition of—Application for—Onus on appellant making.

It is for the appellant, who applies to the Court to exercise its powers under O. 41, R. 20, C.P.C., to show how the party sought to be added as a respondent is interested in the result of the appeal. (*Sir John Wallis.*) **CHOCKALINGAM CHETTI v. SEETHAI ACHE.** (1927) 55 I. A. 7 = 6 R. 29 = 27 L. W. 1 = (1928) M. W. N. 20 = 4 O. W. N. 1231 = 32 C. W. N. 281 = 47 C. L. J. 136 = I. L. T. 40 R. 18 = 30 Bom. L. R. 220 = 107 I. C. 237 = 26 A. L. J. 371 = A. I. R. (1927) P. C. 252 = 54 M. L. J. 88.

—O. 41, R. 22—Cross-appeal not filed—Point arising on—Entertainment of, at hearing of appeal—Irregularity or illegality—Leave to file cross-appeal and extension of time for purpose—Grant of—Procedure proper in such a case.

In the course of the winding up of a limited company, an order was made in 1912 recognising the validity of a charge in favour of the appellant the Secretary of the company, upon unpaid calls. The order was not appealed against by the official liquidator who opposed the application therefor, and was allowed to become final.

More than a year after, the appellant applied for the enforcement of the said order. This application was opposed by the debenture-holders and by the liquidator on the ground, amongst others, that the charge being unregistered was unenforceable. The District Court overruled the objections and held that the appellant was entitled to priority over the debenture-holders. On appeal from the last-mentioned order, the High Court allowed the debenture-holders to raise the point of non-registration which had been decided against them long before.

Held that the proper course to be taken in order to raise the point of non-registration would have been to get leave, notwithstanding the lapse of time, to appeal from the judgment of 1912; but that, inasmuch as the matter was merely one of practice and the High Court could have regularized the proceedings by extending the time, and giving leave to appeal from the 1912 decision, and they considered the point without going through that process, the decision of the High Court ought not to be reversed merely because the proper course in point of practice was not taken (40-1).

Whether leave should have been given to appeal would have been a matter of discretion, but the High Court appear to have had no doubt that they should allow the point to be raised (41). (*Viscount Finlay.*) **KRISHNA AYYANGAR v. NALLAPERUMAL PILLAI.** (1919) 47 I. A. 33 = 43 M. 550 (563) = 18 A. L. J. 489 = 28 M. L. T. 28 = 22 Bom. L. R. 568 = (1920) M. W. N. 419 = 12 L. W. 92 = 56 I. C. 163 = 38 M. L. J. 444.

C. P. CODE (ACT V OF 1908), O. 41, R. 22—(Contd.)

—Decree under appeal—Finding adverse in—Erroneous nature of—Respondent's right to urge—No appeal by him.

Plaintiff, the survivor of two brothers, sued the widow of his deceased brother for the recovery of possession of the property held by the deceased on the ground that the brothers were joint in estate, and that the plaintiff was entitled to the property by survivorship. The widow maintained that the brothers were separate, and claimed a widow's estate in the property of her husband. She further maintained that the question had been conclusively determined in her favour in a former suit between her and the plaintiff. The High Court determined the plea of *res judicata* in her favour and dismissed the plaintiff's suit. They also enquired into the question of fact and held that the brothers were joint in estate.

Held, in an appeal preferred by the plaintiff from the decree of the High Court dismissing his suit, that the widow could, though she had not appealed, support the decree of the High Court in her favour on the ground that that Court ought to have decided the question of separation in her favour (34). (*Sir Robert P. Collier.*) RUN BAHADOOR SINGH *v.* LACHOO KOER. (1884) 12 I. A. 23 =

11 C. 301 (306) = 4 Sar. 602.

—Decree under appeal—Respondent's right to support—Error in procedure by court below—Decree right on merits—Right to show.

It is competent to a respondent in a Privy Council appeal to maintain the decree which is under appeal by showing that it is right upon the merits. (499–500).

So held in a case in which the original decision of the Court below was wholly against the respondent, but the same was on review set aside, on an application for review as regards a portion of the suit properties only, and a final decree (against which the appeal before the Privy Council was filed) was made in favour of the respondent as regards all the suit properties. The objection to the decision on review was that it ought to have been confined to the properties in respect of which the application for review was made. (499–500). (*Sir James Colville.*) BHUGWANDEEN DOOBEY *v.* MYNE BAE. (1867) 11 M. I. A. 487 =

9 W. R. P. C. 23 = 2 Suth. 124 = 2 Sar. 327.

—Issue—Decision adverse by Court below on—Respondent's right to attack—No memo. of objections by him.

The issue upon S. 33 was decided against the defendants by the Sub-Judge; but the decree being entirely in their favour it was not necessary for them to file a notice of objection under S. 561 of C. P. C. of 1882. They could support the decree on the ground that that issue ought to have been decided in their favour (61). (*Sir Richard Couch.*) LALA GOWRI SUNKER LAL *v.* JANKI PERSHAD.

(1889) 17 I. A. 57 = 17 C. 809 (813–4) = 5 Sar. 518.

—O. 41, R. 23—Preliminary point—Cardinal point not—Distinction. See APPEAL—REMAND—PRELIMINARY POINT—CARDINAL POINT NOT.

(1894) 22 I. A. 1 = 17 A. 112.

—Preliminary point—Test. See APPEAL—REMAND—PRELIMINARY POINT—TEST.

(1894) 22 I. A. 1 = 17 A. 112.

—Remand in appeal. See APPEAL—REMAND.

—O. 41, R. 24—Cardinal point not preliminary—Disposal of suit on, after taking whole evidence—Remand under O. 41, R. 23—Procedure under O. 41, R. 24—Course proper in such case. See APPEAL—REMAND—PRELIMINARY POINT—CARDINAL POINT NOT.

(1894) 22 I. A. 1 = 17 A. 112.

C. P. CODE (ACT V OF 1908), O. 41, R. 24—(Contd.)

—Case set up in lower Court—Point not covered by—Decision of, on evidence on record—Jurisdiction.

The suit was, *inter alia*, to set aside an order of the Dy. Collector, and a subsequent order of the Collector, for registration of the defendants' names with reference to the plaint mouzahs, and for a decree for registration of the plaintiff's name, after cancelling the registration of the defendants' names, in Zemindary right. The plaint also asked for the setting aside of two kobalas relied on by the defendants before the Collectors. The defendants relied upon the said kobalas, and claimed to be co-sharers in the zemindari. They did not claim to be putnidars. Issues were framed as to whether the plaintiff was in possession of the disputed mahals as Zemindar or not, and as to whether the defendants were part-owners of the Zemindary or mere under-tenure holders. The Sub-Judge decreed the suit, declaring the defendants to be the plaintiff's under-tenure holders of the said mahals. In their appeal to the High Court the defendants urged that they ought to have been held to be part owners of the Zemindary, and not mere under-tenure holders. The High Court by its decree ordered and decreed, that the plaintiff was entitled to have his name registered as zemindar in lieu of the names of the defendants in respect of the suit mouzahs, and that the defendants were putnidars of the same, founding the declaration that the defendants were putnidars upon certain statements in the documentary evidence which had been put in by the plaintiff.

Held, that upon the case which had been set up in the defence, and the issues which had been framed and tried by the lower Court, the High Court could not properly make such a declaration (169).

The defendants had not claimed to be putnidars, but had set up a false claim to be Zemindars, and had attempted to prove it by forged deeds (*i.e.*, the kobalas which were found to be forged), and they ought certainly not to be in a better position than they would have been in if they had brought a suit to have a declaration of their title as putnidars, in which case an issue as to that title would have been framed and tried by the lower Court. The proceedings in this suit were regulated by C.P.C. of 1877, and their Lordships do not find any provision there which would authorise the appellate Court to do what has been done in this case. S. 565, which enables the appellate Court in some cases to determine a question of fact upon the evidence then on the record, cannot apply where the case has not been set up in the lower Court (169–70). (*Sir Richard Couch.*) OFFICIAL TRUSTEE OF BENGAL *v.* KRISHNA CHUNDER MOZOOMDAR. (1885) 12 I. A. 166 = 11 C. 239 = 4 Sar. 657

—O. 41, R. 25—Issues—Framing of—Reference thereof to Court below for trial—Power of appellate Court—Mode in which question dealt with by Court below unsatisfactory.

In a case in which the question was whether the defendants were tenants from year to year or they had a permanent right of occupancy in the lands in dispute, the High Court in second appeal was not satisfied with the mode in which the District Judge had dealt with the question. The learned Judges accordingly framed certain issues and asked the District Judge to return revised findings on them. *Held*, that the High Court had jurisdiction to do so.

The contention that the High Court acted without jurisdiction proceeds on a misapprehension of what the High Court did. It did not remand under O. 41, R. 23 of C.P.C. of 1908, but merely framed issues and referred them for trial to the District Court as provided in rule 25, and for this reason. In the opinion of the learned Judges of the High Court the District Judge had omitted to determine a question of fact which appeared to them essential to the right decision of the suit on the merits (83). (*Sir Lawrence*

C. P. CODE (ACT V OF 1908), O. 41, R. 25—(Contd.)

Jenkins.) SETURATNA IYER v. VENKATACHALA GOUNDAN. (1919) 47 I. A. 76 = 43 M. 567 (575) =

18 A.L.J. 707 = 27 M.L.T. 102 = 11 L. W. 399 =
22 Bom. L. R. 578 = (1920) M.W.N. 61 = 56 I. C. 117 =
25 C.W.N. 485 = 38 M.L.J. 476.

—Issues new—Framing of—Power of.

Two suits were instituted, one by A, claiming to be the sister's son of the last male owner, and the other by B, alleging himself to be of the same gotra with the deceased, for the recovery of the properties of the deceased. The defendant in both suits was the same and claimed to be entitled to the suit properties as the widow of the adopted son of the last male owner. Evidence in B's suit was by consent of parties received in that of A. Both suits were decreed by the 1st Court, and appeals were preferred therein by the defendant. Pending the appeals, the defendant entered into a compromise with B, admitting his title. Thereupon in the appeal against A, the appellate Court framed a new issue under S. 566 of the Code of 1882 as to whether he was entitled as nearest of kin, or was excluded by B. On objection taken to the framing of that issue on the ground that it was new, and had not been raised by the defendant in her written statement, *held* that, in the circumstances of the case, the appellate Court did not act with irregularity in raising the issue in question (371). (*Lord Hobhouse.*) CHANOT DIN v. NARAINI KUAR. (1892) 14 A. 366.

—Issues new—Framing of—Remand of cause for re-hearing thereon—Jurisdiction—Validity. See APPEAL—REMAND—ISSUE NEW—FRAMING OF—REMAND OF CAUSE FOR RE-HEARING THEREON.

(1916) 43 I. A. 172 (177-9) = 43 C. 1104 (1116).

—Remit under—Jurisdiction—Failure of L. A. C. to properly consider evidence.

In an appeal to the P.C., one of the objections urged for the appellant was that the High Court had acted without jurisdiction in remitting the appeals to the District Judge for a proper finding. The High Court did so under O. 41, R. 25, C.P.C. It appeared that the case had been remitted three times because the District Judge had not properly considered the evidence, and on the first remit misunderstood the order of the High Court, and on the second expressed himself as unable to come to a definite conclusion.

Held, that the course chosen by the High Court was fully within their competence (295).

To adopt the language of the judgment in L. R. 47 I.A. 76, "In the opinion of the learned judges of the High Court the District Judge had omitted to determine a question of fact which appeared to them essential to the right decision of the suit on the merits;" he had failed to consider whether, apart from the particular contract to which his attention was exclusively directed, there was evidence on which to hold that from their inception the holdings of the defendants were permanent or in the nature of occupancy rights (295-6). (*Mr. Ameer Ali.*) CHIDAMBARA SIVAPRAKASA v. VEERAMA REDDI. (1922) 49 I.A. 286 = 45 M. 586 (597-8) = 27 C.W.N. 245 = 37 C.L.J. 199 = 16 L.W. 102 = 31 M. L. T. 54 = (1922) M.W.N. 749 = A.I.R. (1922) P.C. 292 = 68 I.C. 538 = 43 M.L.J. 640.

—Remit under—Jurisdiction—Issues already framed covering all points remitted—Sufficient materials on record for decision of case.

Their Lordships entertain serious doubts whether the Court was justified in making the remand, by the provisions of S. 566 of C.P.C. of 1882. All the points remitted were substantially covered by the issues which had been previously sent for trial in the Court below; and it appears to their Lordships that there were sufficient materials for the

C. P. CODE (ACT V OF 1908), O. 41, R. 25—(Contd.)

decision of the case (156). (*Lord Watson.*) MAHARAJA RADHA PARSHAD SINGH v. LAL SAHAB RAI.

(1890) 17 I.A. 150 = 13 A. 53 (63) = 5 Sar. 600.

—O. 41, R. 27—Additional evidence—Admission of—Power of—Exercise of—Caution required in regard to—Conditions of exercise of. See C.P.C. OF 1908, S. 107 (d).

(1926) 53 I.A. 84 (88) = 49 M. 435.

—Additional evidence—Admission of—Power of appellate Court as to. See PARTNERSHIP—ACCOUNTS OF DISSOLVED—BALANCE DUE ON. (1834) 5 W.R. 76.

—Additional evidence—Production by party of—Rights of—England and India—Distinction.

The whole question in the case depends upon the credit given to the witnesses examined for the one side and the other, the known character of those witnesses, and the mode in which they gave their testimony. The trial Court (the Provincial Court) gave no credit to the witnesses who deposed on the part of the plaintiff, gave credit to the witnesses on the part of the defendants, and decided against the plaintiff. He took the case on appeal to the court of Sudder Dewanny Adawlut, and he might, when he did so, have said: "I am not satisfied with the case I made before the Provincial Court. I have other witnesses. I will satisfy you my case was true." When he went before the Sudder Dewanny Adawlut, his case might have received fresh evidence; he was not concluded by the case made before the Provincial Court. It is not like the courts in this country, where a case is called at *Nisi Prius* and the whole case is tried in a few hours. The party says: "I had no idea my witnesses would have answered as they did;" or "I was taken by surprise, and I wish to have a new trial." (*Sir Thomas Erskine.*) RAJAH ROW VENCATA NILADRY ROW v. ENOOGOONTY SOORIAH. (1834) 5 W. R. 79 = 1 Suth. 16 (16-7) = 1 Sar. 51 = 2 Knapp. 259.

—Additional evidence—Rejection of—Decision of appeal irrespective of such evidence if amounts to.

Where certain documents were for the first time brought to the notice of the High Court before the hearing of an appeal, but that court decided the appeal irrespective of those documents, *held* that it must be taken that in the opinion of the High Court it was not a case in which they ought to admit any further evidence under S. 355 of C.P.C. of 1859 (26). (*Sir James W. Colville.*) GOBIND SUNDARI DEBIA v. JAGADAMEA DEBIA. (1868) 3 B.L.R. 25 P.C.

—Applicability—Admission of fact made at hearing of appeal—Use of.

Where, in a case in which no application was made for the introduction of new evidence, the learned Judges in the court below (the appeal court) took stock of an admission made before them, which was cardinal to the matter under discussion, *Held* that O. 41, R. 27 of C.P.C. of 1908 had no application to the procedure adopted by the court below, and that no argument could be founded upon it. (*Lord Shaw.*) GANPAT v. LALAMIYA. (1919) 12 L.W. 574 = 16 N.L.R. 59 = 56 I.C. 673.

—Party a professional man—Examination in his own behalf of—Permission for—Grant of—Propriety—Evidence adduced by him in court below found to be insufficient.

In a case like this it does appear to their Lordships somewhat dangerous to allow a plaintiff, a professional man, who has not thought fit to give evidence in his own suit in his own behalf, upon the failure of evidence which he has adduced, to be subsequently summoned and examined in the appellate court for the purpose of supporting the case which had broken down (119). MUSSUMAT USHRUFOONNISSA BEGUM v. BABOO GRIDHAREE LALL. (1872) 19 W.R. 118 = 2 Suth. 763 = 5 Sar. 708.

C. P. CODE (ACT V OF 1908), O. 41, R. 27—(Contd.)

—O. 41, R. 27 (1) (b)—*Additional evidence—Admission by appellate court of its own motion—Power of—Exercise of, very sparingly—Necessity.*

When the matter came up by appeal before the High Court, that court, acting apparently *ex mero motu* and not at the instance of the parties, determined to take original evidence anew, by the examination of other witnesses. A power of that character should be exercised very sparingly; because, where it is done not at the instance of the parties, but at the suggestion of the court itself, witnesses may be called who are not the witnesses that the parties themselves would have thought fit to adduce; and it is possible that the new original inquiry by the High Court may be in itself imperfect, and not sufficiently extensive to answer the purposes of justice (48-9). (*Lord Westbury*). SREEMANCHUNDER DEY v. GOPAULCHUNDER CHUCKERBUTTY.

(1866) 11 M.I.A. 28 = 7 W.R. P.C. 10 = 1 Suth. 651 = 2 Sar. 215.

—*Additional evidence—Admission in appeal of—Propriety—Insanity—Issue as to, in civil suit—Lunacy proceedings after adverse decision of first court and pending appeal therefrom—Medical officer examined in—Evidence of—Admission of, in appeal in civil suit.*

In a suit instituted by the 2nd plaintiff as next friend of the 1st, the question was whether the 1st plaintiff was insane and whether the 2nd plaintiff was entitled to sue as his next friend. Before instituting the suit the 1st plaintiff's family obtained a certificate from a surgeon that the 1st plaintiff, who had been under his treatment for sometime was suffering from chronic delusional insanity, and that his delusions were such as to render him incapable of managing his own affairs or protecting his interest. The plaintiffs also examined the Surgeon as a witness in the suit, when he deposed to the same effect. The Subordinate Judge was, however, not satisfied with the medical evidence of the Surgeon, and dismissed the suit on the ground that the 1st plaintiff was not proved to be insane and to be incapable of managing his own affairs or protecting his interests, and that, therefore, the 2nd plaintiff had no right to sue as his next friend. Pending an appeal to the High Court from the Sub-Judge's decision, the plaintiff's family instituted lunacy proceedings in the District Court. In those proceedings, another medical officer was examined for the plaintiffs and cross-examined by the defendants, and, on the strength of his evidence, the 1st plaintiff was adjudged to be a lunatic incapable of managing his own affairs and the second plaintiff was appointed his guardian. In the appeal to the High Court from the Sub-Judge's decree, an application was made by the plaintiff for the admission in evidence of the evidence given by the Medical Officer in the Lunacy proceedings, especially as the Sub-Judge was not quite satisfied with the medical evidence of the Surgeon examined before him. The learned Judges of the High Court held that a case had been made out for taking the evidence of the Medical Officer, and, as he had already been cross-examined at great length in the lunacy proceedings, it was not thought necessary to call him again and his certificates and depositions were accordingly admitted as evidence in the case.

Held, that the High Court acted rightly in admitting the additional evidence. (*Sir John Wallis*). MAHANT RAI v. MT. LACHHMINA.

(1927) A.I.R. (1927) P.C. 123 (126-7) = (1927) M.W.N. 456 = 26 L.W. 94 = 31 C.W.N. 1087 = 39 M.L.T. 155 = 101 I.C. 363 (2).

—*Additional evidence—Admission of, on application of party—No prohibition of—Conditions of admissibility in such a case.*

Under O. 41, R. 27 (1) (b) of C. P. C. of 1908 an appellate Court has a discretion to admit additional evidence upon the application of a party. It does not imply a prohibition

C. P. CODE (ACT V OF 1908), O. 41, R. 27—(Contd.)

against the admission of additional evidence except where the appellate court has itself discovered some inherent lacuna or defect, and required evidence to fill up the gap or remedy the defect. That limitation applies only to cases in which the appellate court admits additional evidence of its own motion. A suitor is entitled for any "substantial cause" to apply to the court for the admission of such additional evidence. Under O. 47, R. 1 of C.P.C. a party has a right to apply for a review of judgment to the court that has decided the case before an appeal has been preferred. He can do so on the grounds specifically set forth in Rule 1. But where an appeal has been preferred, and a review, therefore, is out of the question, his only and proper course is to apply to the appellate court, which is in possession of the case, to admit the additional evidence either under the general principles of law or under the specific provisions of O. 41, R. 27. (*Mr. Ameer Ali*). INDRAJIT PRATAP SAHI v. AMAR SINGH.

(1923) 50 I. A. 183 (189-91) =

2 P. 676 = 21 A.L.J. 554 =

A.I.R. (1923) P.C. 128 = 4 Pat. L.T. 447 =

1 Pat. L.R. 345 = 33 M.L.T. 233 = 18 L.W. 728 =

25 Bom. L.R. 1259 = 28 C.W.N. 277 =

39 C.L.J. 318 = 74 I.C. 747 = 45 M.L.J. 578.

—*Additional evidence—Admission under rule of—Necessity for—Time for deciding as to—Special and preliminary application—Decision on—Propriety.*

The legitimate occasion for S. 568 is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent. Further evidence can be allowed by the appellate court in such a case only after the appeal on the merits had been heard and the evidence as it stands has been examined by the judges. It ought not to be ordered on special and preliminary application (122). (*Lord Robertson*). KESSOWJI ISSUR v. GREAT INDIAN PENINSULA RY. CO. (1907) 34 I.A. 115 = 31 B. 381 (390) =

6 C.L.J. 5 = 11 C.W.N. 721 = 2 M.L.T. 435 =

9 Bom. L.R. 671 = 4 A.L.J. 461 = 17 M.L.J. 347.

—*Additional evidence discovered outside court—Admission of—Application made for—Admission on, on the ground of the appellate court requiring such evidence—Permissibility.*

Additional evidence cannot be admitted in appeal under S. 568 of C.P.C. of 1882 on the ground of the appellate court requiring it, in cases in which a discovery is made, outside the court, of fresh evidence and an application is made to import it. That is the subject of the separate enactment in S. 623 of C.P.C. of 1882 (122). (*Lord Robertson*). KESSOWJI ISSUR v. GREAT INDIAN PENINSULA RY. CO.

(1907) 34 I.A. 115 = 31 B. 381 (390) =

6 C.L.J. 5 = 11 C.W.N. 721 = 2 M.L.T. 435 =

9 Bom. L.R. 671 = 4 A.L.J. 461 = 17 M.L.J. 347.

—*Additional evidence to impeach testimony of witness examined in court below—Admission of—Re-calling of witness and giving of opportunity to him to contradict or explain additional evidence—Necessity.*

Under S. 568 (b) of C.P.C. of 1882, an appellate court should not allow to be produced before it additional evidence which impeaches the testimony of a witness called in the court below without that witness also being called and being given an opportunity to contradict or explain the additional evidence so given. (*Lord Shaw*). JAGRANI KOER v. KUAR DURGA PRASAD. (1913) 41 I.A. 76 =

36 A. 93 (99-100) = (1914) M.W.N. 137 =

16 O.C. 386 = 22 I.C. 103 = 12 A.L.J. 125 =

19 C.L.J. 165 = 18 C.W.N. 521 =

16 Bom. L.R. 141 = 15 M.L.T. 125 = 26 M.L.J. 153.

—*Requires—Meaning of.*

The word "requires" in the expression "if the appellate court requires" in S. 568 of C. P. C. of 1882, plainly means

C. P. CODE (ACT V OF 1908), O. 41, R. 27—(Contd.)

needs, or finds needful (122). (*Lord Robertson.*) **KESSOWJI ISSUR v. GREAT INDIAN PENINSULA RAILWAY COMPANY.** (1907) 34 I. A. 115 = 31 B. 381 (390) =

6 C. L. J. 5 = 11 C. W. N. 721 = 2 M. L. T. 435 =

9 Bom. L. R. 671 = 4 A. L. J. 461 = 17 M. L. J. 347.

—*Witness material not examined in Court below—Examination of—Power of—Evidence below found to be unsatisfactory.*

Where the appellate Court think that the evidence below is of so unsatisfactory a character as to make it necessary that they should summon and examine a material witness who had not been examined in the court below, *held* that they undoubtedly possessed the power of summoning and examining that witness (119). **MUSSUMAT USHRUFOONNESSA BEGUM v. BABOO GRIDHAREE LALL.**

(1872) 19 W. R. 118 = 2 Suth. 763 = 5 Sar. 708.

—**O. 41, R. 27 (2)—Additional evidence—Admission of—Reasons for—Omission to record—Presumption in case of, as to admission not being under R. 27.**

Where the order admitting fresh evidence in appeal states no reason for such admission, *prima facie*, it must be taken that it was not done under S. 568 of C. P. C. of 1882 (122). (*Lord Robertson.*) **KESSOWJI ISSUR v. GREAT INDIAN PENINSULA RAILWAY COMPANY.** (1907) 34 I. A. 115 = 31 B. 381 (390) = 6 C. L. J. 5 = 11 C. W. N. 721 = 2 M. L. T. 435 = 9 Bom. L. R. 671 = 4 A. L. J. 461 = 17 M. L. J. 347.

—*Additional evidence—Admission of—Reasons for—Record of—Necessity—Admission by appellate court of its own motion.*

When the matter came up by appeal to the High Court, the High Court was dissatisfied with the reasons given by the Court below, and with the evidence taken in it; and the High Court, acting apparently *ex mero motu*, and not at the instance of the parties, determined to take original evidence anew, by the examination of other witnesses. It is a power given by the code to the High Court, which may be very wholesome; but it is desirable that the reasons for exercising that power should always be recorded or minuted by the High Court on the proceeding (48). (*Lord Westbury.*) **SREEMANCHUNDER DEY v. GOPALCHUNDER CHUCKERBUTTY.** (1866) 11 M. I. A. 28 = 7 W. R. P. C. 10 = 1 Suth. 651 = 2 Sar. 215.

—*Additional evidence—Admission of—Reasons for—Record of—Not a condition precedent.*

The provision in the Code of Civil Procedure of 1859 (S. 355), which requires the Judges who admit fresh evidence on an appeal, to record their reasons, though not a condition precedent to the reception of the evidence, is yet one that ought at all times to be strictly complied with. It is a salutary provision which operates as a check against a too easy reception of evidence at a late stage of litigation, and the statement of the reasons may inspire confidence and disarm objection (368). (*Lord Romilly.*) **GUNGA GOBIND MUNDUL v. COLLECTOR OF THE TWENTY-FOUR PERGUNNAHS.** (1867) 11 M. I. A. 345 = 7 W. R. 21 = 1 Suth. 676 = 2 Sar. 284.

—**O. 41, R. 33—Defendant—Addition as respondent of—Application for—Rejection by Court below of—P. C.'s interference with.**

Plaintiff, whose suit had been dismissed against all the defendants, failed to appeal against the decree in so far as it affected some of them and allowed the appeal as against them to become barred. On an application made by him to the appellate court to take action under O. 41, R. 33, C. P. C. so as to deprive those defendants of the very valuable right which they had acquired in consequence of the plaintiff's failure to appeal against the decree in so far as it

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affected them, the appellate court, in the exercise of its discretion, refused to do so.

Held, in the circumstances of the case, that there was no sufficient reason for interfering with the refusal of the appellate court to take action under the Rule. (*Sir John Wallis.*) **CHOCKALINGAM CHETTI v. SEETHAI ACHE.** (1927) 55 I. A. 7 = 6 R. 29 = 27 L. W. 1 = (1928) M. W. N. 20 = 4 O. W. N. 1231 = 32 C. W. N. 281 = 47 C. L. J. 136 = I. L. T. 40 R. 18 = 30 Bom. L. R. 220 = 107 I. C. 237 = 26 A. L. J. 371 = A. I. R. 1927 P. C. 252 = 54 M. L. J. 88.

—*Defendant—Addition as respondent of a, for purpose of passing a decree against him—Power of.*

Quære: whether under O. 41, R. 33 of C. P. C. the court may in a proper case add a defendant as respondent for the purpose of passing a decree against him. (*Sir John Wallis.*) **CHOCKALINGAM CHETTI v. SEETHAI ACHE.**

(1927) 55 I. A. 7 = 6 R. 29 = 27 L. W. 1 =

(1928) M. W. N. 20 = 4 O. W. N. 1231 =

32 C. W. N. 281 = 47 C. L. J. 136 = I. L. T. 40 R. 18 =

30 Bom. L. R. 220 = 107 I. C. 237 = 26 A. L. J. 371 =

A. I. R. 1927 P. C. 252 = 54 M. L. J. 88.

—*Non-appealing respondent—Reversal of decree in favour of—Power of appellate court.*

All illegitimate son of a deceased Hindu sued his legitimate brother for recovery of possession of a village assigned to him for maintenance by the deceased and forcibly taken possession of by his legitimate brother. The first two courts held that the plaintiff was not entitled to possession of the village but was entitled to its net profits for maintenance and gave him a decree for maintenance at a certain rate. He acquiesced in their decision; but the defendant, the legitimate son, preferred a special appeal, urging that the courts below erred in holding that his father had power to alienate ancestral immoveable property by granting it to the plaintiff, and that they erred in decreeing maintenance, notwithstanding that the plaintiff was simply for possession of the village, and did not pray for a decree for maintenance. The Court in special appeal held that the courts below had no power to make a decree for maintenance in money, and varied the decrees below by giving a decree for possession of the village.

Held that the court in special appeal had power to make the decree it did, notwithstanding the absence of an appeal by the plaintiff himself and notwithstanding that he had acquiesced in the decrees of the first two courts.

By his special appeal the legitimate son re-opened the whole question. He contended that the particular decree which had been made had been improperly made. He also contended that the suit ought to have been dismissed. If he were right on the former point, but wrong upon the latter, it became necessary for the court in Special Appeal to make some decree, and therefore the question what decree was proper to be made upon the pleadings and evidence in the cause was necessarily open and raised before him (163-4). (*Sir James W. Colville.*) **RAJAH PARICHET v. ZALIM SINGH.** (1877) 4 I. A. 159 = 3 C. 214 (219) = 3 Sar. 728 = 3 Suth. 436.

—In a suit for rent brought by some of the co-sharers making the co-sharer who refused to joint as plaintiff a party defendant, the trial court made a decree against the tenant partly in favour of the plaintiffs and partly in favour of the defendant co-sharer. In an appeal by the tenant against the entire decree, the High Court corrected the second part of the decree by awarding to plaintiff for the defendant co-sharer's benefit the amount awarded to him directly by the trial court. On appeal to the Privy Council, *held* that the entire decree having been brought before the High Court, it had jurisdiction to make the amendment in question, even in the absence of a separate appeal by the

C. P. CODE (ACT V OF 1908), O. 41, R. 33—(Contd.)

defendant co-sharer. (*Lord Sumner.*) **TRICOMDAS COOVERJI BHOJA v. GOPINATH JIN THAKUR.**

(1916) 44 I. A. 65 = 44 C. 759 (769) =
1 Pat. L. W. 262 = 19 Bom. L. R. 450 =
21 M. L. T. 262 = (1917) M. W. N. 363 = 5 L. W. 654 =
21 C. W. N. 577 = 25 C. L. J. 279 = 15 A. L. J. 217 =
39 I. C. 156 = 32 M. L. J. 357.

—Property, which was subject to two mortgages, was sold for arrears of revenue and was purchased by the appellant himself, the real owner, the recorded proprietor being his mere benamidar. The prior mortgagee instituted a suit, to which the puisne mortgagee was a party, for the recovery of his mortgage money out of the surplus proceeds of the revenue sale. The puisne mortgagee himself brought two suits, one for a declaration that the recorded proprietor was the benamidar of the appellant, and that consequently the latter acquired the property only subject to the incumbrances, and the second, to enforce his mortgage against the property itself. In the prior mortgagee's suit, a decree was passed directing payment of his mortgage amount from out of the surplus proceeds, or, in the event of the revenue sale being set aside in proceedings then pending for that purpose, realisation of the same by sale of the mortgaged property. In the puisne mortgagee's suit also the usual mortgage decree was made. The appellant did not appeal against the decree in the prior mortgagee's suit, but the puisne mortgagee did. The appellant appealed against the decrees in the puisne mortgagee's suits. On all the appeals coming for hearing together, the High Court dismissed all of them, varying, however, the decree in the prior mortgagee's suit by making it an ordinary decree against the property itself.

On an appeal preferred by the puisne mortgagee objecting to that variation, *held* that the High Court had, under Ss. 107 and 151 and O. 41, R. 33 of C.P.C. of 1908, abundant power to do so.

On hearing the appeal in the prior mortgagee's suit, the court had before it the facts that showed all the circumstances relating to the sale. The prior mortgagee seems to have raised no objection to the variation of the order and does not appear here or appeal against it. It is the puisne mortgagee in whose suit all the facts were established, who seeks, on the one hand, to retain a judgment based on the view that the sale was regular and, on the other hand, to get the benefit of the decree which determined that it was not. There is certainly nothing in the statute which gives him such rights, and there is no equity to which he can appeal which entitles him to their possession. (*Lord Buckmaster.*) **TARINI CHARAN SARKAR v. BISHUN CHAND.** (1918) 23 M. L. T. 147 = 7 L. W. 315 = 27 C. L. J. 303 = 22 C. W. N. 505 = (1918) M. W. N. 295 = 4 P. L. W. 249 = 16 A. L. J. 271 = 20 Bom. L. R. 553 = 44 I. C. 304 = 34 M. L. J. 361 (368).

—*Reversal of decree—Non-appealing party's right to benefit of.*

In a suit to recover the balance due on account of dower, the plaintiffs were the widow herself, *K*, a purchaser from her of one-fourth part of the amount alleged to be due to her, and *S*, a purchaser of another fourth part of the widow's dain mohur.

The first Court dismissed the entire suit on the ground of limitation. An appeal was preferred from its decree in respect of a 12 annas share of the sum claimed on account of dain mohur, exclusive of the one-fourth share of *K*, who did not join in the appeal. The High Court reversed the decree below, and remanded the suit for ascertaining the amount of the dower. On remand, the trial Court decreed the claim in favour of all the plaintiffs, including *K*.

Held that *K* not having appealed from the first decision of the trial Court dismissing the suit on the ground of limitation, he was not entitled to the benefit of the reversal

C. P. CODE (ACT V OF 1908), O. 41, R. 33—(Contd.)

of that decision by the High Court, and the trial Judge ought not to have re-opened his first decision as regards *K* and his share (141). (*Sir Barnes Peacock.*) **MUSSUMAT MULLEEKA v. MUSSUMAT JUMEELA**

(1872) Sup. I.A. 135 = 11 B.L.R. 375 = 5 W.R. 23 = 3 Sar. 220 = III O.G. Sup. Vol. 82 = 2 Suth. 766.

—**O. 43, R. 1—Execution of decree—Attachment and sale of property in—Order of—Appeal from.**

An order for attachment and sale in execution of a decree is an order "of the same nature" within the meaning of S. 588, cl. (7) of C.P. Code of 1877, as an order made in the course of a suit for attachment of the debtor's property made appealable by cl. (r) of S. 588 of that Code. The nature of the order in both cases is an order for attachment of property. Therefore, an order for attachment and sale of property in execution of a decree is an appealable order within S. 588 of C. P. Code of 1877 (170). (*Sir Barnes Peacock.*) **PULUKDHARI ROY v. RAJAH RADHA PERSHAD SINGH.**

(1881) 8 I.A. 165 = 8 C. 28 (31) = 4 Sar. 279.

—**O. 44, R. 1—Leave to appeal in forma pauperis—Application for—Time for making—Time of first lodging appeal—Filing of application subsequently.**

Quære: whether, under the Orders and Rules of the Civil Procedure Code, or otherwise, an application for leave to appeal in *forma pauperis* must be made, when first the appeal is lodged or not at all. (*Lord Sumner.*) **SABITRI THAKURAIN v. SAVI.**

(1921) 48 I.A. 76 = 48 C. 481 (486) = (1921) M.W.N. 159 = 33 C.L.J. 307 = 19 A.L.J. 281 = 23 Bom. L.R. 681 = 14 L.W. 362 = 60 I. C. 274 = 40 M.L.J. 308.

—Leave to continue appeal in *forma pauperis*—Grant of—Appeal presented as ordinary appeal—Rejection of, on ground of failure to furnish security for costs—Liability for—Grant of leave in case of. See C. P. CODE OF 1908, O. 41, R. 10—LETTERS PATENT APPEALS.

(1921) 48 I.A. 76 = 48 C. 481.

—**O. 45, R. 3—See C. P. CODE OF 1908, S. 110 AND S. 109.**

—**O. 45, R. 7—Security for costs of appeal—Time for furnishing—Extension of—Jurisdiction of Court below—Discretion.**

At the hearing of the appeal in this case a preliminary objection was taken before their Lordships on behalf of the respondent that the Court below had wrongly and without jurisdiction extended the time limited by law for deposit of security for costs by the appellant. The Court below acted under S. 602 of C.P. Code of 1877 and I.L.R. 2 Cal. 128.

Their Lordships overruled the preliminary objection, observing: Their Lordships concur in the view which was taken by the Full Bench of the Court in Calcutta, that the words in S. 602 of C.P. Code of 1877 relating to the giving of security are directory only; and, although not to be departed from without cogent reason, in this particular case it seems to them that the Court below has exercised a right discretion (9-10). (*Sir Robert P. Collier.*) **BURJORE AND BHAWANI PERSHAD v. MUSSUMAT BHAGANA.**

(1883) 11 I.A. 7 = 10 C. 557 (561-2) = 4 Sar. 478 = R. and J.'s No. 76 (Oudh).

—**O. 45, R. 8—Admission of appeal—Notice to respondent of—Omission to give—Re-hearing of appeal on ground of—Respondent in fact aware of admission of appeal.**

Omission to give to the respondents notice of the admission of an appeal to His Majesty in Council is not a ground for re-hearing the appeal, where the respondents were in fact aware of the admission of the appeal. **HARDIT SINGH v. GURUMUKH SINGH.**

(1919) 59 I.C. 7 = 4 P.W.R. 1921.

C. P. CODE (ACT V OF 1908)—(Contd.)

—O. 45, R. 13 (2) (b) and (c)—Execution of decree—Allowing or staying of—Jurisdiction as to. *See* PRIVY COUNCIL—APPEAL—EXECUTION OF DECREE UNDER.

—O. 45, R. 13 (2) (d)—Protection of property in dispute—Order for—Jurisdiction of High Court and of Privy Council as to. *See* PRIVY COUNCIL—APPEAL—PROTECTION OF PROPERTY IN DISPUTE PENDING.

—Receiver of property subject of appeal—Appointment of—High Court—Jurisdiction of—Appeal admitted by special leave. *See* PRIVY COUNCIL—APPEAL—RECEIVER OF PROPERTY SUBJECT OF. 10 C. L. J. 326.

—Stay of proceedings pending appeal. *See* PRIVY COUNCIL—APPEAL—STAY OF PROCEEDINGS PENDING.

—O. 45, Rr. 15 and 16—Orders in Council. *See* PRIVY COUNCIL—APPEAL—DECREE IN.

—O. 47, R. 1—Compromise—Decree on foot of—Compromise falling through ultimately—Review of decree on ground of—Provision in decree for review on that ground. *See* COMPROMISE—DECREE ON FOOT OF—RE-OPENING OF. (1871) 6 B.L.R. 648 = 15 W.R. 23 P.C.

—Exhaustive of grounds on which review now permitted—Practice under former and different enactments—Reference to, not permissible.

The Code contemplates procedure by way of review by the Court which has already given judgment as being different from that by way of appeal to a Court of Appeal. The three cases in which alone mere review is permitted are those of new material overlooked by excusable misfortune, mistake or error apparent on the face of the record, or "any other sufficient cause" (150-1). Rule 1 of O. 47 of C.P. Code of 1908 must be read as in itself definitive of the limits within which review is to-day permitted, and reference to practice under former and different enactments is misleading (152). (*Viscount Haldane*.) CHHAJJU RAM v. NEKI. (1922) 49 I.A. 144 = 3 L. 127 (133) = 30 M.L.T. 295 = 26 C.W.N. 697 = 16 L.W. 37 = 17 P.W.R. 1922 = 24 Bom. L.R. 1238 = 36 C.L.J. 459 = 3 Pat. L.T. 435 = A.I.R. 1922 P.C. 112 = 4 U.P.L.R. (P.C.) 99 = 72 I.C. 566 = 43 M.L.J. 332.

—Execution sale—Setting aside of—Application under O. 21, R. 90 for—Rejection of—Review of order of. *See* C. P. CODE OF 1908, O. 21, R. 90—APPLICATION UNDER—REJECTION OF—REVIEW OF ORDER OF. (1876) 3 I.A. 230 (236).

—Minor—Decree affecting—Review of—Application for, made ten years after on minor attaining majority—Grant of. *See* HINDU LAW—MINOR—COMPROMISE DECREE AFFECTING—SETTING ASIDE OF, ON REVIEW. (1874) 22 W.R. 290 = 3 Suth. 41 (43).

—Prior legislation—History of.

The Bengal Regulation XXVI of 1814, by S. 2, confers on the Courts there mentioned a power of review analogous to that under consideration, excepting that the expression "otherwise requisite for the ends of justice" is added, an expression which may have been regarded as enlarging the scope of the word "sufficient," used as it was in much the same way as in the present Code of 1908. The expression "requisite for the ends of justice" is again introduced in S. 8 of C.P. Code of 1859. But in the Code of 1877 the language is varied, and the law is enacted in substantially the more restricted words in which it is enacted in the Code of 1908. (*Viscount Haldane*.) CHHAJJU RAM v. NEKI. (1922) 49 I.A. 144 (151) = 3 L. 127 (134) = 30 M.L.T. 295 = 26 C.W.N. 697 = 16 L.W. 37 = 17 P.W.R. 1922 = 41 P.L.R. 1922 = 24 Bom. L.R. 1238 = 3 Pat. L.T. 435 = A.I.R. 1922 P.C. 112 = 4 U.P.L.R. (P.C.) 99 = 72 I.C. 566 = 43 M.L.J. 332.

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—Review—Appeal—Objects of—Distinction.

A review is perfectly distinct from an appeal. The primary intention of granting a review is a reconsideration of the same subject by the same Judge, as contra-distinguished to an appeal, which is a hearing before another Tribunal (304). (*Dr. Lushington*). MAHARAJAH MOHESHUR SING v. BENGAL GOVERNMENT.

(1859) 7 M.I.A. 283 = 3 W. R. 45 = 1 Suth. 325 = 1 Sar. 645.

—Review—Appeal—Rights of—Co-existent.

The right, if it exists, of reviewing an order may co-exist with the liberty to appeal (226). (*Sir James W. Colvile*). REASUT HOSSEIN v. HAJEE ABDOLAH.

(1876) 3 I.A. 221 = 2 C. 131 (137) = 26 W.R. 50 = 3 Sar. 641.

—Review—Powers of—Extent and limits of—England and India—Distinction.

In England it is only under strictly limited circumstances that an application for a review can be entertained. In India, however, provision has for long past been made by legislation for review in addition to appeal. But as the right is the creation of Indian Statute law, it is necessary to see what such statutory law really allows (149). That the power given by the Indian Code is different from the very restricted power which exists in England appears plain from the decision in *Charles Bright & Co. v. Sellar*, where the Court of Appeal discussed the history of the procedure in England and explained its limits (151). (*Viscount Haldane*). CHHAJJU RAM v. NEKI.

(1922) 49 I.A. 144 = 3 L. 127 (132) = 30 M.L.T. 295 = 26 C. W. N. 697 = 16 L. W. 37 = 17 P.W.R. 1922 = 41 P.L.R. 1922 = 24 Bom. L.R. 1238 = 36 C.L.J. 459 = 3 Pat. L.T. 435 = A.I.R. 1922 P.C. 112 = 4 U.P.L.R. (P.C.) 99 = 72 I.C. 566 = 43 M. L. J. 332.

—Review—Right of, in India—Creation of statute law—Limits of such right.

In India the right of review is the creation of Statute law, and must be exercised within the limits allowed by it (149). (*Viscount Haldane*). CHHAJJU RAM v. NEKI.

(1922) 49 I.A. 144 = 3 L. 127 (132) = 30 M.L.T. 295 = 26 C. W. N. 697 = 16 L.W. 37 = 17 P. W. R. 1922 = 41 P.L.R. 1922 = 24 Bom. L. R. 1238 = 36 C.L.J. 459 = 3 Pat. L. T. 435 = A. I. R. 1922 P.C. 112 = 4 U.P.L.R. (P. C.) 99 = 72 I. C. 566 = 43 M.L.J. 332.

—Review application—Delay in disposal of, till after Full Bench decision—Grant of review on ground thereof—Propriety.

It was argued that the suit having been finally decided by the High Court in the appellant's favour, it ought not to have been admitted to a review, in order to give the defendants the benefit of what had been decided in other cases after such final judgment had passed. Their Lordships, however, observe that the application for a review seems to have been regularly made within 90 days of the date of the decree sought to be reviewed, pursuant to S. 377 of C. P. Code of 1859; and this being so, their Lordships conceive that it was competent to the High Court to delay, if they did delay, their final decision on that application until the law on which so much doubt existed had been settled by the judgments of the Full Bench of the High Court (176). (*Sir James Colvile*.) HURRYHUR MOOK HOPODHYA v. MADUB CHUNDER BABOO.

(1871) 14 M.I.A. 152 = 20 W.R. P. C. 459 = 8 B.L.R. 566 = 2 Suth. 484 = 2 Sar. 713.

—Review application—Grounds of—Enlargement of, on oral application of party—Jurisdiction of court hearing review as regards.

C. P. CODE (ACT V OF 1908), O. 47, R. 1—(Contd.)

The question still remains, whether it was not competent to the Judges, by whom the order allowing or rejecting the application for review was to be made, to enlarge the writ ten grounds for review on the oral application of the party, if satisfied that there was a proper case on the merits for so doing. There seems to be nothing in the Code of Procedure which expressly prohibits them from so doing (498-9). (*Sir James W. Colville.*) **BHUGWANDEEN DOOBEY v. MYNA BAE.** (1867) 11 M. I. A. 487 = 9 W. R. P. C. 23 = 2 Suth. 124 = 2 Sar. 327.

—Second application for review—Maintainability.

Mr. Y, the then Judicial Commissioner of Oudh, set aside the judgment of a competent Court which by law was final, and without appeal, purporting to act on an erroneous interpretation of S. 622 of C.P.C. of 1877. Mr. Y left the Court shortly after that decision, and his successor, Mr. T. reversed his decision on review, being of opinion that the error of the District Judge, whose judgment was reversed by Mr. Y assuming him to have been in error, did not come within the terms of S. 622. Fifteen months after that judgment Mr. Y resumed charge of the Court, and an application was made to him by the plaintiff to reverse Mr. T's proceedings. Mr. Y was of opinion that those proceedings could neither be reversed by him under S. 622, nor reviewed under S. 629, but he considered that Mr. T's order "was passed *per incuriam*, and was one which the Court would not have made if it had been duly informed." He therefore cancelled it under what he considered to be an inherent power possessed by the Court, and restored his own original order under S. 622.

Held that Mr. Y had no jurisdiction to pronounce the order reverting Mr. T's. The application to Mr. Y to reverse Mr. T's order was incompetent as being a second application for review, and it would have been out of time if it had been regular in other respects (106). (*Lord Macnaghten.*) **MUHAMMAD YUSUF KHAN v. ABDOL RAHMAN KHAN.** (1889) 16 I. A. 104 = 16 C. 749 (751-2) = 5 Sar. 362.

—O. 47, R. (1) (c)—Event subsequent to decree—Review on ground of—Permissibility—Decree right when it was made.

The ground of amendment of a decree under O. 47, R. 1 of C. P. C. of 1908 must at any rate be something which existed at the date of the decree. The rule does not authorise the review of a decree which was right when it was made on the ground of the happening of some subsequent event (205). (*Lord Davey.*) **RAJAH KOTAGIRI VENKATA SUBBAMMA RAO v. RAJA VELLANKI VENKATARAMA RAO.** 7 Sar. 678 = (1900) 27 I. A. 197 = 24 M. 1 (10) = 4 C. W. N. 725 = 2 Bom. L. R. 771 = 10 M. L. J. 221.

—Evidence new—Discovery of—Application for review presented after time on ground of—Maintainability—Conditions—Bengal Civil Procedure Reg. XXVI of 1814—Effect.

There may be cases in which an application for review may be presented, under Bengal Regulation XXVI of 1814, after the period allowed therefor, on the ground of the discovery of fresh evidence. But for granting a review in such cases, the causes accounting for the delay, and intended to justify the grant of a review, ought to be of grave importance (308). (*Dr. Lushington.*) **MAHARAJAH MOHESHUR SING v. BENGAL GOVERNMENT.** (1859) 7 M. I. A. 283 = 3 W. R. 45 = 1 Suth. 325 = 1 Sar. 645.

—Evidence new—Review on ground of—Permissibility—No satisfactory explanation for non-production of such evidence at trial.

In a case in which the appellant applied the High Court for a review of its judgment on the basis of certain additional documents not produced at the trial, and that application was rejected, *held*, on further appeal to the Privy

C. P. CODE (ACT V OF 1908), O. 47, R. 1—(Contd.)

Council, that the application for the reception of new evidence was rightly rejected.

The application itself was made after a final judgment in a suit which had already lasted for a period of over three years. It is enough to say that no sufficient reason appears from the affidavits themselves to show why the proposed new evidence was not timeously submitted. (*Lord Shaw.*) **SHIVALINGAPPA BASAPPA SHINTEE v. REVAPPA.**

(1915) 19 C. W. N. 762 = (1915) M. W. N. 787 = 29 I. C. 717.

—Evidence new and important—Discovery of—Review on ground of—Application for—Proof required in case of.

The Code of Civil Procedure permits applications for review on the ground of discovery of new and important evidence, but it enacts very strict conditions so as to prevent litigants lying on their oars when they ought to be looking for evidence—it enjoins the judge to require the facts as to the absence of negligence to be strictly proved; and it makes the judge who tried the case final on such applications (120). (*Lord Robertson.*) **KESSOWJI ISSUR v. GREAT INDIAN PENINSULA RY. & CO.** (1907) 34 I. A. 115 =

31 B. 381 (388) = 6 C. L. J. 5 = 11 C. W. N. 721 = 2 M. L. T. 435 = 9 Bom. L. R. 671 = 4 A. L. J. 461 = 17 M. L. J. 347.

—Evidence which could have been, but was not, produced at trial—Review on ground of.

In a suit brought by a passenger against a Railway Co. for damages for personal injuries alleged to have been sustained through their negligence, the trial judge believed the plaintiff's evidence that the injuries sustained by the plaintiff were serious, and that he was in consequence long disabled from business, and awarded him damages. 14 days after his judgment, the Railway Co. applied for a review thereof, on the ground that, since the trial, there had come to their knowledge new and important evidence which was, in short, that one of the employers of the plaintiff said that the plaintiff had lost the employment of the informant's firm owing to causes unconnected with the accident, whereas in evidence the plaintiff had ascribed that loss to the accident. That was an information which they could have easily obtained during the trial if they had desired to inform themselves of it.

Held that a review could not be allowed in such a case (121).

It would be *pessimi exempli* if provisions for review were perverted to supply such omissions (121). (*Lord Robertson.*) **KESSOWJI ISSUR v. GREAT INDIAN PENINSULA RY. CO.** (1907) 34 I. A. 115 = 31 B. 381 (388-9) = 6 C. L. J. 5 = 11 C. W. N. 721 = 2 M. L. T. 435 = 9 Bom. L. R. 671 = 4 A. L. J. 461 = 17 M. L. J. 347.

—Evidence which ought to have been produced in first instance—Review for purpose of admitting.

In this case the Sudder Court on appeal decreed to the plaintiff-respondent a portion of the suit property on the ground that her claim as to that was not barred by limitation, and dismissed the suit as regards the remainder on the ground that the claim as to that was barred by limitation. After the decree had been pronounced, the defendants-appellants petitioned to have the cause heard again, and to be allowed to put in evidence other deeds to prove that the plaintiff's claim as to the portion decreed to her was also barred. The Court, however, refused to re-open the case.

Held that that Court acted properly in refusing to re-open the case for the purpose of admitting evidence which ought to have been produced in the first instance (12-3). (*Mr. Justice Erskine.*) **SHEIKH IMDAD ALI v. MUSSUMAT KOOTBY BEGUM.** (1842) 3 M. I. A. 1 =

6 W. R. 24 P. C. = 1 Suth. 124 = 1 Sar. 227.

C. P. CODE (ACT V OF 1908), O. 47, R. 1—(Contd.)

—*Finding of fact without evidence to support it—Review on ground of.*

In support of an application for review of judgment there was no allegation that the applicant had discovered any new matter or evidence which was not within his knowledge, or could not be adduced by him at the time the decree was passed. Nevertheless, the judge granted the review, and the only other good and sufficient reason appearing in his judgment was that the Court had found a fact without any evidence to warrant it. But even that was not correct.

Held, that the Judge was wrong in granting the review (67-8). (*Sir Barnes Peacock*.) LUCHMUN SINGH v. SHUMSHERE SINGH. (1874) 2 I.A. 58 =

14 B. L. R. 373 = 3 Sar. 437 = 3 Suth. 67 = R. & J's No. 33 (Oudh).

—*Law—Incorrect exposition of—Review on ground of.*

Where one Division Bench of the Chief Court of the Punjab allowed a review of a judgment of another Division Bench in an appeal on the ground that the judgment of the latter had "proceeded upon an incorrect exposition of the law," *held* that the Division Bench which heard the review had no jurisdiction to allow it on the ground on which they did (152). (*Viscount Haldane*.) CHHAJJU RAM v. NEKI. (1922) 49 I.A. 144 = 3 L. 127 (135) = 30 M.L.T. 295 =

26 C. W. N. 697 = 16 L.W. 37 = 17 P.W.R. 1922 = 41 P.L.R. 1922 = 24 Bom. L. R. 1238 = 36 C. L. J. 459 = 3 Pat. L.T. 435 = A. I. R. 1922 P.C. 112 = 4 U.P.L.R. (P. C.) 99 = 72 I. C. 566 = 43 M.L.J. 332.

—*New case in review—Raising of—Permissibility. See MALICIOUS PROSECUTION—SUIT FOR—REVIEW.*

(1909) 14 C. W. N. 86 (96).

—*"Other sufficient cause"—Meaning—Ejusdem generis rule—Applicability.*

Quære: whether the words "other sufficient cause" in O. 47, R. 1 of C.P.C. of 1908 should be confined to reasons strictly *ejusdem generis* with those enumerated (205). (*Lord Davey*.) RAJAH KOTAGIRI VENKATA SUBBAMMA RAO v. RAJAH VELLANKI VENKATRAMA RAO. (1900) 27 I.A. 197 = 24 M. 1 (10) = 4 C. W. N. 725 = 2 Bom. L. R. 771 = 7 Sar. 678 = 10 M. L. J. 221.

—*The words "any other sufficient reason," in O. 47, R. 1, mean a reason sufficient on grounds at least analogous to those specified immediately previously (152). (Viscount Haldane.) CHHAJJU RAM v. NEKI.*

(1922) 49 I.A. 144 = 3 L. 127 (135) = 30 M.L.T. 295 = 26 C. W. N. 697 = 16 L.W. 37 = 17 P.W.R. 1922 = 41 P.L.R. 1922 = 24 Bom. L.R. 1238 = 36 C.L.J. 459 = 3 Pat. L.T. 435 = A.I.R. 1922 P.C. 112 = 4 U.P.L.R. (P. C.) 99 = 72 I. C. 566 = 43 M. L. J. 332.

—*Point not taken at original hearing—Raising of, in review—Permissibility of—Quære. (Lord Phillimore.) JIJIBOY N. SURTY v. T. S. CHETTYAR.*

(1928) 55 I. A. 161 = 6 R. 302 = 5 O.W.N. 479 = 47 C.L.J. 510 = 30 Bom.L.R. 842 = 26 A.L.J. 657 = 32 C. W. N. 845 = 109 I.C. 1 = 28 L.W. 207 = A.I.R. (1928) P.C. 103 = 54 M.L.J. 626.

—*O. 47, R. 4—Reasons for granting review—Record of—Not a condition precedent—Omission to record—Special leave to appeal to P. C. on ground of—Not granted.*

A Judge granting a review should put his reasons on record as required by O. 47, R. 4 of the Code. But his failure to do so is not a ground for giving special leave to appeal from the order admitting the review and from the decree passed in review.

The provision in O. 47, R. 4 is rather a direction to the Judge how to act when he has decided to grant the application than a condition of granting it. (*Lord Hobhouse*.)

C. P. CODE (ACT V OF 1908), O. 47, R. 4—(Contd.)

THAKUR SHANKAR BUKSH v. BALWANT SINGH.

(1899) 27 I.A. 79 = 27 C. 333 = 4 C.W.N. 208 = 2 Bom. L. R. 596 = 7 Sar. 686.

—*Review—Grant of—Jurisdiction as regards—Absence of—Irregular exercise of—Distinction.*

Upon an appeal, where an appeal lies, it may be open to the Court of appeal to say that the Judge below ought not to have admitted a review; but that is a very different thing from ruling that he has acted wholly without jurisdiction. In the first case the appellate court reverses the order because the judge has erred in the mode in which he has exercised a judicial discretion; and in the latter case it quashes the order because there was no discretion at all to be exercised (*Sir James W. Colville*.) REASUT HOSSEIN v. HADJEE ABDOOLLAH. (1876) 3 I.A. 221 (229) =

2 C. 131 (141) = 26 W.R. 50 = 3 Sar. 641.

—*Review—Grant of—Jurisdictions—Conditions—C. P. C. of 1859, Ss. 376, 378—Law under.*

Looking to the extreme generality of the terms used in these sections (Ss. 376 and 378 of C.P.C. of 1859), particularly to these terms "other good and sufficient reason" and "necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice," their Lordships are not prepared to say that there is an absolute defect of jurisdiction whenever the parties have failed to show that there was either positive error in law, or new evidence to be brought forward which could not be brought forward on the first hearing (229.) (*Sir James W. Colville*.) REASUT HOSSEIN v. HADJEE ABDOOLLAH. (1876) 3 I.A. 221 = 2 C. 131 (140) = 26 W.R. 50 = 3 Sar. 641.

—*Review—Grant of—Validity—Conditions—Bengal Civil Procedure Regulation XXVI of 1814—S. 4, Cls. 2 and 3—Effect.*

Under clauses 2 and 3 of S. 4 of Ben. Reg. XXVI of 1814, whenever a petition for review of any judgment of the Sudder Court is presented after 3 months, it is indispensable that the party preferring such petition should, in the first instance, account for the delay. The delay being satisfactorily accounted for, the review is to be granted, if, upon a consideration of the reasons stated, the circumstances of the case shall appear in justice to require it. The reasons to be considered are those stated in the petition for a review, and not of other reasons which might be suggested, but are not to be found in the petition. The Sudder Court must also record on their proceedings the grounds upon which the review is granted (307). (*Dr. Lushington*.) MAHARAJAH MOHESHUR SINGH v. BENGAL GOVERNMENT.

(1859) 7 M.I.A. 283 = 3 W.R. 45 = 1 Suth. 325 = 1 Sar. 645.

—*Review—Grant of—Validity—Delay of 2 years in applying for review—Delay of 2 years more before re-hearing by new set of Judges—Delay to suit convenience of Government applicant.*

In a case in which a decree was pronounced against a Collector on 19-12-1849, he applied for a review of the decree in October 1851. That review was granted as a matter of course, without argument or reasons assigned by the Court. Nothing was done upon it till April 1853, when all the Judges of the Court who had heard the case argued had been changed.

Held, that it was impossible to view, without jealousy, such a proceeding as that (37).

The Government, which appoints the Judges, and removes them at pleasure, had raised a question of great general importance, which had been decided against it. Two years elapse before any application is made to the Court for a review of the judgment, and two more years elapse before the case is brought on for re-hearing before a new set of Judges (37). (*Lord Kingsdown*.) SUMBHOOLOLL GIRDHUR,

C. P. CODE (ACT V OF 1908), O. 47, R. 4—(Contd.)

LOLL v. COLLECTOR OF SURAT, (1859) 8 M.I.A. 1 = 4 W.R. 55 = 1 Suth. 387 = 1 Sar. 713.

—Review—Grant of—Validity—Delay in making application—Order granting review not stating that sufficient cause had been shown for—Effect.

S. 377 of C. P. C. of 1859 enacts that the application for a review shall be made within 90 days from the date of the decree, unless the party preferring the same shall be able to shew just and sufficient cause, to the satisfaction of the court, for not having preferred such application within the limited period.

In this case, the application for review was not made within the 90 days allowed, and yet the judge admitted the review. He, however, did not state that there was, or that it had been shown to his satisfaction that there was, sufficient cause for not having made the application for the review within the 90 days.

Held that the review itself and all the subsequent proceedings under it were invalid (68-9). (Sir Barnes Peacock). LUCHMUN SINGH v. SHUMSHERE SINGH.

(1874) 2 I. A. 58 = 14 B. L. R. 373 = 3 Sar. 437 = 3 Suth. 67 = R. & J's No. 33 (Oudh).

—Review—Judges hearing application for—Order leaving to discretion of Judge who is to review decision the extent to which the review is to be carried—Jurisdiction to make.

Though the Judges, by whom the order allowing or rejecting an application for review is to be made, may make a final order, granting or rejecting the application *in toto*, or in part. But they are not incompetent to make a qualified order, leaving in the court which is to review the decision a discretion as to the extent to which the review should be carried (498-9). (Sir James W. Colville). BHUGWANDEEN DOOBEY v. MYNA BAE. (1867) 11 M. I. A. 487 = 9 W. R. P. C. 23 = 2 Suth. 124 = 2 Sar. 327.

—O. 47, R. 4 (1)—Review—Refusal to grant—Reasons given by Judge at time of—Alteration or modification of original judgment or decree founded upon it by—Not allowed.

What was said by the learned Judge on those two occasions when a review was applied for and refused, was not a decision to that effect, nor an alteration of the judgment which had already been given. A mere refusal to grant a review of judgment cannot alter the judgment sought to be reviewed or the decree founded upon it, and nothing which the Judge says with reference to his refusal to grant the review can be binding so as to alter such judgment or decree (908-9).

RAMHURRY MONDUL v. MOTHOR MOHUN MONDUL. (1873) 2 Suth. 906 = 20 W. R. 450.

—O. 47, R. 4 (2)—Proviso (a)—Review—Order granting—Notice prior to opposite party of—Necessity.

Under the Code of Civil Procedure no order of review can be made without previous notice to the person in possession of the decree which is to be reviewed. (Lord Macnaghten). ZAHUR-UD-DIN v. NUR-UD-DIN. (1903) 14 M. L. J. 7.

—O. 47, R. 5—Review—Hearing of—Judge who decided the case—Judge different—Rule—Exception.

There might be cases in which a review might take place before a different Judge from the one who heard the case originally; because death or some other unexpected and unavoidable cause might prevent the Judge who made the decision from reviewing it; but such exceptions are allowable only *ex necessitate*. In all practicable cases the same Judge ought to review (304). (Dr. Lushington.) MAHARAJA MOHESHUR SINGH v. BENGAL GOVERNMENT.

(1859) 7 M. I. A. 283 = 3 W.R. 45 = 1 Suth. 325 = 1 Sar. 645.

—Review of judgment of Division Bench of High Court—Application for—Court hearing—Constitution of—

C. P. CODE (ACT V OF 1908), O. 47, R. 5—(Contd.)

One of Judges of Division Bench precluded by absence from sitting—Constitution in case of.

Where one of the Judges of a Division Bench of two Judges who decided an appeal is precluded by absence from hearing an application for review of that judgment, the application must be heard by the other learned Judge alone who was a party to the original hearing. Where in such a case the application for review was heard and allowed by a Division Bench composed of the latter and another judge who was not a party to the original hearing, held that that circumstance would, under O. 47, R. 5 of C. P. C. of 1908, in itself be a fatal objection to the judgment in review. (Viscount Haldane). CHHAJJU RAM v. NAKI.

(1922) 49 I. A. 144 (150) = 3 L. 127 (133) = 30 M. L. T. 295 = 26 C. W. N. 697 =

16 L. W. 37 = 17 P. W. R. 1922 = 41 P. L. R. 1922 = 24 Bom. L. R. 1238 = 36 C. L. J. 459 = 3 Pat. L. T. 435 = A. I. R. 1922 P. C. 112 = 4 U. P. L. R. (P. C.) 99 = 72 I. C. 566 = 43 M. L. J. 332.

—Sudder Court—Decree of—Review by High Court of—Jurisdiction.

In a case in which the Sudder Court passed a decree in appeal based on a compromise, an application for review of that decision was made to the High Court after it had succeeded the Sudder Court.

Held that the High Court had power to re-hear, as the Sudder Court, if it had existed, might itself have done (43). UNNODA DABEE v. MARIA LOUISA STEVENSON.

(1874) 3 Suth. 41 = 22 W. R. 290.

—Sch. II—See ALSO UNDER ARBITRATION.

—Sch. II—Sections of—Construction—English law—Provisions of relating to arbitration—Analogies drawn from—Applicability.

The construction of Ss. 508, 514 and 521 of the Code of Civil Procedure, 1882, cannot be very much aided by analogies drawn from sections of the English Common Law Procedure Act dealing with arbitrations, because a specific rule has been laid down in the Code for dealing with arbitrations, probably grounded on reasons of public policy (57). (Lord Morris.) RAJA HAR NARAIN SINGH v. CHAUDHRAIN BHAGWANT KUAR. (1891) 18 I. A. 55 = 13 A. 300 = 6 Sar. 14.

—Sch. II—Three heads of, dealt with by C. P. C.—Procedure in cases of.

The chapter in the Code of Civil Procedure of 1882 on Reference to Arbitration (Chapter 37) deals with arbitrations under three heads:—

1. Where the parties to a litigation desire to refer to arbitration any matter in difference between them in the suit. In that case all proceedings from first to last are under the supervision of the court.

2. Where parties without having recourse to litigation agree to refer their differences to arbitration, and it is desired that the agreement of reference should have the sanction of the court. In that case all further proceedings are under the supervision of the court.

3. Where the agreement of reference is made and the arbitration itself takes place without the intervention of the court, and the assistance of the court is only sought in order to give effect to the award.

Full directions are to be found in the Code as to the course of procedure in cases falling under head No. 1, and large powers are given to the court with the view of making the award in such cases complete, operative, and final. In cases falling under heads 2 and 3, the provisions relating to cases under head No. 1, are to be observed so far as applicable. But there is this difference. In cases falling under head No. 1, the agreement to refer and the application to the court founded upon it must have the concurrence of all

C. P. CODE (ACT V OF 1908), Schedule II—(Contd.)

parties concerned, and the actual reference is the order of the court. So that no question can arise as to the regularity of the proceedings up to that point. In cases falling under heads 2 & 3, proceedings described as a suit and registered as such must be taken in order to bring the matter—the agreement to refer or the award, as the case may be—under the cognizance of the court. That is or may be a litigious proceeding—cause may be shown against the application—and it would seem that the order made thereon is a decree within the meaning of that expression as defined in the C. P. C. (*Lord Macnaghten*). *GHULAM JILANI v. MUHAMMAD HUSSAN*.

(1901) 29 I. A. 51 (56-8) = 29 C. 167 (182-3) =
6 C. W. N. 226 = 4 Bom. L. R. 161 =
25 P. R. 1902 = 8 Sar. 154 = 12 M. L. J. 77.

—Para. 1—Application to court under—Signature of parties in—Necessity.

S. 1 of Sch. II to C. P. C. of 1908, which provides that, when the parties to a suit have agreed that the matter in difference shall be referred to arbitration, they may apply in writing to the Court for an order of reference, does not require that the writing should of necessity be signed (5). (*Viscount Haldane*.) *THAKUR UMED SINGH v. SOBHAG MAL DHADHA*. (1915) 43 I. A. 1 = 43 C. 290 (299) = 32 I. C. 161 = (1916) 1 M. W. N. 67 = 14 A. L. J. 97 = 3 L. W. 145 = 19 M. L. T. 108 = 23 C. L. J. 130 = 18 Bom. L. R. 308 = 20 C. W. N. 137 = 30 M. L. J. 67.

—All the parties to a suit upon a mortgage entered into an agreement to refer the questions in dispute to arbitration. One of the defendants was a minor and a guardian *ad litem* had been appointed for him. The agreement was signed by the parties each with his own hand, excepting in the case of the minor defendant, on whose behalf it was signed by his guardian *ad litem*. An application to the Court for an order of reference was filed. The parties appeared before the trial Judge and produced the agreement. The guardian *ad litem* was present in court and was a party to the application. The trial Judge thereupon made an order of reference, and the arbitrators made an award.

Held that the order of reference was not bad because the application to the Court for reference to arbitration was not signed by the guardian *ad litem* (5). (*Viscount Haldane*.) *THAKUR UMED SINGH v. SOBHAG MAL DHADHA*.

(1915) 43 I. A. 1 = 43 C. 290 (299) = 20 C. W. N. 137 =
(1916) 1 M. W. N. 67 = 14 A. L. J. 97 = 3 L. W. 145 =
19 M. L. T. 108 = 23 C. L. J. 130 = 18 Bom. L. R. 308 =
32 I. C. 161 = 30 M. L. J. 67.

—Para. 3—Order of reference under—What amounts to an.

Where the Court made an order referring all matters in difference *in the suit between the parties to the suit* to the final decision of the arbitrators named in the agreement to refer, in terms of that agreement, with consequential declarations applicable to such a reference *held* that the order was one made in pursuance of paras. 1 & 2 of Sch. II to C. P. C. of 1908, and in the exercise of a power thereby given to the court to refer to arbitration matters in difference in a suit defined by itself in the order of reference (7). (*Lord Blanesburgh*.) *RAM PROTAP CHAMRIA v. DURGA PROSAD CHAMRIA*.

(1925) 53 I. A. 1 = 53 C. 258 =
24 A. L. J. 13 = 43 C. L. J. 14 = (1926) M. W. N. 96 =
27 Punj. L. R. 35 = 3 Pat. L. R. 330 = 92 I. C. 633 =
28 Bom. L. R. 217 = A. I. R. 1925 P. C. 293 =
3 O. W. N. 127 = 49 M. L. J. 812 (818).

—Order of reference under—Terms of—Strict compliance with—Duty of arbitrators—Award not in accordance with terms—Invalidity of.

C. P. CODE (ACT V OF 1908), Schedule II—(Contd.)

Where an order of reference is made under paras. 1 and 2 of Sch. II to C. P. C. of 1908 it is incumbent upon arbitrators acting under such an order strictly to comply with its terms. The Court does not thereby part with its duty to supervise the proceedings of the arbitrators acting under the order. An award made otherwise than in accordance with the authority by the order conferred upon them is an award which is "otherwise invalid" and which may accordingly be set aside by the Court under para. 15 of the same Schedule (7-8). (*Lord Blanesburgh*.) *RAM PROTAP CHAMRIA v. DURGA PROSAD CHAMRIA*.

(1925) 53 I. A. 1 =
53 C. 258 = 24 A. L. J. 13 = 43 C. L. J. 14 =
(1926) M. W. N. 96 = 27 Punj. L. R. 35 =
3 Pat. L. R. 330 = 92 I. C. 633 = 28 Bom. L. R. 217 =
A. I. R. 1925 P. C. 293 = 3 O. W. N. 127 =
49 M. L. J. 812 (818).

—Order of reference under—Validity—Matter not in difference in suit and concerning person not party thereto—Reference of.

Where parties to a pending suit agree to refer all matters in dispute between them to arbitrators and make an application to the court to refer the said matters to the arbitrators, the Court has, on such an application, no power to refer to arbitration any questions between the parties to the suit other than those in question in the suit or any questions in which was concerned any one not a party to the suit (7). (*Lord Blanesburgh*.) *RAM PROTAP CHAMRIA v. DURGA PROSAD CHAMRIA*. (1925) 53 I. A. 1 = 53 C. 258 = 24 A. L. J. 13 = 43 C. L. J. 14 = (1926) M. W. N. 96 = 27 Punj. L. R. 35 = 3 Pat. L. R. 330 = 92 I. C. 633 = 28 Bom. L. R. 217 = A. I. R. 1925 P. C. 293 = 3 O. W. N. 127 = 49 M. L. J. 812 (818).

—Time for making of award—Fixing of—Directory or mandatory—Fixing of date for hearing of case by court—Sufficiency of.

S. 508 of C. P. C. of 1882 is not merely directory, but it is mandatory and imperative (57.)

Where the order of reference made by the Court did not specify, directly, any time for the delivery of the award, but merely fixed a date for the hearing of the case by the court, *held* that the order was not in strict compliance with the terms of the section, though it might be sufficient (57). (*Lord Morris*.) *RAJA HAR NARAIN SINGH v. CHAUDHRAIN BHAGWANT KUAR*.

(1891) 18 I. A. 55 =
13 A. 300 = 6 Sar. 14.

—Time for making of award—Omission to fix in original order of reference—Fixing of, in subsequent order enlarging time—Power of.

In a case in which the original order of reference did not fix the time within which the award was to be made, the Court repeatedly made orders enlarging the time, and in those orders fixed the time within which the award was to be made.

Held that it was competent for the court to do so under S. 514 of C. P. C. of 1882, which enables the Court to grant a further time, and from time to time to enlarge the period, for the delivery of the award, in cases when it cannot be completed within that period from want of necessary evidence or from any other cause (57). (*Lord Morris*.) *RAJA HAR NARAIN SINGH v. CHAUDHRAIN BHAGWANT KUAR*. (1891) 18 I. A. 55 = 13 A. 300 = 6 Sar. 14.

—Para. 5 (1) (b) (ii)—Refuses to act—Re-fusal to accept nomination if included in.

The Courts in India have construed S. 510 of C. P. C. of 1882 as meaning that the section can only apply if the arbitrator who refuses had accepted office before refusing. It has been held that the court has power, under S. 510, to appoint a new arbitrator in the place of another only when that other had first consented to act and thereafter refused

C. P. CODE (ACT V OF 1908), Schedule II—(Contd.)

or become incapable. In their Lordships' opinion this is not a proper construction of S. 510. It appears to their Lordships that, when an arbitrator is nominated by parties, his refusal to act is signified as clearly by his refusal to accept nomination as by any other course he could pursue. His refusal to act necessarily follows, for he has not performed the first action of all, namely, to take up the office by signifying his assent to his appointment (186). (*Lord Shaw.*) **SADIK HUSAIN v. KANIZ ZOHRA BEGAM.** (1911) 38 I.A. 181 = 33 A. 743 (750-1) = 10 M. L. T. 173 = (1911) 2 M. W. N. 132 = 8 A. L. J. 1164 = 14 C. L. J. 313 = 15 C. W. N. 1005 = 13 Bom. L. R. 826 = 14 O. C. 289 = 12 I. C. 15 = 21 M. L. J. 1151.

—**Para. 5 (2) — Refusal of one of arbitrators to act—Procedure on—Supersession of arbitration and trial of suit by Court—Legality—Compromise referring decision of rights of parties to arbitration—Decree on, putting an end to suit itself—Effect.**

The parties to a suit brought for the administration of the estate of a deceased person entered into a compromise by which two arbitrators were appointed to settle, allocate, etc., the respective rights of parties. On the basis of the compromise a decree was passed which bore that "it is ordered that in the terms of the compromise herewith annexed, marked 'A', . . . plaintiff's claim be decreed under S. 375, C.P. Code, and as regards costs, the Court orders that parties do bear their own costs." The arbitrator named by one of the parties, however, refused to accept office as such, or to act, and the party concerned refused to name another in his stead. Thereupon, the other party presented a petition to the Court narrating this fact, and asking it to withdraw its order of reference and to deal with the matter itself. The Court superseded the arbitration, and, entering upon the determination of the matters submitted by the agreement, passed an order allotting the properties in a certain manner, and its order was affirmed on appeal.

Held that the procedure of the Courts below was erroneous and that all that they could have done was to take advantage of the sections of the Code which enabled them to keep the machinery of arbitration going, by, for instance, simply naming a fresh arbitrator (188).

Parties who agree to set up a tribunal of arbitration are not bound to submit the case referred to to another tribunal, such as a District or other Judge (188).

To "proceed with the suit" within the meaning of S. 510, C.P. Code, was in this case impossible. The suit was at an end, and something different from and going much beyond the suit had been entered upon. The decree passed on the basis of the compromise was not a decree for partition nor for administration. It was simply a decree ordering the agreement and compromise of parties to be carried into effect; and that decree was final. It put an end to the suit, and that was the very object of the compromise. To proceed with the suit as provided by S. 510 is impossible, because there is no suit now pending with which the Court can proceed (188). (*Lord Shaw.*) **SADIK HUSAIN v. KANIZ ZOHRA BEGAM.** (1911) 38 I.A. 181 = 33 A. 743 = 10 M.L.T. 173 = (1911) 2 M.W.N. 132 = 8 A.L.J. 1164 = 14 C.L.J. 313 = 15 C.W.N. 1005 = 13 Bom. L.R. 826 = 14 O.C. 289 = 12 I.C. 15 = 21 M.L.J. 1151.

—**Para. 10—Signing of award—Signing by arbitrators separately—Validity of award in case of.** See **ARBITRATION—AWARD—SIGNING THEREOF BY ARBITRATORS SEPARATELY.**

(1875) 3 Suth. 145 (146) = 23 W.B. 429.

C. P. CODE (ACT V OF 1908), Schedule II—(Contd.)

—**Time for making of award—Enlargement of, after award is made—Power of.**

In a case in which 20th March, 1885 was the date within which an award was to be delivered, no award was delivered within that time, though one was delivered on the 24th of March, 1885.

Held that it would not have been competent for the Court to have extended the time after the award was made (57-8).

When once the award was made and delivered, the power of the Court under S. 514 was spent, and although the Court had the fullest power to enlarge the time under that section so long as the award was not completed, it no longer possessed any such power when once that time was passed (58). (*Lord Morris.*) **RAJA HAR NARAIN SINGH v. CHAUDHRAN BHAGWANT KUAR.**

(1891) 18 I.A. 55 = 13 A. 300 = 6 Sar. 14.

—**Para. 15—Award—Validity—Matters in difference in suit—Matters not within scope of suit—Award in relation to former dictated or colored by view taken of latter.**

The award made by the arbitrators acting under an order of reference made under paras. 1 and 2 of Sch. II to C. P. Code of 1908 in no way discriminated between those which were at issue in the suit and those which were not. The arbitrators took a comprehensive view of the family situation and made an award which doubtless they regarded as just on the whole and as a whole, but which probably they would not have themselves made precisely in the same terms, if the dispute thereby dealt with had alone or separately been submitted to them for adjudication.

Held that it was impossible to uphold an award in relation to a suit the conclusions of which were plainly coloured, if not dictated, by the view taken by the arbitrators of other questions between the parties or some of them to which the suit had no reference (9 10). (*Lord Blanesburgh.*) **RAM PROTAP CHAMRIA v. DURGA PROSAD CHAMRIA.**

(1925) 53 I.A. 1 = 53 C. 258 = 24 A.L.J. 13 = 43 C.L.J. 14 = (1926) M.W.N. 96 = 27 Punj. L.R. 35 = 3 Pat. L. R. 330 = 92 I.C. 633 = 28 Bom. L. R. 217 = A.I.R. 1925 P. C. 293 = 3 O.W.N. 127 = 49 M.L.J. 812 (819-20).

—**Para. 15 (1) (c)—Award made after expiry of period allowed—Invalidity of—Notice of Court's duty to take.** See **ARBITRATION—AWARD—DECREE IN ACCORDANCE WITH—VALIDITY OF—AWARD MADE AFTER EXPIRY OF.**

(1891) 18 I.A. 55 (58) = 13 A. 300.

—**Award "otherwise invalid"—Award not in accordance with order of reference is an.** See **C.P. CODE OF 1908—SCH. II, PARA. 3—ORDER OF REFERENCE UNDER—TERMS OF.**

(1925) 53 I.A. 1 (7-8) = 53 C. 258.

—**Para. 16—Decree in accordance with award.** See **ARBITRATION—AWARD—DECREE IN ACCORDANCE WITH.**

—**Para. 20—Application to file.** See **ARBITRATION—AWARD—APPLICATION TO FILE, UNDER PARA. 20 OF SCH. II OF C.P. CODE OF 1908.**

CIVIL PROCEEDINGS.

—**Institution or prosecution improper of—Liability for.** See **MALICIOUS PROSECUTION—CIVIL PROCEEDING.**

CIVIL SERVANTS IN INDIA.

—**Purchase of immovable property by—Rules regulating—Purchase for "residential purposes"—Meaning—Purchase in contravention of rules—Effect.**

Under the rules passed for the conduct of Civil Servants

CIVIL SERVANTS IN INDIA—(Contd.)

in India, a member of the subordinate Civil Service in India may, without obtaining the consent of any superior, acquire immovable property for residential purposes, but the consent of the Local Government or of the head of a department specially charged with the duty of giving such consent, is absolutely necessary for its acquisition by such an officer for any other purposes.

Held, on a construction of the rule in question, that the purchasing of a plot of ground for the purpose of having a house built upon it in which the purchaser intended to reside would undoubtedly be a purchase for "residential purposes"; but *semble* the purchases of plots of ground as a speculation for having dwelling houses for tenants built upon them would not be treated as "purchases" of that kind within the meaning of the rule (284-5).

Quære as to the effect (if any) which the non-observance of the rule may have upon a purchase by the Civil Servant of immovable property in contravention of the rules (280). (*Lord Atkinson*). *KERWICK v. KERWICK*.

(1920) 47 I. A. 275 = 48 C. 260 (270-1) = 32 C.L.J. 490 = 13 L.W. 455 = 2 U.P.L.R. (P.C.) 153 = 28 M.L.T. 194 = (1920) M.W.N. 738 = 23 Bom. L. R. 730 = 57 I.C. 834 = 39 M.L.J. 296.

CIVIL SERVICE ANNUITY FUND (MADRAS)—

Subscriber — Excess subscription over one-half value of annuity paid by—Refund of—Right to—East India Company's right to dispute—Estoppel.

The Madras Civil Service Annuity Fund was created for the purpose of providing annuities to the Civil Servants of the East India Company in the Madras Presidency, upon retiring from service. The annuities were to be provided for by subscriptions of the Civil Servants to that fund, to the amount of one-half, and by contributions by the East India Company to the extent of the other half. These contributions were to be received by trustees and applied by them to make good the deficiency which was to be supplied by the Company. It appeared that in some instances the trustees of the fund, where an excess of subscriptions had been paid by a subscriber entitled to an annuity beyond the half-value of the annuity, had returned the excess. R, a subscriber, from the institution of the fund in 1825, had contributed beyond the half value of his annuity.

Held that, although the regulations of the Madras Civil Service Annuity Fund did not justify a refund to a subscriber of the amount of his subscriptions in excess of the prescribed amount, yet that the practice which had prevailed of the trustees refunding the contributions in excess and the acquiescence of the East India Company in such practice, precluded the Company from disputing the right of the subscriber to re-payment of the surplus of his subscriptions in excess of the half-value of the annuity payable out of the Fund. (*Lord Justice Turner*). *EAST INDIA COMPANY v. ROBERTSON*. (1859) 7 M.I.A. 361 = 12 Moo. P.C. 400 = 4 W.R. 10 = 1 Suth. 332 = 1 Sar. 652.

CODE.

—Exhaustiveness of, on matters dealt with by it. *See* STATUTE—CODE. (1902) 29 I.A. 196 (202) = 29 C. 707 (715).

CO-DEFENDANTS.

—*See also* EJECTMENT SUIT—CO-DEFENDANTS AND EVIDENCE—CO-DEFENDANTS.

—Admission by one of—Effect of, against the other. *See* ADMISSION—CO-DEFENDANTS.

—Question between—Decision by Privy Council of. *See* PRIVY COUNCIL—APPEAL—CO-DEFENDANTS.

CO-DEFENDANTS—(Contd.)

—*Res judicata* between. *See* C.P.C. of 1908, S. 11—CASES UNDER—CO-DEFENDANTS.

—Written statement filed by, in suit by third party—Admission in—Effect *inter se*—No estoppel. *See* PRACTICE—PLEADINGS—ADMISSION IN—CO-DEFENDANTS. (1870) 13 M.I.A. 551 (559).

CO-HEIRS.

—*Adverse Possession—Bar of claim of one of heirs by—Benefit of—Right to—Other heirs—Party in possession.*

Where some of the heirs are barred, the benefit of the bar should go to the party in possession and not to the other heirs. (*Lord Parker*). *SHOHARAT SINGH v. MUSSAMMAT JAFRI BIBI*. (1914) 1 L.W. 965 = 16 M.L.T. 517 = 19 C.W.N. 225 = 21 C.L.J. 4 = 17 Bom. L. R. 13 = 13 A. L. J. 113 = (1915) M. W. N. 389 = 24 I.C. 499 = 27 M.L.J. 80 (92).

—*Debt on inheritance paid by one of—Recovery from other heir of—Right of—Possession of entire inheritance by heir paying debt—Profits got by, more than sufficient to satisfy debt—Right of other heir to recover such profits barred—Effect.*

Soon after the death of M, in January 1881, the appellant, her husband, took possession of her entire property, though the respondent, her mother, was entitled to a moiety of the same. In September, 1886, the respondent sued for the recovery from the appellant of the moiety to which the respondent was entitled together with mesne profits only from the date of suit. The estate of M was subject to eleven debts due from M and out of those five had been paid by the appellant. In the suit he claimed to be entitled to receive from the respondent what he had paid in discharge of those debts. The respondent's answer was that the profits from the entire property of M realised by the appellant during his exclusive possession thereof for upwards of five and a half years before suit would more than cover the amount claimed from her (the respondent), and that, as respondent did not by her plaint seek to recover those profits, the appellant was not entitled to insist upon payment of the amount claimed by him.

Held, that the appellant was not entitled to the amount claimed by him (33).

It is true that the respondent could not claim to have a decree for the mesne profits of the 5½ years before suit, but if an account was to be taken of the appellant's payments, it must also be taken of his receipts (33). (*Sir Richard Couch*). *ABDUL WAHID KHAN v. SHALUKA BIBI*.

(1893) 21 I. A. 26 = 21 C. 496 (502-3) = 6 Sar. 399 = R. & J's No. 134.

—*Litigation for preservation of inheritance—Costs incurred by one of heirs in connection with—Contribution to, by other heir—Liability for.*

The respondent and the appellant were respectively mother and husband of one M, deceased, and by Mahomedan Law entitled to her estate in equal moieties. A suit brought against M for a share in the entire estate held by her was, on her death, continued against the appellant and the respondent as her representatives. In that suit a decree was passed in favour of the plaintiff by the Judicial Commissioner. An application by the appellant for review was dismissed by the Judicial Commissioner, but his decree was, on appeal by the appellant, reversed by the Privy Council. Suits for mesne profits were also defended by the appellant successfully. The respondent took no part in those proceedings, having up to the making of the decree of the Judicial Commissioner appeared in the suit and defended separately. In a suit brought by the respondent to recover from the appellant, who had taken possession of the entire estate of M, a moiety thereof with mesne profits, *held* that the respondent was not liable for any portion of the costs

CO-HEIRS—(Contd.)

incurred by the appellant in connection with the proceedings aforesaid (34).

The proceedings were taken by the appellant for his own benefit, and without any authority express or implied from the respondent; and the fact that the result was also a benefit to the respondent does not create any implied contract or give the defendant any equity to be paid a share of the costs by the respondent (34). (*Sir Richard Couch.*) **ABDUL WAHID KHAN v. SHALUKA BIBI.**

(1893) 21 I.A. 26 = 21 C. 496 (503-4) = 6 Sar. 399 = R. & J's No. 134.

——Mahomedan Law — Co-heirs. See MAHOMEDAN LAW—CO-HEIRS.

——Mortgage by deceased—Redemption of—Suit by one of heirs for—Dismissal of—Fresh redemption suit by another heir (minor at date of prior suit)—Maintainability.

A suit for redemption brought by one of the heirs of the deceased mortgagor was dismissed in 1870 on the ground that the mortgage lien was determined by a deposit of the mortgage money into the Government Treasury made in pursuance of a decree in a prior suit for redemption, and that there was nothing left to redeem. The appellant was another of the heirs of the mortgagor. He was a minor at the date of that suit, and the person who instituted it was not the guardian of the appellant, either natural or appointed; nor did the suit purport to be instituted on behalf of the appellant, who was not in any form a party on the record. In a suit for redemption subsequently brought by the appellant, *held* that the suit was not barred under S. 13 of C.P.C. of 1882 by the decree in the earlier suit (241-2). (*Lord Davey.*) **CHAUDHRI AHMAD BAKHSH v. SETH RAGHUBAR DAYAL,** (1905) 32 I. A. 229 = 28 A. 1 (16-7) = 2 C.L.J. 413 = 2 A.L.J. 813 = 7 Bom. L.R. 912 = 10 C. W.N. 115 = 9 O.C. 7 = 8 Sar. 882 = 15 M.L.J. 407.

——Mortgage by deceased—Redemption of—Suit by one of heirs for—Scope of—If on behalf of other heirs also—Redemption sought of entire property.

The question was whether a suit brought by one of the heirs of a deceased Mahomedan for redemption of a mortgage made by the deceased was brought on behalf also of the appellant, who was a co-heir and a minor at the date of the suit.

Held, that the mere fact that redemption was sought of the entire property was no proof whatever that the suit was on behalf of the appellant also (242). (*Lord Davey.*) **CHAUDHRI AHMAD BAKHSH v. SETH RAGHUBAR DAYAL** (1905) 32 I. A. 229 = 28 A. 1 (17) = 2 C. L. J. 413 = 7 Bom. L. R. 912 = 2 A. L. J. 813 = 10 C. W. N. 115 = 9 O. C. 7 = 8 Sar. 882 = 15 M. L. J. 407.

——Property belonging to, but illegally transferred solely by one of—Suit by other for recovery of, from transferee—Maintainability—Judgment prior obtained by plaintiff against transferor co-heir—Not a bar.

The plaintiff sued for the restitution of Promissory notes, commonly called Company's Paper, of the Indian Government, or alternatively, for the recovery of their value. His case was that the legal title in the notes was in him and the 2nd defendant's mother, and devolved upon him and the 2nd defendant on her death, but that the 2nd defendant in violation of plaintiff's right as one of the heirs, alone illegally sold and transferred the notes to the 1st defendant. Plaintiff claimed the reliefs above-mentioned as against the 1st defendant. Plaintiff had previously instituted a suit of a similar nature against the 2nd defendant and another, to whom two of the Notes had been traced, and had recovered judgment therein against the 2nd defendant. Plaintiff had not taken any steps to enforce his judgment

CO-HEIRS—(Contd.)

against the 2nd defendant and there was no proof that the 2nd defendant was insolvent or incapable of satisfying that judgment.

Held, reversing the courts below, that the existence of the prior judgment against the 2nd defendant was no bar to the suit (520).

The 2nd defendant ought not to have been dismissed from the suit, for if the plaintiff had any right against the first defendant, it may be that the 1st defendant, if he makes satisfaction to the plaintiff, ought to have the benefit of any subsisting judgment against the 2nd, or, at all events, to have some remedy by way of indemnity or otherwise over against him; it must in this point of view be obviously for his benefit that the 2nd defendant should be bound by all the proceedings in this suit; the plaintiff having brought the 2nd defendant before the court, he, under the circumstances, ought not to be dismissed unless the whole suit should eventually fail on the merits against the first defendant (522). (*Lord Justice Giffard.*) **IKBALOODOWLAH v. SAH BUNARSEE DOSS.** (1869) 12 M. I. A. 507 = 2 Sar. 463 = R. & J's No. 8 (Oudh).

——Transfer illegal by one of—Suit by other heir to recover property transferred—Parties to—Onus on transferee in—Defences open to him. See GOVERNMENT PROMISSORY NOTES—TRANSFER ILLEGAL OF, BY ONE OF CO-HEIRS. (1869) 12 M. I. A. 507.

COLONIAL APPEAL.

——Concurrent findings of fact—Rule of Privy Council as to—Applicability. See PRIVY COUNCIL—PRACTICE—QUESTION OF FACT—CONCURRENT FINDINGS—INTERFERENCE WITH—RULE AS TO—COLONIAL APPEALS. (1927) 101 I. C. 903.

——First consideration of Privy Council in—Substantial Justice. See PRIVY COUNCIL—APPEAL—COLONIAL APPEAL. (1927) 47 C. L. J. 328.

COLONIAL COURTS.

——English decisions—Authority of—Appellate Court—House of Lords—Decisions of—Distinction—Privy Council—Decisions of—Authority of.

When an appellate court in a Colony which is regulated by English law differs from an appellate court in England, it is not right to assume that the Colonial court is wrong. It is otherwise if the authority in England is that of the House of Lords. That is the Supreme tribunal to settle English law, and that being settled, the Colonial court which is bound by English law is bound to follow it. Equally, of course, the point of difference may be settled so far as the Colonial court is concerned by a judgment of this Board (69). (*Viscount Dunedin.*) **WILLIAM ROBINS v. NATIONAL TRUST CO., LTD.** (1927) 101 I. C. 903 = A. I. R. 1927 P. C. 66 = 4 O. W. N. 463.

COLONIZATION.

——See SETTLEMENT IN FOREIGN COUNTRIES. COMMISSION.

——Agent—Commission payable to—Agreement as to—Construction—5 per cent. of nett profits as shown in books of employer—Provision for—Meaning and effect of. See PRINCIPAL AND AGENT—AGENT—COMMISSION PAYABLE TO. (1927) 53 M. L. J. 278.

——Agent—Commission payable by Company to, on nett income—When becomes payable. See COMPANY—AGENTS. (1927) 54 M. L. J. 651.

——Evidence taken on—Use of—Conditions.

Evidence taken on commission should only be permitted to be used where the witness is proved to be too ill to give his evidence in court or is absent for other sufficient reason.

COMMISSION—(Contd.)

(*Lord Atkinson*). SATISH CHANDRA CHATTERJI *v.* KUMAR SATISH KANTHA ROY.

(1923) 33 M. L. T. 325 (P. C.) = 73 I. C. 391 = A. I. R. 1923 P. C. 73 = 45 M. L. J. 363 (369).

—Purdanashin party to suit—Commission to examine—Omission to issue—Reversal of decree on ground of—Condition. *See* C. P. C. OF 1908—S. 99—COMMISSION TO EXAMINE PARTY. (1898) 25 I. A. 117 = 25 C. 807.

—Purdanashin defendant—Examination of—Commission for—Issue of—Discretion as to—Refusal to issue when not prudent.

In a suit on a mortgage bond executed by a Purdanashin lady, the question was whether the first court committed a material error in refusing to allow the evidence of the lady to be taken on commission.

The plaint was filed on 9-4-1891, and the written statement on 13-7-1891. On 4-8-1891, the lady applied (*inter alia*) that her own evidence might be taken by commission. No order was made on that application. On 2-4-1892, the lady applied to be examined by commission at her then residence beyond the jurisdiction of the court, to which the plaintiffs objected that she should be examined at her permanent residence within the jurisdiction of the Court. The Judge refused to issue a commission for her examination at her temporary residence, saying that he was not satisfied that she was ill or in such a state of health that she could not be removed to her permanent residence without danger to her life. On 6-5-1892, the defendant made another application to be examined at her temporary residence supported by an affidavit, which application was refused, the Judge saying that he had on previous occasions disbelieved the defendant's plea of illness, and still adhered to that opinion; that he was further inclined to believe that the defendant did not mean to comply with the Court's order, but was simply trying to put off the disposal of the suit.

Their Lordships observed: whether the Sub-Judge properly exercised his discretion when he refused to issue the commission need not be determined. Probably it would have been prudent to issue it (124-5). (*Sir Richard Couch*). SRIMATI AKIKUNNISSA BIBI *v.* RUP LAL DAS. (1898) 25 I. A. 117 = 25 C. 807 (815-6) = 2 C. W. N. 566 = 7 Sar. 358.

—Salary—Person paid by—Positions of—Distinction.

The distinction between the position of a man who is to be paid by a fixed salary and that of a man who is to be paid by a commission is obvious. The man who is paid by a salary is not necessarily affected by the prosperity or adversity of the company, or even by its dissolution. He may be entitled to his fixed salary whatever may happen. But a man who agrees to be paid by a commission upon sales to a certain extent speculates on the prosperity of the company; the more the company sells the more he gets, the less it sells, the less he gets, and if it sells nothing he gets nothing (206). (*Sir Robert P. Collier*.) COWASJEE NANABHOY *v.* LALLBHOY VULLUBHOY.

(1876) 3 I. A. 200 = 1 B. 468 (473) = 26 W. R. 78 = 3 Sar. 645.

COMMISSIONER.

—Accounts—Commissioner for taking. *See* ACCOUNTS—COMMISSIONER FOR TAKING.

—Evidence—Commissioner for taking—Admissibility of evidence—Ruling as to—Power to give.

A commissioner before whom evidence is taken does not rule points as to the admissibility of evidence. (*Lord Atkinson*.) MUSAMMAT ATKIA BEGUM *v.* MAHOMED IBRAHIM RASHID NAWAB. (1916) 6 L. W. 26 (29) = (1917) M. W. N. 261 = 21 C. W. N. 345 = 36 I. C. 20 = 10 Bur. L. T. 79.

COMMISSIONER—(Contd.)

—Local investigation. *See* LOCAL INVESTIGATION.

—Partnership—Dissolution—Accounts—Suit for—Commissioner—Decree leaving matters of account to—Propriety—Ruling of Commissioner—Objection to—Application to court in respect of. *See* PARTNERSHIP—DISSOLUTION—ACCOUNTS—SUIT FOR—COMMISSIONER.

(1923) 19 L. W. 425.

COMMON CARRIERS—*See* CARRIERS—COMMON CARRIERS.

COMMUNITY.

—Land—Ownership of—Native ideas as to—Community—Individual—Rights of. *See* LAND—OWNERSHIP OF. (1926) 30 C. W. N. 961.

—Tengalai community. *Quære* whether any body can be described as a. *Quære* whether there is any body that can be described as the Tengalai community (101). (*Lord Macnaghten*.) SADAGOPA CHARIAR *v.* RAMA RAO.

(1907) 34 I. A. 93 = 30 M. 185 (190) = 5 C. L. J. 566 = 11 C. W. N. 585 = 2 M. L. T. 204 = 9 Bom. L. R. 663 = 4 A. L. J. 333 = 17 M. L. J. 240.

—Well-being of—Danger to—Usury and abuse of legal procedure—Avoidance of—Necessity—Litigation—Delay in—Evil effects of.

Usury and the abuse of legal procedure are a formidable and dangerous combination to the well-being of any community. The former is one which it is not easy to repress, but the latter ought not to be incapable of remedy. There seems to be no lack of expedition in the Courts in disposing of cases when once entered for hearing. The delay is associated with dilatoriness in procedure and the apparent unwillingness on the part of persons who have the control of litigation to bring it to a speedy conclusion (369). (*Lord Buckmaster*.) TARINI CHARAN SARKAR *v.* BISHEN CHAND.

(1917) 23 M. L. T. 147 = 7 L. W. 315 = 27 C. L. J. 303 = 22 C. W. N. 505 = (1918) M. W. N. 295 = 4 P. L. W. 249 = 16 A. L. J. 271 = 44 I. C. 304 = 20 Bom. L. R. 553 = 34 M. L. J. 361.

COMMUNITY OF OWNERSHIP.

—Insertion of one or two names as representatives in case of. *See* OWNERSHIP—COMMUNITY OF. (1919) 47 I. A. 57 (66) = 42 A. 368 (378).

COMPANY.

AGENTS—COMMISSION PAYABLE TO, ON NETT INCOME.

AMALGAMATION OF—SCHEME OF.

CERTIFICATE OF INCORPORATION OF.

CONTRACT WITH.

DEBENTURES IN.

DIRECTORS OF.

FIRM OF INDIVIDUAL MEN (R. W. & CO.)—LIMITED COMPANY OF SAME MEN (R. W. & CO., LTD).

HOLDERS OF SHARES IN—MEANING OF.

LIQUIDATOR.

MANAGER OF.

MEETING OF.

PREFERENTIAL DIVIDEND—LIABILITY FOR.

PROXY.

RATIFICATION.

SALE OF ASSETS AND RIGHTS OF—CONSIDERATION FOR.

SALE OF BUSINESS AND EFFECTS OF ONE, TO ANOTHER COMPANY.

SHARES IN.

COMPANY—(Contd.)

SHAREHOLDERS OF.

UNAUTHORIZED AND *ultra vires* TRANSACTIONS.

WINDING UP OF.

Agents—Commission payable to, on nett income,*—When becomes payable—Only when nett income ascertained.*

Defendants, who were agents to a cottons pinning Co. and who managed its affairs and were its secretaries and treasurers, were, under the terms of their agreement with the company and under clause 34 of the Articles of the company, entitled to be paid a commission on their sales. Their commission was earned at fixed rates upon the weight of yarn and cloth manufactured and sold varying with the quality. There was, however, a provision in the Articles which regulated the rate of the defendants' commission as against the company, which qualified that. Art. 34 contained a schedule which set out the terms of the agreement, and paragraph 4 was the paragraph in question. It said:—

But if in any year the nett income of the company happens to be less than 6 per cent. on the paid-up capital of the shareholders, then in that year the agents shall give up an amount up to one-third share of their commission in order to make up that much amount in that year. But in no case shall they give more amount than one-third share of their commission in order to make up that amount. The amount in respect of the commission of the agents shall be calculated at the end of the month and shall be credited to their account."

Held that the true construction of that paragraph was that, although the agents might be entitled to credit themselves in the books month by month with the amount of commission earned by them, that would necessarily be only a provisional credit, which could not become definite and final until it had been ascertained whether the nett income of the company was less than 6 per cent. on the paid-up capital of the shareholders or not.

Held further that the course of business was to take that ascertainment as happening when the company held its general meeting and passed its account and not before. (*Viscount Sumner.*) KHUSHALDAS GOKALDAS v. CHIMANLAL KALIDAS. (1927) I. L. T. 40 B. 62 =

108 I. C. 14 = 26 A. L. J. 505 = 30 Bom. L. R. 765 = 28 L. W. 354 = A. I. R. 1928 P. C. 47 = 54 M. L. J. 651.

Amalgamation of—Scheme of.

—Appointment of liquidators pursuant to—Invalidity of, and of scheme of amalgamation—Declaration of—Suit by shareholders of transferor company for, against transferor and transferee companies and liquidators—Scope of—Reliefs claimable in—Personal capacity of shareholders—Suit in.

The two appellants, who held only a few of the shares in company A, sued company A, its "ostensible liquidators", and company B, which had, under a scheme of amalgamation, taken over the entire undertaking of company A, exclusive only of its uncalled capital, *inter alia*, for declarations that the appointment of the "ostensible liquidators" was invalid, and that the amalgamation agreement was not binding on the members of company A or on the plaintiffs. The plaint also asked that the agreement should be ordered to be delivered by company B to the plaintiffs for cancellation and for other consequential relief. In the first instance the suit was representative, the two appellants as plaintiffs purporting to sue on behalf of themselves and other shareholders of company A. On application made to the Court, however, under O. 1, R. 8 of C. P. C., permission so to sue was refused and the suit proceeded as one personal to the plaintiffs alone.

COMPANY—(Contd.)**Amalgamation of—Scheme of—(Contd.)**

Held that, in view of the extremely special character of the suit, the plaintiffs' competent claims were narrowly circumscribed. The plaintiffs' claims had, to be valid, to be in respect of some right personal to themselves as shareholders in company A; they must not be in respect of any matter which was within the cognizance of a majority of the shareholders, unless in acting in the manner complained of such majority had acted either fraudulently, tyrannically or arbitrarily. As against company B, the purchasing company, the actionable claims of the plaintiffs, were even further circumscribed. They could not extend beyond claims which would be competent to company A itself if that company were plaintiff and were putting them forward. (*Lord Blanesburgh.*) PARASHRAM DETARAM SHAMDASANI v. TATA INDUSTRIAL BANK, LTD. (1928) 55 I. A. 274 =

52 B. 571 = 30 Bom. L. R. 1115 = 28 L. W. 93 = 32 C. W. N. 1038 = 110 I. C. 195 = 48 C. L. J. 436 = A. I. R. 1928 P. C. 180 = 55 M. L. J. 697.

—Liquidators appointed pursuant to—Restriction of, in exercise of their statutory duties—Irregularity—Objection to—Maintainability of, after lapse of time—Injustice not resulting from restriction—Companies Act, S. 213.

A liquidator in a voluntary liquidation, which is an essential condition of an amalgamation scheme under S. 213 of the Indian Companies Act, 1913, must not by the resolution appointing him be restricted in the exercise of his statutory duties. A resolution appointing liquidators under which in terms they become merely ministerial officers required to have regard to the supervision of the directors of the two companies in discharging their duties, is highly objectionable.

An objection to the liquidators' appointment on the ground of the form of such a resolution will not, however, be allowed to be taken nearly 5 years after the event, when the irregularity has not produced any injustice whatever. (*Lord Blanesburgh.*) PARASHRAM DETARAM SHAMDASANI v. TATA INDUSTRIAL BANK LTD.

(1928) 55 I. A. 274 = 52 B. 571 = 30 Bom. L. R. 1115 = 28 L. W. 93 = 110 I. C. 195 = 32 M. W. N. 1038 = 48 C. L. J. 436 = A. I. R. 1928 P. C. 180 = 55 M. L. J. 697.

—Validity—Tests of, as regards transferor and transferee Companies—Distinction—Companies Act, S. 213.

A scheme of amalgamation by which Company B takes over the undertaking of Company A does not depend for its validity upon the constitution of company A. It rests upon statute, and the only question, so far as Company A is concerned, is whether the scheme is authorized by S. 213 of the Indian Companies Act. Where Company B as purchasers were not proceeding under S. 213, the issue whether the amalgamation is binding on them depends not upon the section but upon the question whether that Company is by its constitution empowered to effect the acquisition in question. (*Lord Blanesburgh.*) PARASHRAM DETARAM SHAMDASANI v. TATA INDUSTRIAL BANK, LTD.

(1928) 55 I. A. 274 = 52 B. 571 = 28 L. W. 93 = 30 Bom. L. R. 1115 = 32 C. W. N. 1038 = 110 I. C. 195 = 48 C. L. J. 436 = A. I. R. 1928 P. C. 180 = 55 M. L. J. 697.

Certificate of incorporation of.

—Effect of—Memorandum of Association not signed by 7 subscribers—Certificate granted in case of—Validity—S. 6 of Companies Act (Indian) of 1882—"Otherwise" in—Effect.

A certificate of incorporation of a Company under the Indian Companies Act of 1882 is conclusive as to the fact

COMPANY—(Contd.)**Certificate of Incorporation of—(Contd.)**

of incorporation and that all previous requisites had been complied with.

Their Lordships will assume that the conditions of registration prescribed by the Indian Companies Act were not duly complied with, that there were not seven subscribers to the memorandum of association, and that the Registrar of Companies ought not to have granted a certificate of incorporation. As a matter of fact, a certificate of incorporation was granted. In their Lordships' opinion the certificate of incorporation is conclusive for all purposes (243-4).

The matter would seem to be absolutely plain on the words of the Act. The use of the word "otherwise" in S. 6 shews that the statutory condition that the Memorandum of Association must be signed by seven persons is as much a condition of registration as any other requisition to be found in the Act which is preliminary to registration, and apparently essential (245). (*Lord Macnaghten.*) **MOOSA GOOLAM ARIFF v. EBRAHIM GOOLAM ARIFF.**

(1912) 39 I. A. 237 = 40 C. 1 = 16 I.C. 70 = 16 C.W.N. 937 = 16 C.L.J. 642 = 14 Bom. L.R. 1211 = 12 M.L.T. 449 = 5 Bur. L.T. 211 = (1912) M. W. N. 1097 = 10 A.L.J. 486 = 6 B.L.R. 119 = 23 M.L.J. 215.

Contract with.

—Offer by letter—Acceptance in minute—Incorporation of terms of offer in minute—Permissibility—Variance between letter and minute—Minute the only concluded contract.

Where one Rose who had invented a tile called "Perfect tile" offered his services as well as his patent to the provisional Directors of the "Perfect Pottery Co." which on being duly formed accepted the offer by a certain minute of October 15th, 1905 agreeing to pay Rs. 30,000 for the patent, Rs. 10,000 paid in cash, and Rs. 20,000 in shares, with the proviso that absolute property therein should vest in Rose in the fifth year, and, Rose having died before the expiration of the fourth year, the Company refused to allot finally the said shares to Rose's widow, held that the only contract between Rose and the Company was that contained in the minute of 15th October, 1905, and that the offer by Rose could be incorporated into the minute only to the extent it was not inconsistent with the minute, and that the clause in the offer enabling the Company to cancel and retain shares, which was inconsistent with the minute of the Company by which there was a sale of the Patent for Rs. 30,000 was of no effect. (*Lord Parker.*) **THE PERFECT POTTERY, CO., LTD. v. IDA L. ROSE** (1914) 18 C. W. N. 1185 = 1 L.W. 610 = 10 N.L.R. 108 = 24 I. C. 506 = 27 M.L.J. 74.

Debentures in.

—Mortgage of, in favour of trustees—Power of sale outside Court in—Provision for—Validity—Limited Company. See MORTGAGE—SALE OUTSIDE COURT.

(1923) 50 I.A. 162 (171) = 4 Lah. 284.

—Terms on which, are secured—Modification of—Power of, conferred upon majority of holders—Exercise of—Validity—Conditions—Interest of class as a whole—Exercise of power in.

To give a power to modify the terms on which debentures in a company are secured is not uncommon in practice. The business interests of the company may render such a power expedient even in the interests of the class of debenture-holders as a whole. The provision is usually made in the form of a power, conferred by the instrument constituting the debenture security, upon the majority of the class of holders. It often enables them to modify, by resolution properly passed, the security itself. The provision of such a

COMPANY—(Contd.)**Debentures in—(Contd.)**

power to a majority bears some analogy to such a power as that conferred by S. 13 of the English Companies Act of 1908, which enables a majority of the shareholders by special resolution to alter the Articles of Association. There is, however, this restriction of such powers, when conferred on a majority of a special class in order to enable that majority to bind a minority. They must be exercised subject to a general principle, which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities. It is that the power given must be exercised for the purpose of benefiting the class as a whole, and not merely individual members only. Subject to this, the power may be unrestricted. It may be free from the general principle in question when the power arises not in connection with a class, but only under a general title which confers the vote as a right of property attaching to a share.

There is no real difficulty in combining the principle that while usually a holder of shares or debentures may vote as his interest directs, he is subject to the further principle that where his vote is conferred on him as a member of a class he must conform to the interest of the class itself when seeking to exercise the power conferred on his capacity of being a member. (*Viscount Haldane.*) **BRITISH AMERICA NICKEL CORPORATION LTD v. O' BRIEN LTD.**

(1927) 101 I.C. 897 = A.I.R. 1927 P.C. 62.

Directors of.

—Accounts—Errors mere in—Liability for, See COMPANY—DIRECTORS OF—FALSE REPORTS ISSUED ETC.

(1850) 7 Moo. P.C. 141 (155-6).

—Allotment of shares to director himself—Participation in—Validity of his appointment and of allotment—Right to question, in action for calls—Estoppel.

A man who acting as a director of a company takes part in the allotment of shares to himself cannot in any action for calls be permitted to say that his appointment as Director or the allotment to him of the shares was irregular and *ultra vires* (29). (*Lord Atkinson.*) **YORKSHIRE INSURANCE CO., LTD. v. THOMAS CRAINE.**

(1922) 32 M.L.T. 25 P.C.

—Amount fraudulently received by—Suit by shareholders for recovery of—Judgment prior and unsatisfied against one of them—No bar.

In the case of persons whose liability for a certain amount is joint and several, an unsatisfied judgment obtained against one of them is no bar to a fresh suit against them (205).

This principle held applicable to a claim by the Shareholders of a company to recover amounts fraudulently received by the directors thereof (205). **GEOFFREY TEIGNMOUTH CLARKSON v. E. C. DAVIES.**

(1922) 32 M.L.T. 196 P.C.

—Amount improperly paid by—Suit by liquidator for recovery of—Basis of—Constructive trust—Limitation.

In a case in which the assets and undertaking of one company were sold to another company, an arrangement was made between the Directors of the company sold, and the managing director of the purchasing company that a further payment of £. 30,000 beyond anything provided for or disclosed in the sale-deed should be made out of the funds of the purchasing company to the directors of the company sold. That payment of the £ 30,000 was made by the managing director of the purchasing company to the managing director of the company sold, who retained a portion of the amount to himself, and distributed the remainder among his co-Directors.

In a suit brought by the liquidator of the purchasing company and another, suing on behalf of herself and all other shareholders of the company sold against the directors

COMPANY—(Contd.)**Directors of—(Contd.)**

of the latter company to whom the £ 30,000 was paid for the recovery of the said sum, *held* that any claim by the purchasing company, or the liquidators thereof to recover the said sum, if competent at all, could only be based on constructive trust (203). **GEOFFREY TEIGNMOUTH CLARKSON v. E.C. DAVIES. (1922) 32 M.L.T. 196 P.C.**

—Amounts improperly received by—Liability of directors in respect of—Joint or joint and several.

In a suit by the share-holders of a company for the recovery from the directors thereof of amounts improperly received by them, *held* that the liability of the several directors in such a case was not a mere joint liability, but was joint and several (205) **GEOFFREY TEIGNMOUTH CLARKSON v. E. C. DAVIES. (1922) 32 M. L. T. 196 (P. C.)**

—Amounts improperly received by—Suit by share-holders for recovery from them of—Parties—Company necessary party.

The assets and undertaking of one company were sold to another. At the time of the sale it was arranged, between the directors of the company sold and the managing director of the purchasing company, that a further payment of £ 30,000 beyond anything provided for or disclosed in the agreement of sale should be made out of the funds of the purchasing company to the directors of the company sold. That payment of £ 30,000 was made by the Managing director of the purchasing company to the Managing Director of the company sold, who retained a portion of the amount to himself, and distributed the remainder among his co-directors.

In a suit brought by the share-holders of the company sold for the recovery of the said amount from the directors of the said company who received payment of the said amount, *Held* that such an action could not be brought without making the company sold a party (204-5). **GEOFFREY TEIGNMOUTH CLARKSON v. E. C. DAVIES. (1922) 32 M. L. T. 196 (P. C.)**

—Bond by—Liability under—Personal liability—Pledge—Meaning of. See SURETY—BOND EXECUTED BY—LIABILITY UNDER—COMPANY. (1922) 43 M.L.J. 66.

—Borrowing and mortgaging of company's property—Restriction imposed by Articles of Association on—Constructive notice of, to lenders—Act of Directors in excess of authority—Ratification—Effect—Such ratification not an extension of future authority.

The Oriental Rice Company, Ltd., was incorporated under the Statutes in force in the Colony of Victoria, by deed of settlement dated 25th April, 1861, and on the 18th of August 1864, it was duly registered as a company, limited by guarantee under an Act of the Legislature of Victoria, known as the Companies statute, 1864, which followed and adopted the provisions of the Companies Act, 1862.

By that registration the company, by virtue of the section of the Colonial Act corresponding with S. 196 of the Companies Act, 1862, became subject to all the provisions, applicable to the case, of the Colonial Companies Act, in the same manner in all respects as if it had been formed under that Act.

The Articles of Association contained no restriction or limitation on the company's power of borrowing.

As regards the Directors, however, it was provided by Article 50 of the Articles of Association, which were registered under the Companies Act, that their power of borrowing sums on the credit of the company "should not exceed in the aggregate as an existing debt at the same time one-half of the then actual paid-up capital." The authority of the Directors was capable of being extended under the provisions of Art 31, but by that article one-half of the votes of all the

COMPANY—(Contd.)**Directors of—(Contd.)**

shareholders given at a general meeting called for the purpose was necessary.

By Art. 21 it was provided that an ordinary half-yearly meeting should be held during the months of October and April in each year; by Art 22, that an extraordinary general meeting might be called at any time for a special object, by Art. 25, that a notice should be sent to each shareholder, stating the day and place of the meeting, and "also the business proposed to be transacted thereat"; by Art. 26, that at every general half-yearly meeting the accounts and a statement of the company's affairs, etc., should be laid before the shareholders, and such meeting "may examine, allow, and confirm, or reject the accounts and report of the Directors or auditors, so as to bind all the members for the time being of the company, and all persons claiming under them."

Held, on the construction of the Articles of the Association, the limitation of the power of borrowing and of mortgaging, contained in Art. 50, was merely a limitation of the authority of the Directors conferred by the same article; it was not part of the constitution of the Company, which, if the Company had been originally formed under the Companies Act of 1862, must have been contained in the memorandum; and consequently, it was not a limitation of the general powers of the Company, or of the whole body of shareholders; and the acts of the Directors in excess of their authority might be ratified by the company and rendered binding; it would be competent for a majority of the shareholders present (though not a majority of the shareholders of the company) at an extraordinary meeting convened for that object, and of which object due notice had been given, to ratify an act previously done by the directors in excess of their authority;

Semble if a report had been circulated before a half-yearly meeting distinctly giving notice that the Directors had done an act in excess of their authority, and that the meeting would be asked by confirming the report to ratify the act, this might be sufficient notice to bring the ratification within the competency of the majority of the shareholders present at the half-yearly meeting;

But if the object was to give the Directors in future an extended authority beyond what was given by Art. 50, it would be an alteration of the provisions contained in the articles which, under Art. 31, could only be made by a vote of one-half of all the shareholder of the company; the ratification at a half-yearly meeting of a particular act in excess of authority would not extend the authority of the Directors so as to authorise them to do similar acts in future; anybody lending money to the Directors was bound to take notice of the restriction on their powers of borrowing imposed by Art. 50. (*Sir Barnes Peacock.*) **IRVINE v. UNION BANK OF AUSTRALIA. (1877) 4 I.A. 86 = 3 C. 280 = 3 Sar 692 = 3 Suth. 394.**

—False reports issued by Company—Accounts—Errors in—Liability for.

It may be true, indeed, that for mere errors, in accounts for matters which would not come, within the ordinary scope of their duties, but more properly within the province of paid officers, the Directors might not be personally answerable; but we must express our opinion, that those who accept such an office are bound to have at least, a general knowledge of the affairs of the Company and to exercise due care and superintendence for the protection of its interests (155-6). A Director is responsible for a false report issued by the Company to which he was privy (155-6) (*Dr. Lushington.*) **WILLIAM PATRICK GRANT, In re. (1850) 7 Moo. P.C. 141.**

COMPANY—(Contd.)**Directors of—(Contd.)**

—False reports issued by Company—Misappropriation of funds of Company—Liability as regards.

No embarrassment, and no difficulty, can excuse portraying, in false and delusive colours, the condition of the affairs of a Bank entrusted to the charge of its directors; in absence of corrupt motives, no hope of saving a falling Company can justify a violation of the deed, by which all were bound, and a consequent misappropriation of the funds entrusted to their care, and misappropriated too so as to deceive both the shareholders and the public, by enhancing nominally, though not in reality, the value of the shares (158-9). (*Dr. Lushington*). WILLIAM PATRICK GRANT, *In re*. (1850) 7 Moo. P.C. 141.

—Misappropriation of funds—Liability as regards. See COMPANY—DIRECTORS OF—FALSE REPORT ISSUED BY COMPANY. (1850) 7 Moo. P.C. 141 (158-9).

—Purchase of shares—Fraud or false representation inducing—Liability for—Conditions—Shareholder's suit against director—Maintainability.

The appellant was a shareholder in a bank, and the respondent was a director of the bank. The appellant, by his suit, sought to make the respondent liable for alleged fraud or false representations made in his capacity of a bank director and a private individual and said to have induced the appellant to purchase shares in the bank.

The verbal representations alleged to have been made by the respondent were found to be not proved. It was found that a false balance-sheet was issued for the half-year previous to appellant's purchase of shares, that the respondent knew it to be false, but that the appellant in buying the shares did not act upon any representation contained in that balance-sheet, or made by the declaration of the *ad interim* dividend made on the basis thereof, and was not thereby induced to buy the shares.

Held that the appellant failed to prove that in buying the shares he acted upon or was induced by any false representation for which the respondent was liable, and that his suit was rightly dismissed by the Courts below. (*Sir Richard Couch*.) MACAULIFFE *v* WILSON. (1898) 26 I.A. 6=21 A. 209=7 Sar. 405.

—Relation of, to share-holders and to Company—Fiduciary relation only to Company and not to share-holders.

The directors of a Company are the agents of the Company and not of the share-holders, and there is no privity between the share-holders as such and the directors. The fiduciary relation of the directors is to the Company (204-5). GEOFFREY TEIGNMOUTH CLARKSON *v* E. C. DAVIES. (1922) 32 M. L. T. 196 (P.C.).

Firm of individual-men (R. W. & Co.)—Limited
Company of samemen (R. W. & Co., Ltd.).

Distinction.

The *persona* in the case of Robert Watson & Company, Limited, *i.e.*, an incorporated *persona* is different from the *persona* in the case of Robert Watson and Company, a firm of individual men. Legal remedies at law available against a limited company might not be the same as in the case of individuals (101-2). (*Lord Shaw*). RAMKANAI SINGH *v* MATHEWSON. (1915) 42 I.A. 97=

42 C. 1029 (1041)=17 M.L.T. 377=2 L.W. 555=19 C.W.N. 585=13 A.L.J. 534=21 C.L.J. 446=17 Bom. L.R. 449=30 I.C. 55=29 M. L. J. 80.

Holder of shares in—Meaning of.

—Deceased share-holder whose name is continued on register of Company if a "holder" of shares. See COMPANY—PREFERENTIAL DIVIDEND.

(1894) 21 I.A. 139 (146)=19 B. 1.

COMPANY—(Contd.)**Liquidator.**

—See also COMPANY—AMALGAMATION AND COMPANY—WINDING UP OF.

—Compromise with contributories or alleged contributories—What amounts to.

A registered joint stock company in Bombay, with limited liability being in the course of voluntarily winding up under the Act of the Indian Legislature 19 of 1857, S. 69, and the Official Liquidators having entered into an arrangement for compromise with a class of contributories, in discharge of their liabilities, for a specific sum, the Indian Companies (Act X of 1866), was passed. The Liquidators applied to the High Court under the said Act to ratify the compromise above entered into, which the court accordingly sanctioned and ordered.

Held that, under Ss. 173 and 174 of the Companies Act of 1866, the power of the liquidators extended to making a general compromise of claims upon contributories as a class abandoning an equal proportion in each case, notwithstanding the difference of position between the contributories or inquiring closely into the means of each individual contributory, and that the compromise in question was a compromise with contributories or alleged contributories, and consequently a compromise within the words of S. 174 (31). (*Lord Justice Selwyn*.) BANK OF HINDUSTAN, CHINA, AND JAPAN *v* EASTERN FINANCIAL ASSOCIATION. (1869) 13 M. I. A. 15=12 W. R. P. C. 27=3 B. L. R. P. C. 9=2 Suth. 250=2 Sar. 476.

—Compromise with contributories or alleged contributories—Sanction of—Caution as regards—Necessity.

The power of sanctioning a compromise conferred by S. 174 of the Indian Companies Act of 1866 is one of so wide and extensive a character, that it is doubtless one which ought to be exercised with very great caution (34). (*Lord Justice Selwyn*.) BANK OF HINDUSTAN, CHINA, AND JAPAN *v* EASTERN FINANCIAL ASSOCIATION.

(1869) 13 M. I. A. 15=12 W. R. P. C. 27=3 B. L. R. 9=2 Suth. 250=2 Sar. 476.

—Compromise with contributories or alleged contributories—Sanction of—Courts power of.

The words which are to be found in S. 174 of the Indian Companies Act of 1866, especially the words "liabilities to calls, debts, and liabilities capable of resulting in debts, subsisting or supposed to subsist," and the words "alleged contributory," plainly show that the compromises intended to be sanctioned might be entered into before the list of contributories had been settled, or the liabilities or competence of the shareholders had been ascertained (31).

(*Lord Justice Selwyn*.) BANK OF HINDUSTAN, CHINA, AND JAPAN *v* EASTERN FINANCIAL ASSOCIATION.

(1869) 13 M. I. A. 15=12 W. R. P. C. 27=3 B. L. R. 9=2 Suth. 250=2 Sar. 476.

—Compromise with contributories or alleged contributories—Sanction of—Discretion of Indian courts as to—Privy Council's interference with.

In a case in which, acting under the power conferred by S. 174 of the Indian Companies Act of 1866, the courts in India had sanctioned a compromise by the Liquidators of a company with contributories or alleged contributories, their Lordships observed. "In accordance with the principle upon which this Board has always acted, their Lordships would be extremely reluctant to interfere with the discretion of the courts in India when two courts there had arrived at the same conclusion in such a case as this, unless it could be shown that these courts had acted upon an erroneous principle. A question respecting such a compromise as that which is now under consideration is one falling in a peculiar manner within the discretion of the Judges before

COMPANY—(Contd.)**Liquidator—(Contd.)**

whom it is brought, and in this case that discretion appears to have been exercised with very great caution" (34). (*Lord Justice Selwyn*). *BANK OF HINDUSTAN, CHINA, AND JAPAN v. EASTERN FINANCIAL ASSOCIATION*.

(1869) 13 M. I. A. 15 = 12 W. R. P. C. 27 =
3 B. L. R. 9 = 2 Suth. 250 = 2 Sar. 476.

Manager of.

———*Liability of Stranger or of manager or manager's partner—Power to take over.*

The manager or managing director of a Mill company has no implied authority to purchase on behalf of his mill the liability of a stranger and still less of their own Manager or Manager's partner in a private transaction of his own. (*Sir George Farwell*). *RAJA BAHADUR MOTILAL SHIVLAL v. BOMBAY COTTON MANUFACTURING CO., LTD.*

(1915) 19 C. W. N. 621 = 17 M. L. T. 443 =
21 C. L. J. 524 = 17 Bom. L. R. 484 = 2 L. W. 560 =
(1915) M. W. N. 790 = 30 I. C. 59 = 28 M. L. J. 596.

———*Shareholders' suit for account against—Preliminary decree in—Resolution of company subsequent to, absolving defendant from liability for suit amount—If an adjustment of suit under O. 23, R. 3 of C. P. C. of 1908—Efficacy of. See C. P. C. OF 1908, O. 23, R. 3—ADJUSTMENT OF SUIT—COMPANY.*

(1923) 45 M. L. J. 763.

Meeting of.

———*Business to be transacted at—Notice of—Insufficiency of—Shareholder's right to complain of—Knowledge prior on his part of such business—Effect.*

A shareholder of a company who knew even before a meeting of the company was held everything about the business to be transacted at the meeting cannot complain of the notice or the circular convening the meeting on the ground of insufficiency. (*Lord Blanesburgh*). *PARASHRAM DETARAM SHAMDASANI v. TATA INDUSTRIAL BANK, LTD.*

(1928) 55 I. A. 274 = 52 B. 571 =
30 Bom. L. R. 1115 = 28 L. W. 93 =
32 C. W. N. 1038 = 110 I. C. 195 = 48 C. L. J. 436 =
A. I. R. (1928) P. C. 180 = 55 M. L. J. 697.

———*Hearing at—Denial to shareholder of—What amounts to.*

Where the question was whether a shareholder of a company was denied a hearing at a general meeting of the shareholders thereof, and it appeared that there was no organised opposition against him, but that, knowing that there was a very clearly expressed inclination by the other shareholders of a desire not to hear the shareholder in question further, the latter desisted from any further effort to make himself heard, held that the complaint of a denial of hearing was, in the circumstances, not well-founded. (*Lord Blanesburgh*). *PARASHRAM DETARAM SHAMDASANI v. TATA INDUSTRIAL BANK, LTD.*

(1928) 55 I. A. 274 =
52 B. 571 = 30 Bom. L. R. 1115 = 28 L. W. 93 =
32 C. W. N. 1038 = 110 I. C. 195 = 48 C. L. J. 436 =
A. I. R. (1928) P. C. 180 = 55 M. L. J. 697

Preferential dividend—Liability for.

———*Holder of share—Dividend payable to, and to his executor holding same—Death of shareholder leaving will—Estate fit for distribution but not in fact distributed—Shares in name of deceased—Effect.*

In 1863, the appellant Company was formed for the purpose of taking over the business of *W* as a timber merchant. The company was registered with a nominal capital of 25 lacs, divided into 1000 shares of Rs. 2,500 each.

The terms and conditions of the transfer of the business to the company were embodied in an agreement dated 22-7-1864 made between *W* and the company and ratified and adopted by the company in general meeting and carried

COMPANY—(Contd.)**Preferential dividend—Liability for—(Contd.)**

into effect. Cl. 12 of the agreement provided that, in consideration of the transfer of certain property, referred to as "the fixed assets," *W* should be entitled to have allotted to him 100 shares in the company of Rs. 2,500 each, but at the same time it declared that the company should not be bound to give their consent to or recognise as valid any assignment of the said 100 shares, or any of them, during a period of 5 years from the date of the registration of the company. Cl. 13, so far as material, was in these terms: "In consideration of the transfer by the said *W* to the company of the premises hereby agreed to be transferred"—those premises consisted of timber already cut-live stock, stores, and plant—"the said *W* his executors or administrators shall be entitled so long as he or they shall hold the said one hundred shares to an extra or preferential dividend."

On that agreement the parties acted, and *W* held the shares till he died in England in 1888. He left a will naming executors, two of whom survived him. The will was proved in England by one of his executors. As the attorney of that executor, the plaintiff—respondent obtained a grant of letters of administration, with the will annexed from the High Court at Bombay. The letters of administration were produced to the company, and they recognised the title of the administrator by noting the letters of administration in the share register. The shares still stood in the name of *W*; but it was practically admitted that all the testator's debts had been paid or satisfied.

In a suit brought by the plaintiff—respondent for a declaration that Cl. 13 of the agreement was still in operation, and that the extra or preferential dividend payable under that clause was still payable and ought to be paid to the respondent as administrator of the estate of *W*, held, that so long as *W*'s name was on the register, the company was bound to credit the proper dividends to his holding, and to recognise the title of his legal personal representatives to receive any dividends which might be carried to his credit (146).

The company are only concerned with the legal title to the shares; the legal title is that of *W*, deceased; and his legal personal representatives are entitled to whatever may be payable in respect of his shares (147). (*Lord Macnaghten*) *BOMBAY BURMAH TRADING CORPORATION v. SMITH*.

(1894) 21 I. A. 139 = 19 B. 1 = 6 Sar. 498.

Proxy.

———*Appointment of—Validity—"Naming" of person in strict legal sense of term, in power of attorney—Necessity—Description of him sufficient for all business purposes—Sufficiency of—Articles of Association of company—Construction.*

Held, that, on the true construction of articles 64 and 66 of the Articles of Association of a company, the appointment of a proxy could not be objected to on the ground that he was not named in the power of attorney appointing him, in the strict legal sense of the word "named", that it was enough if he was sufficiently described in the proxy for all business purposes, and that the articles required nothing more (44). (*Lord Lindley*). *BOMBAY BURMAH TRADING CORPORATION v. DORABJI CURSETJI SHROFF*.

(1904) 32 I. A. 39 = 29 B. 126 (132) = 7 Bom. L. R. 99 =
2 A. L. J. 139 = 1 C. L. J. 150 = 8 Sar. 768.

———*Voting by—Shareholder only to be proxy—Condition of—Compliance with—Person nominated not qualified when proxy was signed but qualified when proxy was used—Effect.*

By the articles of association of a company voting by proxy was allowed. Art. 65 of the said articles provided;

COMPANY—(Contd.)**Proxy—(Contd.)**

"No person shall be appointed or have authority to act as a proxy who is not a shareholder in the company."

Held, that to construe that article as requiring the person appointed to be a shareholder when the proxy was signed was to put too narrow a construction on the words, and that the article was complied with by his being so qualified at the time when he was called upon to act as proxy (44).

If an unqualified person is named in the proxy the nomination is not an appointment in any effective sense; his nomination does not become an appointment until he is qualified. In order to act something more is required he must be qualified, not only when appointed, but when he acts (44). (*Lord Lindley*). BOMBAY—BURMAH TRADING CORPORATION *v.* DORABJI CURSETJI SHROFF.

(1904) 32 I.A. 39 = 29 B. 126 (132) = 7 Bom. L.R. 99 = 2 A.L.J. 139 = 1 C.L.J. 150 = 8 Sar. 768.

Ratification.

—Unauthorized and *ultra vires* transactions—Ratification of—Power of—Distinction. See COMPANY—UNAUTHORISED AND ULTRA VIRES TRANSACTIONS.

(1922) 32 M.L.T. 196 (203) (P.C.).

Sale of assets and rights of—Consideration for.

—Directors—Compensation to, for loss of office—Stipulation for—Validity—Disclosure full and complete of main facts to parties interested—Necessity.

In a case in which the business and effects of one company were taken over by another it appeared that the consideration stated in the deed of transfer was not the full or true consideration for the sale and transfer, and that there was an additional consideration of a sum of money secretly bargained for and obtained by the directors of the company whose assets and rights were transferred. With regard to the payment and receipt of the said sum by the directors, the Chief Justice in appeal said: "These gentlemen (the directors of the company whose assets and rights were transferred) lost their offices as a result of the sale; it was reasonable for them to ask and to receive compensation for the loss of their positions, and it was on this basis that the money they received was paid to them. I venture to think that the usual course in such a transaction as was entered into is to compensate officers who are deprived of their positions as the result of it, and, in my view, the amounts allowed as compensation in this case were reasonable."

Held, that a necessary basis for a payment of compensation such as the Chief Justice described was that there should be a full and complete disclosure to the parties interested of all the main facts (201-2). GEOFFREY TEIGNMOUTH CLARKSON *v.* E.G. DAVIES. (1922) 32 M.L.T. 196 (P.C.).

Sale of business and effects of one, to another company.

—Payment of amount by directors of purchasing company to directors of company sold over and above consideration stated in deed of sale—Validity—Ratification of payment by shareholders of both companies—Effect. See COMPANY—UNAUTHORISED OR *ultra vires* TRANSACTION.

(1922) 32 M.L.T. 196 P.C. (203).

Shares in.

—Grant of, in consideration of establishing and providing working capital of company—Agreement for—Validity. See COMPANIES ACT OF 1913, S. 105 (2).

A.I.R. (1928) P.C. 143.

—Holder of—Meaning of—Deceased shareholder whose name is continued on register of company if a "holder" of shares. See COMPANY—PREFERENTIAL DIVIDEND.

(1894) 21 I. A. 139 (146) = 19 B. 1.

COMPANY—(Contd.)**Shares in—(Contd.)**

—Pledge of—Accession to shares pledged during period of pledge—Fresh shares issued payable out of dividends of old ones—Pledger's right to.

During the period of pledge of certain shares in a company, the company issued fresh shares, payable out of the dividends of the old ones.

Held, that the fresh shares so issued were clearly accessions to the shares expressly pledged or hypothecated, and the pledger or his representative was clearly entitled to recover the same (143-4). (*Mr. Ameer Ali*.) MOTILAL HIRABHAI *v.* BAI MANI.

(1924) 52 I.A. 137 =

49 B. 233 = 30 C.W.N. 5 = A.I.R. (1925) P.C. 86 =

27 Bom. L.R. 455 = 86 I.C. 368 =

48 M.L.J. 648.

—Pledge of—Redemption of—Decree for—Accession to shares during period of pledge—Recovery of fresh shares by pledger—Mode of—Execution—Separate suit.

The pledger of certain shares in a company sued for and obtained a decree for redemption of the shares pledged. It appeared that during the period of the pledge, the company had issued fresh shares, payable out of the dividends of the shares expressly pledged. In execution of the decree for redemption, the pledger applied for the return of the fresh shares also.

Held, that the question whether the pledger was entitled also to the fresh shares was one which related to the execution, etc., of the decree, and could, under S. 47 of C.P.C. of 1908, be decided in execution proceedings (142-3). (*Mr. Ameer Ali*.) MOTILAL HIRABHAI *v.* BAI MANI.

(1924) 52 I.A. 137 = 49 B. 233 = 30 C.W.N. 5 =

A.I.R. (1925) P.C. 86 = 27 Bom. L.R. 455 =

86 I.C. 368 = 48 M.L.J. 648.

—Property in—Right to—Registered holder—Certificate and transfer signed by—Person in possession of—Rights of.

It is quite true that the full property in shares in a company is only in the registered holder. The company is entitled to deal with the share-holder who is on the register, and only a person who is on the register is in the full sense of the word owner of the share. But the title to get on the register consists in the possession of a certificate together with a transfer signed by the registered holder (97). (*Viscount Dunedin*.) MANECKJI PESTONJI BHARUCHA *v.* WADILAL SARABHAI & CO.

(1926) 53 I. A. 92 =

50 B. 360 = 24 A. L. J. 657 =

28 Bom. L.R. 777 = 43 C.L.J. 508 =

(1926) M. W. N. 499 = 30 C.W.N. 890 =

A.I.R. (1926) P.C. 38 = 94 I.C. 824 = 51 M. L. J. 1.

—Sale of—Contract for—Certificates and blank transfers signed by registered holders of shares—Delivery of—Sufficiency of—Certificates and blank transfers so signed if "goods" under S. 76 of Contract Act.

A broker, who was not himself on a registered holder of shares in a company, sold a certain number of shares therein on the Bombay Stock Exchange to one G for delivery on a specified date. To make good the delivery the broker acquired the requisite member of shares in the market from various brokers, and took from those brokers blank transfers signed by the registered holders along with the corresponding certificates. Those certificates and blank transfers he handed over to G.

Held, that the certificates and blank transfers signed by the registered holders would be choses in action in England but were, in India, by the terms of the Contract Act, goods. (97-8).

By the definition of goods as every kind of moveable property, it is clear that, not only registered shares, but also this class of choses in action are goods (98). (*Viscount Dune-*

COMPANY—(Contd.)

Shares in—(Contd.)

din). MANECKJI PESTONJI BHARUCHA v. WADILAL SARABHAI. (1926) 53 I.A. 92 = 50 B. 360 = 24 A.L.J. 657 = 28 Bom. L.R. 777 = 43 C.L.J. 508 = (1926) M.W.N. 499 = 30 C.W.N. 890 = A.I.R. (1926) P.C. 38 = 94 I.C. 824 = 51 M.L.J. 1.

——Sale of—Passing of property on—Bombay Stock Exchange Rules—Rule (c) of—Scope and effect of.

Rule C of the Bombay Stock Exchange provided: If the cheque given for the money of the shares will not be honoured at the bank on the day following the day when the cheque is given, the shares shall have to be returned immediately to the person selling (then), and the person purchasing them shall have to take away those shares having paid the rupees in cash before two o'clock on that very day. And if the person purchasing shall fail to do so, those shares will be sold off by auction before three o'clock.

Held that the rule could not be read as an express stipulation in the sense of S. 121 of the Contract Act, because it did not say what S. 121 provides must be said, and that the effect of that rule was not therefore to make the delivery not actual, but conditional, with the result that the property in the shares did not really pass till the cheque was honoured (98-9).

The rule in question has, in truth, nothing to do with the perfection of contracts or the passing of property. The Contract Act settles that property is to pass on delivery. Delivery is a fact and the statutory result must follow. The rule in question is for quite another purpose. The buyer may be unable, from temporary embarrassment, to meet his cheque on an exact day. Time is of the essence of this ordinary contract of sale of shares; therefore, he is enjoined by the rule to hand back the shares; he is given the latitude of paying up till 2 o'clock, but if he does not do so then they are sold by the authorities, so as to fix, without further ado, the damages which are become due for breach of contract (99). (*Viscount Dunedin*). MANECKJI PESTONJI BHARUCHA v. WADILAL SARABHAI.

(1926) 53 I.A. 92 = 50 B. 360 = 24 A.L.J. 657 = 28 Bom. L.R. 777 = 43 C.L.J. 508 = (1926) M.W.N. 499 = 30 C.W.N. 890 = A.I.R. (1926) P.C. 38 = 94 I.C. 824 = 51 M.L.J. 1.

——Sale of, by general description—Contract by broker for—Performance by broker of—Certificates and blank transfers signed by registered holders of shares described—Delivery of, if enough.

It would be an upset of all stock Exchange transactions if it were suggested that a broker who sold shares by general description did not implement his bargain by supplying the buyer with certificates and blank transfers, signed by the registered holders of the shares described (97-8). (*Viscount Dunedin*.) MANECKJI PESTONJI BHARUCHA v. WADILAL SARABHAI & CO. (1926) 53 I.A. 92 = 50 B. 360 =

24 A.L.J. 657 = 23 Bom. L.R. 777 = 43 C.L.J. 508 = (1926) M.W.N. 499 = 30 C.W.N. 890 = A.I.R. (1926) P.C. 38 = 94 I.C. 824 = 51 M.L.J. 1.

——Sale of unascertained—Certificates and blank transfers signed by registered holders obtained by vendor and delivered to and accepted by purchaser—Effect—Unpaid purchase-money—Vendor's remedy in respect of—Return of certificates and blank transfers—Suit for—Maintainability against transferee thereof from buyer.

Holder of shares in a company, sold on the Bombay Stock Exchange to one G 129 shares of the company for delivery on a specified date. To make good the delivery the broker acquired the requisite number of shares in the market, from various brokers, and took from those brokers blank trans-

COMPANY—(Contd.)

Shares in—(Contd.)

fers signed by the registered holders along with the corresponding certificates. Those certificates and blank transfers he handed over to G, who gave the broker a cheque for the sum due under the contract. The certificates and blank transfers were handed by G to the 2nd defendant, who, in his turn, handed them over to the 3rd. The cheque being dishonoured, the broker brought a suit against G and the 2nd and 3rd defendants for return of the certificates and blank transfers or otherwise for damages.

Held though, at the time the contract was made the shares were not ascertained, still so soon as the broker (plaintiff) handed G the certificates and transfers, and G accepted them and gave the cheque, the goods become ascertained goods under S. 83 of the Contract Act, the sale was complete and the property passed. *Held further*, from that time onward the plaintiff could only sue G on the cheque, or for the price of the shares unpaid in respect that the cheque had not been honoured, he had no longer any *ius in re* of the certificates and transfers; he had no statutory lien, for he had parted with possession, and, consequently, as he had no contract with defendants 2 and 3, he could not sue them for delivery of the shares, whether they had good title as against G or had not (98). (*Viscount Dunedin*). MANECKJI PESTONJI BHARUCHA v. WADILAL SARABHAI & CO. (1926) 53 I.A. 92 = 50 B. 360 =

24 A.L.J. 657 = 28 Bom. L.R. 777 = 43 C.L.J. 508 = (1926) M.W.N. 499 = 30 C.W.N. 890 = A.I.R. (1926) P.C. 38 = 94 I.C. 824 = 51 M.L.J. 1.

——Sale of, by broker not himself a registered shareholder—Certificates and blank transfers signed by registered holder—Delivery to purchaser of—Vendor's lien for unpaid purchase-money in case of.

The law as to sellers lien in India is statutory and is contained in S. 95 and following sections of the Indian Contract Act (97).

The two plaintiffs, neither of whom was the registered holder of shares of a company, sold certain of those shares to the 1st defendant on the Bombay Stock Exchange for delivery on a specified date. To make good the delivery, the 1st plaintiff, the 2nd plaintiff being his sub-broker, acquired the requisite number of shares in the market from various brokers, and took from those brokers blank transfers signed by the registered holders along with the corresponding certificates. Those certificates and blank transfers were handed to the 1st defendant, who gave a cheque for the sum due under the contract. The cheque being dishonoured, the plaintiffs brought a suit for the return of the certificates and blank transfers, which had in the interval been handed by the 1st defendant to the other defendants, or otherwise for damages.

It was contended that the 1st defendant was only an ostensible owner of the shares, and the plaintiff, who was the unpaid vendor, had the equity in them, and that, under the law of England, there would be an equitable lien in favour of the unpaid vendor, and that that law applied.

Held, that such a view would be far-reaching in ordinary stock exchange transactions, that S. 95 of the Contract Act applied to the case, and that, under that section, unless there was possession, there was no lien (97). (*Viscount Dunedin*.) MANECKJI PESTONJI BHARUCHA v. WADILAL SARABHAI & CO. (1926) 53 I.A. 92 = 50 B. 360 =

24 A.L.J. 657 = 28 Bom. L.R. 777 = 43 C.L.J. 508 = (1926) M.W.N. 499 = 30 C.W.N. 890 = A.I.R. (1926) P.C. 38 = 94 I.C. 824 = 51 M.L.J. 1.

——Transfer of—Right of—Restrictions on—Validity—Conditions.

Shares in a company are *prima facie* transferable. But there is no law which prevents the shareholders from con-

COMPANY—(Contd.)**Shares in—(Contd.)**

tracting for value that they shall each submit to any reasonable restriction which they choose to agree to. It may be for the benefit of the company that, for instance, shares shall not be transferred to rivals in the Company's trade. A restriction which precludes a shareholder altogether from transferring may be invalid, but a restriction which does no more than give a right of pre-emption is valid. In such a case the company may, where the transfer does not comply with the terms of the contract, refuse to register the same. (*Lord Wrenbury*). **ONTARIO JOCKEY CLUB, LTD. v. MC BRIDE.** (1927) 30 Bom. L.R. 1329 =

5 O.W.N. 871 = 111 I.C. 337 = A.I.R. (1928) P.C. 291.

—*Transferee of—Suit to enforce registration of transfer by—Parties—Transferor necessary party.*

To an action by the transferee of shares in a company to enforce registration of the same, i.e., for an order on the company to enter the transferee's name on the register of members, the transferor of the shares is a necessary party. An order for rectification of the register cannot be made in the absence of the transferor, inasmuch as the order to put the transferee's name on the register is necessarily an order to take off the transferor's name. (*Lord Wrenbury*). **ONTARIO JOCKEY CLUB, LTD. v. MCBRIDE.**

(1927) 30 Bom. L.R. 1329 = 5 O.W.N. 871 = 111 I.C. 337 = A.I.R. (1928) P.C. 291.

Shareholders of.

—*Directors—Amount fraudulently received by—Suit for recovery from them of—Judgment prior and unsatisfied against one of them—No bar. See COMPANY—DIRECTORS—AMOUNT FRAUDULENTLY RECEIVED BY.*

(1922) 32 M.L.T. 196 (205) P.C.

—*Directors—Amount improperly received by—Suit for recovery from them of—Parties—Company necessary party. See COMPANY—DIRECTORS—AMOUNT IMPROPERLY RECEIVED BY.*

(1922) 32 M. L. T. 196 (204-5) P.C.

—*Inspection of register of Company—Right of—Nature and extent of. See CORPORATION—MEMBER OF—INSPECTION OF BOOKS OF CORPORATION.*

(1908) 35 I.A. 130 (136) = 32 B. 466 (476-7).

—*Proxy—Appointment of. See COMPANY—PROXY.*

Unauthorised and ultra vires transactions.

—*Adoption and approval of such transactions by company—Distinction.*

There is a distinction between a transaction which is not authorized by a company, and one which is *ultra vires* of the company. A company cannot adopt or effectively approve of what is *ultra vires*, but it can adopt and approve of what is merely unauthorized (203). **GEOFFREY TEIGNMOUTH CLARKSON v. E. C. DAVIES.**

(1922) 32 M.L.T. 196 P.C.

—*Sale of business and effects of one company to another—Payment of amount by purchasing company to directors of Company sold—Arrangement for, between directors of both companies—Unauthorised not ultra vires transaction—Ratification of payment by shareholders of both companies—Effect.*

In a case in which there was a sale of the assets and undertaking of one company to another, it appeared that there was a secret arrangement between the directors of the company sold and the managing director of the purchasing company that a further payment of £30,000 beyond anything provided for or disclosed in the agreement of sale should be made out of the funds of the purchasing company to the directors of the company sold. That payment was made by the managing director of the purchasing company to the managing director of the company sold,

COMPANY—(Contd.)**Unauthorised and ultra vires transactions—(Contd.)**

who retained a portion of the amount to himself and distributed the remainder among his co-directors.

It was contended that the £30,000 transaction was *ultra vires*.

Held, over-ruling the contention, that the transaction might have been unauthorized by either company, but that it could not be said to have been *ultra vires* (203).

If the facts had been disclosed to the shareholders of either company they would have been quite entitled to approve of the payment, and if they had done so, the payment could not have been challenged (203). **GEOFFREY TEIGNMOUTH CLARKSON v. E. C. DAVIES.**

(1922) 32 M. L. T. 196 P.C.

Winding up of.

(SEE ALSO COMPANY—LIQUIDATOR.)

—*Liquidator—Decision against—Debenture-holders—Effect on—Failure of liquidator to appeal—Debenture-holders—Application for being made parties and for leave to appeal—Right to make.*

The appellant, the secretary of a limited company, was granted by the company a charge upon unpaid calls. In the course of the winding up of the company, a petition was presented by the appellant to the District Court, asking for an order recognising the validity of the charge. The liquidator contended that the charge not having been registered was not enforceable by the appellant, as he was an officer of the company when it was taken. The District Court decided in favour of the appellant, and no appeal was ever presented against the order.

Held that the official liquidator must be regarded as having represented on that application the debenture-holders and creditors as well as the company, and that so long as the order on that application stood it was conclusive in the winding up on all parties so represented (40).

The official liquidator did not appeal. If any debenture-holder or other person interested desired to attack the decision it was open to him to ask that he should be made a party and should have leave to appeal. No such application was made (40). (*Viscount Finlay*). **KRISHNA AYYANGAR v. NALLAPERUMAL PILLAI.**

(1919) 47 I. A. 33 = 43 M. 550 (562-3) =

18 A.L.J. 489 = 22 Bom. L.R. 568 =

28 M.L.T. 28 = (1920) M.W.N. 419 = 12 L.W. 92 =

56 I.C. 163 = 38 M.L.J. 444.

—*Order for—Setting aside of—Application for—Onus on applicant.*

Where a winding up order has been passed, an applicant, to have the order set aside, must allege and prove fraud. (*Lord Buckmaster*). **TOM BOEVEY BARRETT v. AFRICAN PRODUCTS, LTD.**

(1928) 110 I.C. 299 =

A.I.R. (1928) P.C. 261 (263) = 29 L.W. 72.

—*Sale by Official Liquidator—Sanction by Court of—Order granting—Setting aside of, on appeal—Propriety—Sale best thing under circumstances—Effect.*

In the matter of the winding-up of the Diamond Jubilee Flour Mills, the Additional District Judge made an order directing the sale of the Flour Mills of which the appellants had been in possession as lessees. Under the said order the appellants became the purchasers of the said Mills. Objections to the order were made on behalf of creditors on the ground that the price was inadequate. Those objections were over-ruled by the Additional Judge who decided that the price was a fair one having taken into consideration the fact that under the terms of the existing lease no purchaser save the lessees could obtain vacant possession. On appeal the Chief Court set aside the sale order.

COMPANY—(Contd.)**Winding up of—(Contd.)**

Held, reversing the Chief Court, that what the appellate Court had to determine was whether *rebus sic stantibus* the sale to the lessees which the Judge of First Instance had effected was the best thing that could be done, and that the court below had not put that question before itself. (*Lord Phillimore.*) **BEHARI LAL-BULAKI RAM v. KUNDAN LAL.** (1922) 27 C.W.N. 509 (512) =

(1922) P.C. 361 = 32 M.L.T. (P.C.) 15 =
(1922) M.W.N. 388 = 69 I. C. 356 = 47 M.L.J. 322.

COMPANIES ACT (X OF 1866).

—S. 174 — Liquidator—Compromise with contributories or alleged contributories—What amounts to—Sanction of. *See* COMPANY—LIQUIDATOR—COMPROMISE WITH CONTRIBUTORIES, ETC.

—S. 174—*Object of.*

The words of S. 174 of the Indian Companies Act are very wide and general, and they are similar to those contained in S. 160 of the English Winding-up Act of 1862. It may be conjectured that the great amount of costs and expenses incurred in the winding-up of these Companies induced the Legislature to increase the powers of the court with respect to compromises, in order to the diminishing of the amount of those costs (31). (*Lord Justice Selwyn.*) **BANK OF HINDUSTAN, CHINA AND JAPAN v. EASTERN FINANCIAL ASSOCIATION.** (1869) 13 M.I.A. 15 = 12 W.R.P.C. 27 = 3 B.L.R. 9 = 2 Suth. 250 = 2 Sar. 476.

COMPANIES ACT (VI OF 1882).

—S. 6—Certificate of incorporation — Validity and effect of. *See* COMPANY—CERTIFICATE OF INCORPORATION. (1912) 39 I. A. 237.

—S. 40—*Reason for enactment of.*

Probably this provision (S. 40) was introduced (into the Indian Act of 1882) because according to the Indian law the contract of an infant is not voidable but void, and it would lead to endless confusion and expense if the registrar were to take upon himself the duty of ascertaining whether the signatories to the memorandum were or were not of full age (244). (*Lord Macnaghten.*) **MOOSA GOOLAM ARIFF v. EBRAHIM GOOLAM ARIFF.**

(1912) 39 I.A. 237 = 16 I.C. 70 = 23 M.L.J. 215.

—S. 68, *Expl.*—Secretary—Charge in favour of—Omission to register—Effect.

Held a charge given to the Secretary of a limited company upon unpaid calls cannot be enforced by him unless it is registered in accordance with S. 68 of the Indian Companies Act, 1882, even though he has ceased to be an officer.

The words "as such" in the Explanation to S. 68 of the Act should not be read as denoting the capacity in which the officers take the mortgages or charges. They are introduced simply as giving the reason for the inability to take advantage of the securities. The reason underlying the judgments, which the Explanation appears to have been intended to crystallise into the form of an enactment, was that officers entrusted with a duty as to registration could not take advantage of a security to them as to which this duty had been neglected by them. The words "as such" relate simply to the prohibition under which they are as officers. The officers are forbidden as such because they are officers and were, therefore, bound to see to registration, to avail themselves of unregistered securities. The words in this sense are unnecessary but not insensible. The drafting is bad (43-4). (*Viscount Finlay.*) **KRISHNA AYYANGAR v. NALLAPERUMAL PILLAI.**

(1919) 47 I. A. 33 = 43 M. 550 (565-6) =
18 A. L. J. 489 = 22 Bom. L. R. 568 = 28 M. L. T. 28 =
(1920) M. W. N. 419 = 12 L. W. 92 = 56 I. C. 163 =
38 M. L. J. 444.

COMPANIES ACT (VIII OF 1913).

—S. 105 (2)—Shares—Grant of, in consideration of establishing and providing working capital for company—Agreement for—Validity.

The appellants were a company which organised building, mortgage and discount corporations and provided them with capital. In the course of their operations they promoted the respondent company. The respondent company was incorporated with a capital of 2,000,000 dollars, divided equally into preference and deferred shares, both the preference and the deferred shares having a face value of 10 dollars apiece. In order to make the respondent company effective as a business concern the Appellants considered that the system with which they were acquainted would need to be installed, and at the same time that they could raise the capital necessary for the purpose of carrying on the business which, in the main, consisted in financing the erection, purchases and sales of houses in selected spots. Accordingly, a proposition was prepared by the appellants and placed before the respondents which contained two proposals; first, that the appellant company should start the business of the respondent company; and secondly, that they should provide the necessary capital for carrying on its work. That capital was to be provided by the issue of the preference shares. Although the two proposals were in their nature independent, the proposition itself which was placed before the respondent company was a proposition in which both the two branches were closely associated, and they were not, and there were never intended to be, two separate and independent proposals. The Appellants' proposition was put before the directors of the respondent company, who considered and adopted it, and that adoption was confirmed by the Shareholders.

Pursuant to that proposal and acceptance, two agreements were prepared. The first was one which referred to the proposition in unity, that had been accepted, and stated in the first recital the arrangements for providing the necessary experience and the assistance for establishing the business and in the second recital the agreement for providing the working capital by underwriting or sale of the company's shares. After those two recitals the operative part of the agreement began. In its first clause it provided that the appellants should instal its business system, provide the necessary office place, and do the necessary clerical work, and in the second, the appellant company agreed to enter into a separate agreement compelling it to underwrite or sell all of the preferred shares of the company at the original agreed commission. Following on these two recitals and the carrying out of those two provisions about the business and the issuing of the shares para. 3 of the agreement was as follows:—The consideration payable by the second party to the first party for the foregoing is hereby fixed at 99,983 shares of the common stock of the second party, to be issued to the first party as fully paid and non-assessable upon the first party executing this agreement and the further agreement with reference to the obtaining of the second party's working capital hereinbefore referred to."

The second agreement, which was executed subsequently, also showed that there had been, as consideration for the dual obligation cast upon the appellants, the duty cast upon the respondents of issuing 99,983 shares of the common stock as fully paid.

Held that the transaction entered into by the respondent company was in direct defiance of the provisions of S. 100 (2) of the Ontario Companies Act of 1914 (corresponding to S. 105 (2) of the Indian Companies Act of 1913) and was, therefore, *ultra vires* the company. (*Lord Buckmaster.*) **BANKING SERVICE CORPORATION, LTD. v. TORONTO FINANCE CORPORATION, LTD.**

(1928) A. I. R. 1928 P. C. 143 = 115 I. C. 748.

COMPANIES ACT (VIII OF 1913)—(Contd.)

—**S. 153**—*Compromise or arrangement between company and creditors—Date from which compromise is binding—Date of arrangement or date of its sanction by court.*

Under S. 153 of the Indian Companies Act, 1913, a compromise or arrangement between a company and its creditors which has been agreed by a three-fourths majority becomes binding upon all the creditors from the date when it is arrived at, subject to subsequent sanction by the court. If that sanction be refused, the agreement is without effect. But it is not the case that the agreement is to take effect from the date of sanction.

It is the proceeding of the meeting that is to be binding, provided only that it does not fail to be subsequently sanctioned. (*Viscount Haldane.*) *RAGHUBAR DAYAL v. BANK OF UPPER INDIA, LTD.* (1919) 46 I. A. 135 =

41 A. 566 = 17 A. L. J. 533 = 23 C. W. N. 697 = 21 Bom. L. R. 481 = 22 O. C. 106 = 30 C. L. J. 214 = 26 M. L. T. 178 = 10 L. W. 374 = (1919) M. W. N. 500 = 50 I. C. 429 = 36 M. L. J. 526.

—*Mortgage by company for a stated sum—Scheme for, approved by share-holders—Mortgage for an increased sum—Sanction by Court of—Validity.*

After a winding up order had been made on a creditor's petition, the Court directed a meeting of share-holders of the company to be held to decide whether they would accept a scheme (believed by all parties and the Court to be one under S. 153 of the Indian Companies Act of 1913) put forward by one K to advance a sum of Rs. ten lacs on mortgage and alternatively to purchase the company at eleven lacs fifty thousand. A meeting of the share-holders was duly held, and K's scheme was accepted by a large majority. The approval of the meeting was not, however, taken subject to modifications to be approved by the court. Subsequently that the advance of Rs. ten lacs was not sufficient, and that a further advance of Rs. 62,000 was necessary. K agreed to make the further advance, and his scheme was approved by the court which directed a mortgage-deed to be executed in favour of K for the sum of Rs. ten lacs and Rs. 62,000. The assent of the share-holders to the amended scheme was, however, not obtained, and, in the circumstances of the case, it was not possible to say that the amended scheme had been approved by the share-holders at the meeting held to consider K's scheme or that they had impliedly assented to an increased advance of Rs. 62,000.

Held, that the share-holders of the company could not be held to have assented to the amended scheme, and that the orders of the court approving the same and directing the preparation of a mortgage-deed pursuant to the same should be set aside. (*Lord Atkin.*) *KAMLAPAT MOTI LAL v. UNION INDIAN SUGAR MILLS CO., LTD.*

(1929) A. I. R. (1929) P. C. 256.

—*Scheme under—Plea that a scheme is not a—Maintainability of, in Privy Council appeal—Court below proceeding on footing that scheme was one under S. 153.*

Held, in such a case, that in the Privy Council appeal the case must be dealt with on the footing that the scheme was one under S. 153, and that it was not a mere scheme for financing the Company's affairs which the Court could in the liquidation approve without the necessity of having it approved by the share-holders. (*Lord Atkin.*) *KAMLA-PAT v. UNION INDIAN SUGAR MILLS CO. LTD.*

(1929) A. I. R. (1929) P. C. 256.

—*Scheme under—Share-holders' consent to—Modifications to be approved by court—Consent subject to—Practice of taking, in carefully drawn schemes.*

The approval of the meeting of the share-holders (to a scheme under S. 153 of the Companies Act of 1913) was

COMPANIES ACT (VIII OF 1913)—(Contd.)

not taken as is usual in carefully drawn schemes subject to modifications to be approved by the Court. (*Lord Atkin.*) *KAMLAPAT v. UNION INDIAN SUGAR MILLS CO., LTD.*

(1929) A. I. R. (1929) P. C. 256.

—**S. 164**—*Winding-up of company—Jurisdiction in respect of—Additional District Judge—Jurisdiction of—Punjab Courts Act of 1888, S. 6—Effect. See PUNJAB COURTS ACT OF 1888, S. 6.*

(1922) 27 C. W. N. 509 (510) = 47 M. L. J. 322.

—**S. 213**—*Amalgamation of—Scheme of. See COMPANY—AMALGAMATION OF.*

—**Ss. 235 and 202**—*Misfeasance summons proceeding—Order of Bench of two judges of High Court on its original side—Privy Council appeal direct from—Right of.*

When two judges of a High Court forming a Bench on its Original Side pass an order in a misfeasance summons proceeding in the exercise of the court's power to assess damages against delinquent directors, etc., under S. 235 of the Indian Companies Act of 1913, there is a right of appeal against that order direct to the Privy Council. (*Lord Pillimore.*) *NATIONAL BANK OF UPPER INDIA v. BISHAMBHAR NATH.* (1927) 4 O. W. N. 685.

COMPENSATION.

—*Claims for—Basis of—Statutory provisions.*

Compensation claims are statutory, and depend on statutory provisions (63). (*Lord Parmoor.*) *SISTERS OF CHARITY OF ROCKINGHAM v. KING.*

(1922) 32 M. L. T. 62 P. C.

COMPROMISE.

(*See also FAMILY ARRANGEMENT AND HINDU LAW—COMPROMISE AND FAMILY ARRANGEMENT.*)

APPEAL—COMPROMISE PENDING.

Consensus ad idem—ABSENCE OF.

CONSIDERATION FOR.

CONSTRUCTION OF.

DECREE ON FOOT OF.

DOUBTFUL RIGHTS—COMPROMISE OF.

EXECUTED COMPROMISE—SUIT TO RESTRAIN ACTS DONE IN CONTRAVENTION OF.

EXECUTION OF.

FRAUD VITIATING.

HINDU FAMILY—MEMBERS OF—COMPROMISE BETWEEN, DIVIDING ESTATE—RIGHTS OF PARTIES.

LEGAL PRACTITIONER.

LITIGATION.

MAINTENANCE—CLAIM FOR—PERMANENT ARRANGEMENT BASED ON.

OFFER OF—INFERENCE OF ADMISSION OF JUSTICE OF DEMAND FROM.

RIGHT TO INSIST UPON—ESTOPPEL.

SETTING ASIDE OF.

SPECIFIC PERFORMANCE—COMPROMISE CAPABLE OF.

SUIT—COMPROMISE OF.

TERMS REAL OF—EVIDENCE.

Appeal—Compromise pending.

—Decree not in accordance with—Validity—Remedy of aggrieved party. *See APPEAL—COMPROMISE PENDING.* (1872) Sup. I. A. 135 (146).

Consensus ad idem—Absence of.

—*Binding nature of compromise in case of.*

On the representation of counsel on both sides that a part-heard suit was likely to be settled, it was passed over.

COMPROMISE—(Contd.)**Consensus ad idem—Absence of—(Contd.)**

Later in the day counsel for the defendant stated that the case was settled and that the terms would be put in later. What really happened was that counsel for both sides left the amount to which the plaintiff was entitled to be fixed by Mr. C. the leading counsel for the defendant, that Mr. C. mentioned a certain sum, but that, on being informed of it, the plaintiff repudiated the suggestion that Mr. C's opinion was final.

On an application by the defendant for a decree to be passed in accordance with the settlement, held that the parties were not *ad idem* in connection with the compromise, and that the same had thus failed as a settlement of the suit between the parties.

Though the impression upon the minds of counsel for both parties was that a settlement had been achieved, yet in point of fact there was a misapprehension as to the exact ambit of the terms of that agreement. The defendant's counsel was under the impression that Mr. C's interposition was merely to be accepted as a leading and predominant element in contributing to the compromise, while the plaintiff's counsel thought that it was to be conclusive. (*Lord Shaw.*) *JAGATPUT SINGH v. PURAN CHAND NAHATTA.*

(1924) 26 Bom. L. R. 772 = (1924) M. W. N. 646 =
35 M. L. T. 136 = 20 L. W. 571 =
A. I. R. (1924) P.C. 200 = 10 O. & A. L. R. 1011 =
83 I. C. 380 = 47 M. L. J. 136 (144-5).

Consideration for.

——Benefit gained under compromise—Consideration apart from—Necessity. See AGREEMENT—VALIDITY.
(1928) 56 I. A. 104 (109).

——Executed or executory—Adopted son and alienee who would be reversioner but for adoption—Compromise between—Consideration executory—Failure of—Rights of parties on.

A compromise of suit made between the adopted son of the last male owner and an alienee who was reversioner but for adoption, to the effect that the alienee should not question the title of the adopted son thereafter, and that the latter should confirm a portion of the patni leases and also agree to settle on the wife of the alienee benami for the latter in permanent ijara certain other properties when it should come into his khas possession is not for an executed consideration.

The consideration for the compromise was to obtain security of the adopted son's title to the Zemindari and immunity from future attacks, and where the alienee immediately after such compromise questioned the title of the adopted son, there was a failure of consideration so as to disentitle the alienee and his heirs from claiming specific performance of the remaining parts of the agreement.

Although there is no necessary inconsistency in a party who has unsuccessfully tried to rescind an agreement afterwards claiming performance of it, yet where the conduct of the party is such as to amount to a total failure of consideration and is at variance with and amounts to a subversion of the relation intended to be established by the agreement, he will not be entitled to claim specific performance. (*Lord Davey.*) *SRISH CHANDRA ROY v. ROY BANOMALI RAI.* (1904) 31 I. A. 107 = 31 C. 584 = 8 C. W. N. 594 =
6 Bom. L. R. 501 = 2 A. L. J. 31 = 8 Sar. 677 =
14 M. L. J. 185.

——Failure of executory—Rights of parties on. See COMPROMISE—CONSIDERATION FOR—EXECUTED OR EXECUTORY.
(1904) 31 I. A. 107 = 31 C. 584.

COMPROMISE—(Contd.)**Construction of.**

——Annuity—Payment of, to grantee and his heirs—Collateral heirs if included—Charge on estate if created—Enforceability of payment against grantor's successors.

By a compromise which passed between the ancestor of the appellant and the ancestor, though not the lineal ancestor, of the respondent, each of the said ancestors claiming an impartible Zemindari, it was provided that, the ancestor of the respondent relinquishing his claim, the ancestor of the appellant and her heirs should hold the Zemindari and should pay a specified annuity to the ancestor of the respondent and his heirs. Held upon a construction of the compromise, that the payment of the annuity was not limited to the lineal heirs of the grantee; that the annuity was a charge upon the estate and that the agreement was enforceable against the grantor's successors so long as there were lineal or collateral heirs of the grantee. (*Lord Phillimore.*) *RAJA OF RAMNAD v. SUNDARA PANDYASAMI TEWAR.*

(1918) 46 I. A. 64 (68-9) = 42 M. 581 (585-6) =
17 A. L. J. 153 = 23 C. W. N. 549 = 29 C. L. J. 551 =
25 M. L. T. 400 = 10 L. W. 322 = (1919) M. W. N. 511 =
21 Bom. L. R. 885 = 49 I. C. 704 = 36 M. L. J. 164.

——Antecedent title—Acknowledgment and definition of—Creation of title for first time—Compromise having effect of—Test.

R died in 1851. *D*, his only son having predeceased him without male issue, *R*'s property would have descended to *K*, his daughter's son, whose widow was the respondent. The appellant and her sister, the daughters of *D*, however, contended that *R* had, during the lifetime of *D*, become a Mahomedan, and that his ancestral property had, therefore, according to Hindu law, vested in *D*. Disputes, therefore, arose between the widows of *R* and of *D* as to the right to succeed to the property of *R*, and those disputes were, after the deaths of the respective widows of *R* & of *D*, renewed between *K*, on the one hand, and the appellant and her sister, on the other. To put an end to those disputes, *K*, on the one hand, and the appellant and her sister, on the other, effected a compromise, which was embodied in a deed of agreement.

The agreement was as follows: "We do hereby declare that regarding the dispute which existed for all the houses, lands, and property left by *R*, whether moveable or immovable, ancestral, or self-acquired, in the custody of the Court of Wards, situated in the District of Bareilly, etc., and in the province of Oudh, we have come to amicable terms, and agreed to regard the whole property as if it were one rupee, and to divide it in the following shares: 7½ annas as the share of *K*, 4¼ annas as the share of *C* (the appellant's sister) and 4¼ annas as the share of *M* (the appellant). According to these rates the whole of the property shall be divided amongst the above, agreeably to a panchayat to be convened for the purpose. That we shall not retract from this proposed division."

Held, that the agreement assumed that the parties were severally claiming, by virtue of some right of inheritance, the property of *R*; that there were questions between them which might disturb the rights which each claimed, and it was better instead of a long litigation to settle those rights, and that they did settle them by arriving at that agreement, which provided that the property should be held in certain shares, and should be divided according to those shares (164 5).

The compromise is based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is. The appellant's claim to recover the shares of the properties assigned to her and her sister (in whose right also the appellant claimed) under the compromise does not rest on contract only, but upon a title to the land acknowledged and

COMPROMISE—(Contd.)**Construction of—(Contd.)**

defined by the contract, which is part only of the evidence of the appellant to prove her title, and not all her case (166). (*Sir Montague E. Smith.*) *RANI MEWA KUWAR v. RANI HULAS KUWAR.* (1874) 1 I. A. 157 =

13 B. L. R. 312 = 3 Sar. 354 = R. & J's No. 27.

—Covenant to pay out of obligor's share of inheritance in particular estate—Liability under—Estate insolvent and obligor inheriting nothing—Effect. See COMPROMISE—CONSTRUCTION—PAYMENT OUT OF OBLIGOR'S SHARE OF INHERITANCE IN PARTICULAR ESTATE.

—Estate conveyed—Proprietary right—Dispute between sharers as to—Division of estate between them—Compromise effecting—Words—*Naslan-bad-naslan*—Use of—Effect.

Disputes which had existed for several years about the proprietary right respecting talooka *S* between *G*, taluqdar, *U* and *B*, who were all descendants of a common grandfather, were set at rest by a compromise by which the whole estate was divided into certain stated shares among them. The compromise expressly provided that the division was to hold good for ever, and to descend from generation to generation—*naslan-bad-naslan*.

Held, on a construction of the compromise, that the true intention of the parties was to give to all alike the same amount of interest in the shares conceded to them, *viz.*, that absolute ownership which each was claiming for himself in the whole or part of the property, and that each sharer took an absolute interest in the share of the property allotted to him (17).

The insertion of the words, *naslan-bad-naslan*, in the *razinamah* would be conclusive in itself; but, looking to the expressed objects of the *razinamah*, their Lordships would have come to the same conclusion even if words of a less peremptory character had been used (16-7). (*Lord Hobhouse.*) *THAKUR HARIHAR BUKSH v. THAKUR UMAN PARSHAD.* (1886) 14 I. A. 7 =

14 C. 296 (307-8) = 4 Sar. 766.

—Hindu Law—Joint family—Members of—Ancestral property—Agreement to divide—Meaning of "ancestral property" in. See HINDU LAW—JOINT FAMILY—MEMBERS OF—ANCESTRAL PROPERTY. (1859) 8 M.I.A. 91 (96-7).

—Hindu Law—Joint family—Members of—Compromise between, dividing property—Division in status without division by metes and bounds—What amounts to. See HINDU LAW—JOINT FAMILY—PARTITION—DIVISION IN STATUS WITHOUT DIVISION BY METES AND BOUNDS. (1870) 13 M.I.A. 497 (517)

—Hindu Law—Joint family—Partition—Religious ceremonies—Performance of—Allotment of property to one member for—Non-performance of ceremonies by that member and performance thereof by another at his own cost—Suit by latter to recover amount spent from former—Maintainability—Default on his part in retaining his share of rents of property allotted—Effect. See HINDU LAW—JOINT FAMILY—PARTITION—RELIGIOUS CEREMONIES. (1869) 12 M.I.A. 380 (393-4).

—Hindu Law—Joint family—Partition—Religious ceremonies—Performance of—Allotment of property to one member for—Right of that member to recover property allotted—Condition precedent to—Proof of performance of ceremonies not a. See HINDU LAW—JOINT FAMILY—PARTITION—RELIGIOUS CEREMONIES. (1869) 12 M.I.A. 380 (395).

—Literal construction—Object and general spirit—Regard for—Court's duty.

COMPROMISE—(Contd.)**Construction of—(Contd.)**

A document of this character (compromise) between natives should not be construed narrowly, by a strict interpretation of the literal meaning of the words. Its object and general spirit are the best keys to the interpretation of language probably not very carefully studied. (*Lord Cairns.*) *SRI GAJAPATHI RADHIKA PATTI MAHA DEVI GARU v. SRI GAJAPATHI NILAMANI PATTI MAHA DEVI GARU.* (1870) 13 M.I.A. 497 (509) = 14 W. R. P. C. 33 = 6 B. L. R. 202 = 2 Suth. 365 = 2 Sar. 601.

—Partition arrangement providing for share to member whose right to it had been decided against—Concurrence of other sharers in, if condition precedent to.

G, a Mahomedan, died leaving behind him 3 wives and children by each of them. *K* was one of his daughters by his second wife. She, her three sisters, and one of the widows of *G*, sued to have a will, executed by him and of which his eldest son had obtained probate, set aside, and to obtain possession of the respective plaintiffs' separate shares of *G*'s estate. The other wives of *G* and their children disputed the validity of *G*'s second marriage and of the legitimacy of the offspring by her. That litigation was compromised. *K*, however, did not join in that compromise and proceeded successfully to a decree in the Sub-Court. That decision was reversed on appeal by the High Court, the High Court holding that the second marriage was invalid, and that *K* was illegitimate and took no share. From that decision she preferred an appeal to the Privy Council.

Pending that appeal to the Privy Council an *ekrarnama* was executed, which, *inter alia*, fixed the shares of the respective heirs and provided that no claim inconsistent therewith should be made by any of them, and provided for the relinquishment of 17½ gundahs share in the immoveable property of *G* in favour of *K* contrary to the decree of the High Court. The appeal to the Privy Council by *K* was nowhere mentioned in the *ekrarnama*, and its abandonment was not stipulated for. The *ekrarnama* was intended to have been executed by nine persons, but it was in fact executed only by five of them. One important branch of the family did not join in executing it. Nothing was, in fact, done pursuant to the *ekrarnama*.

Held, affirming the High Court, that the *Ekrarnama* was only a provisional agreement and was not effectual to give *K* the 17½ gundahs share in the estate of *G* (73).

The *ekrar* no doubt appears at first sight to have been designed to secure to *K* the 17½ gundahs share from which, as matters then stood, she was barred by the decree of the High Court. It is, however, evident that if each person signing became thereupon bound to each other person signing to allow this provision to be carried out and to make it effective himself, so far as his own participation was concerned, those who signed might, as against those who did not, be placed in a position of considerable personal liability. The admission of *K* to a share in the estate, to which, as the decree in the partition suit against her then stood, she was not entitled at all, would, of course, *pro tanto*, diminish all the other participants' shares, and if those who did not sign were to contest her right to admission as a participant with success, they would share in proportion to a greater extent, while those who had signed, would share to a less extent. In this view, as between those who signed and those who did not, the former class must suffer if the latter should insist on the decree as it stood.

If, on the other hand, the article were to be read, as it would be read, say, in a creditor's composition deed, that is,

COMPROMISE—(Contd.)**Construction of—(Contd.)**

if the consideration upon which each party became bound were the execution of the deed by all the others, so that a mutual obligation of all to all must arise before any particular party could be bound, the working of the article would be simple, and when all had signed a complete settlement would have been provided for. This seems to have been the main issue before the High Court upon the construction of the Ekrarnama. (*Lord Sumner.*) **KARIMUNNESSA KHATUN v. MAHOMED FAZLUL KARIM.**

(1924) 88 I.C. 149 = A. I. R. 1925 (P. C.) 70 (73).

—*Payment out of obligor's share of inheritance in a particular estate—Covenant for—Estate insolvent and obligor inheriting nothing—Liability of obligor to pay in case of—Deed—Construction—Contemporaneous deed in favour of stranger—Admissibility in evidence of.*

On the death of a Mohamedan, who had taken two mortgages in the name of his son A, disputes arose between A and the other heirs of the deceased as to the right to the said mortgages, and proceedings for the administration of the deceased's estate were commenced. Ultimately an agreement was come to between A and the other heirs whereby A, "in consideration of Rs. 25,000, and in manner hereinafter appearing, and of the covenants on the part of the said heirs hereinafter contained" agreed to forego all interest in the mortgages, and to assign the mortgages to the receiver of the estate of the deceased, who had been appointed in the proceedings. Cl. 2 of the agreement, the material clause, provided :—

The said heirs jointly and severally covenant with the said claimant A that in consideration of the aforesaid release by him, and of the covenants on his part, they shall pay to the said claimant or allow him to withdraw out of the amounts realised on the said mortgages, the sum of Rs. 25,000, which sum shall be payable to the said claimant out of the moneys realised on the said mortgages, which sum and the costs and expenses of realisation to be first paid out of all such realisations. And that in the event of the said sum of Rs. 25,000 not being sanctioned by the Court in the said suit—the suit for administration—then the said heirs shall out of their shares of inheritance in the estate of the said deceased pay to the said claimant the said sum of Rs. 25,000 which sum the said heirs shall contribute amongst themselves in the proportion in which they inherit in the estate of the said deceased.

The agreement was not sanctioned by the Court in the administration suit. The estate turned out to be insolvent, and the creditors had not received their debts in full. The sum of Rs. 25,000 or such interest therein as belonged to A was by him assigned to the respondents who instituted the suit out of which the appeal arose for the payment of the said sum. *Held* that in the events which happened the only obligation to pay under the agreement was an obligation to pay out of the inheritance, and not otherwise, and that obligation had not matured.

"By the agreement the heirs bound themselves in the event of the agreement not being sanctioned by the Court to pay this sum of Rs. 25,000 out of their shares of the inheritance, and it was provided that they should contribute the sum as among themselves in the proportions in which they inherited in the estate. As matters have turned out they have no shares in the inheritance, and they inherit nothing from the estate. The fund out of which they were to make payment is therefore non-existent, and their liability has not arisen. It is alleged on behalf of the respondents that on the true reading of the agreement there is a personal covenant to pay, coupled with a charge in one alternative upon the amounts realised from the mortgages, and in the other alternative (which happened) on the beneficial

COMPROMISE—(Contd.)**Construction of—(Contd.)**

interest of the heirs in the estate. But their Lordships cannot so read the document."

Held further. Quære : whether another agreement of even date entered into by the said heirs with the creditors could be used for the purpose of affecting the construction of the agreement of compromise between A and the other heirs referred to above. (*Viscount Cave.*) **SOOLEMA BEE BEE v. S.S.A.O. CHETTY FIRM.** (1919, 23rd May) **High Court File for 1919 (P.C.A. 64 of 1918).**

—*Specific Performance—Terms of compromise if capable of.* See C. P. C. OF 1908—O. 23, R. 3—**COMPROMISE—CONSTRUCTION.** (1927) 53 M. L. J. 345.

—*Vested remainder—Contingent estate—Mahomedan sons—Estate limited to take effect in favour of, after mother's death—Nature of.*

A deed of compromise between a Mahomedan widow and the sons of her deceased husband provided that the widow should, during her lifetime, continue as theretofore to hold possession of and be mistress of a talooka, and manage the estate through agents, but that she should not, without any special emergency, alienate any property so as to deprive the sons of their right, and that after her death the two sons should possess and enjoy each one half of the entire ilaka, and that so long as the widow might be living the sons should obey her.

Held that, on the true construction of the compromise, the interest of the sons, if any, created by the compromise must be regarded as future, and contingent upon the event of their surviving the widow, and that it would be opposed to the Mahomedan law to hold that the deed created in them vested interests which passed to their heirs on their death in the lifetime of the widow (100). (*Sir Richard Couch.*) **ABDUL WALID KHAN v. MUSSUMAT NURAN BIBI.**

(1885) 12 I. A. 91 = 11 C. 597 (607-8) = 4 Sar. 627.

—*Will—Legatees under—Arrangement between, and testator's widow giving entire property to one of legatees—Validity—Writing—Necessity—Estate taken in additional share.* See **HINDU LAW—FAMILY ARRANGEMENT—CONSTRUCTION—ESTATE TAKEN.**

(1898) 25 I. A. 84 = 21 M. 299.

Decree on foot of.

—*Rights of parties thereafter—Basis of—Decree and not compromise.*

Where parties enter into a compromise by which the status of one party as under-proprietor is recognised and a certain amount of rent is made payable to the other party and the compromise is carried into effect by a decree being passed in accordance therewith, the agreement is merged in the decree and the obligation to pay rent is derived from the status of under-proprietor established by the decree, and not from the previous agreement, which furnished the materials upon which the decree is based. Where the rent provided for was left in arrear and a suit was brought for the recovery of the arrears with interest, *held* that the suit was not a suit for breach of contract within the meaning of S. 73 of the Contract Act. (*Lord Davey.*) **THAKUR GANESH BAKHSH v. THAKUR HARIHAR BAKHSH.**

(1904) 31 I. A. 116 = 26 A. 299 (309) = 8 C. W. N. 521 = 6 Bom. L. R. 505 = 7 O. C. 116 = 8 Sar. 628 = 14 M. L. J. 190.

—*Right to—Consensus ad idem in regard to compromise—Absence of—Effect.* See **COMPROMISE—CONSENSUS AD IDEM.**

(1924) 47 M. L. J. 136 (144-5).

—*Setting aside of—Grounds—Sanction of superior authority—Compromise subject to—Decree on foot of, pending sanction and with liberty to apply for review in case*

COMPROMISE—(Contd.)**Decree on foot of—(Contd.)**

of prejudice—Refusal of such sanction—Re-opening of decree on ground of.

The manager of the Court of Wards effected a compromise with claimants on the estate, the compromise being, however, expressly made subject to the sanction of the Commissioner. The plaintiffs appellants represented to the Court that the manager had recommended a settlement, and prayed the Court to postpone the case until the Commissioner had sanctioned the compromise. The Court refused to postpone the case, and made a decree on foot of the compromise, with an express reservation that, in the event of the decree being contrary to the order of approval of the Commissioner and being prejudicial to either of the contending parties, they should be at liberty to present a petition for review of judgment and thus obviate the damage accruing to them. Two months afterwards the Commissioner approved of the manager's proposal. Two months after the date of the Commissioner's approval, however, the manager reported to the Commissioner that he had been imposed upon to consent to the compromise, and, with his consent, applied to the court for a review of its decree passed on foot of the compromise. The appellants opposed the review on the grounds of the compromise being binding and of their not being parties to any fraud.

Held that there was no compromise concluded in the case in such a way as to prevent the character and particulars of the claim being reconsidered upon the petition to review.

On the contrary, provision was made in the original order to keep alive the right of either party, if dissatisfied, to have a petition of review. *LALJI SAHU v. COLLECTOR OF TIRHOOT.* (1871) 6 B. L. R. 648 =

15 W. R. 23 P. C. = 2 Sar. 643 = 6 Mad. Ju. 143 = 2 Sar. 643.

——Setting aside of—Rights of parties on—Position before compromise decree—Restoration of. *See HINDU LAW—MINOR—COMPROMISE DECREE AFFECTING—SETTING ASIDE OF and C. P. C. OF 1908—O. 32, R. 7—COMPROMISE AFFECTING MINOR.*

Doubtful rights—Compromise of.

——Consideration for, apart from benefit gained under compromise—Necessity. *See AGREEMENT—VALIDITY.* (1928) 56 I. A. 104 (100).

——Doubtful nature of rights—Test—Circumstances existing at date of compromise—Result shown by subsequent events.

In deciding whether a compromise was really a *bona fide* compromise of doubtful rights, regard must be had to the circumstances as they stood at the time when the compromise deed was executed, and neither party to the compromise is entitled to avail himself of all the light which subsequent investigation has thrown upon the respective claims of the parties. If the nature or the extent of the rights of the respective parties could be considered as the fair subject of doubt at the date of the deed of compromise, and if, to avoid expense and delay by legal inquiry, they agreed to settle the contest by an amicable arrangement, such transaction is not to be disturbed on the ground of the inequality of benefit which either party may eventually have received from it (249-50). (*Mr. Justice Bosanquet.*) *RAJUNDER NARAIN RAE v. BIJOY GOVIND SING.* (1839) 2 M. I. A. 181 = 1 Moo. P. C. 117 =

1 Sar. 175.

——Doubtful nature of rights at date of compromise—Evidence—Heirs-at-law of husband—Adoption by widow—Persons claiming under—Compromise between.

On the death of a Hindu widow disputes which arose to the right to succeed to the estate of her deceased husband

COMPROMISE—(Contd.)**Doubtful rights—Compromise of—(Contd.)**

and to her own estate, between the appellants, the agnatic relations of the husband, and *B*, who claimed to be heir by the adoption of the widow, were settled by a compromise, by which they agreed to divide between themselves all the properties of the widow and of the husband. The appellants subsequently sought to avoid the compromise on the ground that the widow had no authority to adopt from her husband, that the adoption of *B* was, therefore, invalid and conferred no title upon him to any of the properties, either of the widow or of her husband, and that they (appellants) entered into the compromise under a palpable mistake as to the said facts.

At the date of the compromise it was not taken as clearly understood that the widow could not, without the authority of her husband, make an appointed heir to her husband's property, while the parties and the court thought that if *B* was really Karta Pootra, he would be entitled to all the properties of the widow and of her husband. Further, the entire property at the death of the widow consisted not merely of the Zemindary, which she had inherited from him, but of other considerable property which she had herself purchased during her long enjoyment of the estate, and of personal effects valued at more than 3 lakhs of rupees. It was quite unascertained whether any, and what, part of the real estate the widow died possessed of had been given to her by her husband, whether any, and what, part of it had been purchased by her with the income of her husband's estate, and with her own funds. Considerable doubts existed as to her powers of disposition over the whole or part of these properties, while it was clear that she was entitled to dispose of her separate property or stridhanam in any manner she pleased.

Held that, under all the above-mentioned circumstances, the amount of the relative rights of the litigant parties must be considered as having been doubtful, whether the law or the fact be regarded (249-51). (*Mr. Justice Bosanquet.*) *RAJUNDER NARAIN RAE v. BIJOY GOVIND SING.* (1839) 2 M. I. A. 181 = 1 Moo. P. C. 117 = 1 Sar. 175.

Executed compromise—Suit to restrain acts done in contravention of.

——Defences in—Fraud of plaintiff in procuring compromise if a.

In a Bill to set aside an act done in plain violation of an agreement which, in all its material parts, had been executed, and all the benefits of which the party violating it retained on her part, while as against the other party she treated it as a nullity, *held* that the plea that the agreement was procured by the fraud of the plaintiff could not be used as a defence in the suit (289). (*Lord Kingsdown.*) *GREGORY v. COCHRANE.* (1860) 8 M. I. A. 275 = 1 W. R. 66 = 1 Suth. 431 = 1 Sar. 779.

Execution of.

——Compulsion by threats of third party—Execution under—Evidence—Voluntary execution—Declaration before Court of—Case of compulsion introduced in evidence after death of party alleged to have threatened—Value of.

The agnatic relations of a deceased Hindu sought to avoid a compromise made by them after the death of the deceased's widow with one *B*, whereby they and *B* agreed to divide the estate of the deceased and of his widow in equal moieties. *B* claimed to be the Karta Pootra, or heir by the adoption of the widow. The ground on which the agnatic relations sought to avoid the compromise was that they had been compelled to enter into it by the threats of *M*, the manager of the widow. The allegation of compulsion by the threats of *M* was brought forward in evidence after his death. It appeared, however that within 3 weeks of the

COMPROMISE—(Contd.)**Execution of—(Contd.)**

execution of the compromise, the agnatic relations as well as *B*, appeared before the Zillah Judge, and that before him the agnatic relations admitted that they had voluntarily entered into the compromise, that they were satisfied, and that they had agreed of their free will to relinquish a moiety of the property to *B*.

Held that the allegation of compulsion by the threats of *M*, brought forward in evidence after his death, could not countervail the solemn and unequivocal declaration made by the agnatic relations before the Zillah Judge (249). (*Mr. Justice Bosanquet.*) **RAJUNDER NARAIN RAE v. BIJOY GOVIND SING.** (1839) 2 M. I. A. 181 = 1 Moo. P. C. 117 = 1 Sar. 175.

—*Fraudulent misrepresentation, concealment, or compulsion—Execution under—Proof of.*

The question was as to the validity of a compromise entered into by the heirs-at-law of a deceased Hindu with one *B*, who set up a title as Karta Pootra of the deceased, or heir by the adoption of the deceased's widow. By the compromise, the heirs-at-law agreed to divide the whole of the property of the deceased with *B*, in equal moieties. The validity of the compromise was attacked by the heirs-at-law on various grounds.

Held, on a consideration of the evidence, affirming the court below, that the heirs-at-law had failed to establish that the execution of the solehnamah was obtained by fraudulent misrepresentation, or concealment, or the execution of it compelled by fear, or that the agreement at the time when it was entered into was not a fair subject of compromise of disputed and doubtful rights (251-2). (*Mr. Justice Bosanquet.*) **RAJUNDER NARAIN RAE v. BIJOY GOVIND SING.** (1839) 2 M. I. A. 181 = 1 Moo. P. C. 117 = 1 Sar. 175.

—*Fraudulent representation of fact false to knowledge of opposite party—Execution under—Plea of—Onus of proof of.*

In a case in which the validity of a compromise was in question, it appeared that after the assertion of his title by one of the parties to the compromise and the denial of it by the other party, the compromise was entered into, in the presence of many witnesses, by parties on the spot, and solemnly acknowledged by the parties in a court of law to have been voluntarily executed. *Held* that the burden of showing that the compromise had been fraudulently obtained by false representation was upon those who sought to impeach the validity of their own deed (244). (*Mr. Justice Bosanquet.*) **RAJUNDER NARAIN RAE v. BIJAI GOVIND SING.** (1839) 2 M. I. A. 181 = 1 Moo. P. C. 117 = 1 Sar. 175.

—*Fraudulent representation of fact false to knowledge of opposite party—Execution under—Validity of compromise in case of.*

The question was as to the validity of a compromise entered into by the heirs-at-law of deceased Hindu with one *B*, who set up a title as Karta Pootra of the deceased, or heir by the adoption of the deceased's widow. By the compromise, the heirs-at-law agreed to divide the whole of the property of the deceased with *B*, in equal moieties. The heirs-at-law disputed the validity of the compromise on the ground that it had been obtained by the fraudulent representation of a transaction which was absolutely false namely, that the deceased's widow constituted *B*, her Karta Pootra or adopted heir.

Held that, if that had been clearly proved to be untrue, it must necessarily have been untrue within the knowledge of *B* himself, and that any deed of compromise founded on an assertion of such matter by him, however deliberately entered into by the heirs-at-law, would unquestionably have

COMPROMISE—(Contd.)**Execution of—(Contd.)**

been invalid (244). (*Mr. Justice Bosanquet.*) **RAJUNDER NARAIN RAE v. BIJAI GOVIND SING.**

(1839) 2 M. I. A. 181 = 1 Moo. P. C. 117 = 1 Sar. 175.

—*Fraudulent representation of fact of opponent's adoption—Execution under—Proof necessary of, in suit to set aside compromise on that ground.*

The question was as to the validity of a compromise entered into by the heirs-at-law of a deceased Hindu with one *B*, who set up a title as Karta Pootra of the deceased, or heir by the adoption of the deceased's widow. By the compromise, the heirs-at-law agreed to divide the whole of the property of the deceased with *B*, in equal moieties. The heirs-at-law disputed the validity of the compromise on the ground that it had been obtained by the fraudulent representation of a transaction which was absolutely false, namely, that the deceased's widow constituted *B*, her Karta Pootra or adopted heir. Though there might be ground to pause in giving full credit to the alleged adoption, their Lordships, upon a review of the testimony given on one side and the other, regard being had both to the matter and the credibility of such testimony, did not see such a preponderating weight of evidence against the fact of adoption as to justify a determination that the assertion of its existence was an utter falsehood.

Held that the ground of impeaching the compromise by the co-heirs, on account of its being founded on a *suggestio falsi* by the other party, *B*, had not been maintained (246-7). (*Mr. Justice Bosanquet.*) **RAJUNDER NARAIN RAE v. BIJAI GOVIND SING.** (1839) 2 M. I. A. 181 = 1 Moo. P. C. 117 = 1 Sar. 175.

Fraud Vitiating.

—*What amounts to—Property possessed by one of parties—Concealment of—Fraud consisting in—Non-existence of property not real consideration of compromise—Effect.*

The Bill was filed in the Supreme Court by the Official Assignee of the estate and effects of one *A*, an Insolvent, against his wife, since deceased, and her trustee, to compel specific performance of an agreement, in the nature of a family compromise, entered into by her with her husband; and also to set aside an execution under a decree, taken out by her subsequent to such agreement, whereby a house and premises belonging to her husband was seized; and further to restrain her from receiving any dividends in respect of a debt proved by her against his estate, as being in contravention of such agreement.

The wife, by her answer, admitted the agreement, but alleged that she had been induced to enter into it by fraudulent misrepresentations, concealment, and suppression of facts by her husband, and in particular that at the time of the execution of the deed he was possessed of the house and premises seized by her, which fact he had concealed from her at the time of the compromise, and that the agreement was therefore vitiated by the above circumstances, and she was justified in seizing the said house and premises in contravention of it.

There was no evidence that the wife in entering into the agreement of compromise acted under the belief that her husband was not possessed of any real estate except that mentioned in the agreement. There was no proof that the husband ever made, or was ever called upon to make, any disclosure as to the amount or particulars of his property, except as to purchases made with the money of his wife. The grounds of the compromise, which were fully stated in the recitals of the deed, were not alleged to be inaccurate, and it did not appear therefrom that the fact of the husband's having no other property except that mentioned in the deed was any

COMPROMISE—(Contd.)**Fraud Vitiating—(Contd.)**

consideration for the wife entering into the compromise. It further appeared that with full opportunity of inquiring into the circumstances the wife subsequently acquiesced in the arrangement previously made, and accepted the benefits thereby given to her in satisfaction of her claims under the Judgment under which she seized the house and premises in question.

Held, that no such fraud as was the foundation of the defence in the case had been established against the husband, and that the wife was not justified in treating the compromise as a nullity and in acting in plain violation of it (289). (*Lord Kingsdown.*) GREGORY v. COCHRANE.

(1860) 8 M.I.A. 275 = 1 W.R. 66 = 1 Suth. 431 = 1 Sar. 779.

Hindu family—Members of—Compromise between, dividing estate—Rights of parties.

—Abraham v. Abraham—Principle of—Applicability—Possession obtained under compromise.

The principle in *Abraham v. Abraham*, that a family ceasing to be Hindus in religion may still enjoy their property under the Hindu law, is applicable, *inter se*, to the members of a Hindu family entering into possession of an estate under a compromise by which the members divided the estate among themselves on certain terms. (*Lord Cairns.*) SRI GAJAPATHI RADHIKA PATTI MAHA DEVI GARU v. SRI GAJAPATHI NILAMANI PATTI MAHA DEVI GARU. (1870) 13 M.I.A. 497 (513) = 14 W.R.P.C. 33 = 6 B.L.R. 202 = 2 Suth. 365 = 2 Sar. 601.

Legal Practitioner.

—Compromise by. See LEGAL PRACTITIONER—COMPROMISE BY.

Litigation.

—Compromise of. See LITIGATION—COMPROMISE OF.

Maintenance—Claim for—Permanent arrangement based on.

—Setting aside of—Jurisdiction.

Courts have no jurisdiction to disturb compromises or settled arrangements of a permanent character on the ground that they were originally based on claims for maintenance. (*Lord Hobhouse.*) LOKNATH v. BISSESSARNATH.

(1899) 26 I.A. 268 (279) = 27 C. 103 (115-6) = 7 Sar. 569.

Offer of—Inference of admission of justice of demand from.

—Propriety.

From the offer of a compromise by the defendant to the plaintiff it is not permissible to draw the inference that the defendant admitted the justice of the plaintiff's demand. (*Mr. Thomas Erskine.*) BHAECHUND v. PURTAB CHUND.

(1837) 1 M.I.A. 155 (170-1) = 5 W.R. 31 P.C. = 1 Suth. 51 = 1 Sar. 103.

Right to insist upon—Estoppel.

—Claim inconsistent with compromise—Estoppel by reason of.

On the death of a Hindu widow, disputes arose as to the right to succeed to the properties of the widow and her husband. The rival claimants were B, who claimed as Karta Pootra, or heir by the adoption of the widow, and the appellants, the agnatic relations of the husband. The disputes between them were settled by a compromise, by which it was agreed that they should divide the whole of the property of which the widow died possessed, in equal moieties. The question for decision was whether, in the various pro-

COMPROMISE—(Contd.)**Right to insist upon—Estoppel—(Contd.)**

ceedings detailed in the judgment of their Lordships, B had in such a manner set up claims inconsistent with the compromise as to disentitle him to the benefit of the decree of the first court which was based on the compromise.

Held, on a consideration of the various proceedings and of the evidence in the case, that B was not precluded from insisting on the compromise (243-4). (*Mr. Justice Bosanquet.*) RAJUNDER NARAIN RAE v. BIJOY GOVIND SINGH. (1839) 2 M.I.A. 181 = 1 Moo. P.C. 117 = 1 Sar. 175.

Setting aside of.

—Grounds. See CASES UNDER — COMPROMISE—EXECUTION OF

—Rights of parties on. See C. P. C. OF 1908—O. 32, R. 7—COMPROMISE AFFECTING MINOR and HINDU LAW—MINOR—COMPROMISE DECREE AFFECTING.

—Rights of parties on—Appeal and cross-appeal—Compromise pending—Setting aside of—Revival of appeal and of cross-appeal.

In a suit brought on behalf of an infant daughter by her mother as guardian, a decision was given partly for and partly against the defendant, who thereupon filed an appeal, which he afterwards withdrew in accordance with the terms of a compromise purporting to have been made with the mother and daughter. Subsequently, at the suit of the daughter, the compromise was set aside as fraudulent and collusive, and a review of the original decision, in so far as it was adverse to the plaintiff's interest, was allowed. The defendant then applied that his appeal might be revived, but his application was rejected by the High Court, on the ground that he had deprived himself of his opportunity of appeal by his own fraudulent conduct.

Held, that the effect of setting aside the compromise was to remit both parties to their original rights, and that if the plaintiff was to be allowed to be heard against so much of the original judgment as was unfavourable to her, the defendant must similarly be heard against so much of the same judgment as was unfavourable to him (306).

"If the defendant had a right of appeal, you cannot punish him for his fraud by depriving him of his appeal. Moreover, the plaintiff not having herself appealed, her right of cross-appeal depended upon the defendant's appeal. The compromise being set aside, we think the parties were remitted to their original rights," (297). (*Sir Robert P. Collier.*) RANEE KHUJOORONISSA v. MUSSAMUT ROUSHUN JEHAN.

(1876) 3 I.A. 291 = 2 C. 184 (196) = 26 W.R. 36 = 3 Sar. 629.

Specific Performance—Compromise if capable of.

—Construction of compromise. See C. P. C. OF 1908—O. 23, R. 3—COMPROMISE. (1927) 53 M. L. J. 345.

Suit—Compromise of.

—Application in suit to carry out—Right of.

Where the parties to a suit, which went up on appeal to the Sudder Court, entered into an agreement in 1826, by one of the terms of which it was stipulated that both parties should provisionally take possession of certain portions of the land in dispute, but that either party would be at liberty within twelve months from the date of the agreement to apply to the proper tribunal to effect a rectification in the quantity of land which each was to hold permanently; and one of the parties did make such application to the local Judge, who refused to entertain it on the ground that the appeal (which under the agreement was to be abandoned) was still before the Sudder Court.

Held, that the local Judge should either have entertained the application himself as an original suit, or have kept

COMPROMISE—(Contd.)**Suit—Compromise of—(Contd.)**

possession of it until a petition had been presented to the Sudder Court to make the agreement a proceeding of that Court, and to have an order giving effect to it by way of compromise. (*Lord Cairns.*) **NILKAMAL LAHURI v. SRI. GUNOMANI DEBI.** (1871) 7 B. L. R. 113 P. C. (126) = 15 W. R. 38 = 2 Sar. 651 = 2 Suth. 413 = 6 M. J. 227.

——Bond given as consideration for—Suit prosecuted nevertheless—Both parties responsible for—Consideration for bond if can be held to have failed in case of. *See* BOND—CONSIDERATION FOR—FAILURE OF.

(1874) 1 I. A. 241 (264).

——Concluded or not—Sanction of superior authority—Compromise subject to—Sanction not granted ultimately—Effect. *See* COMPROMISE—DECREE ON FOOT OF—SETTING ASIDE OF.

(1871) 6 B. L. R. 648 = 15 W. R. 23 P. C.

——Consent of party to—Evidence—*Vakils* in suit—Examination of—Necessity.

In a case in which the question was whether or not a compromise of a suit purporting to have been made and entered into by a purdanashin lady had in fact been so made and entered into with her full knowledge and consent or the contrary, *held* that the appellate Court insisted quite properly upon the examination of the *Vakils* engaged on opposite sides in the suit. (*Lord Atkinson.*) **SRIMATI SARAT KUMARI DAS v. AMULLYADHAN KUNDU.**

(1922) 17 L. W. 481 (493) = A. I. R. (1923) P. C. 13 = 32 M. L. T. (P. C.) 137 = 37 C. L. J. 501 = 25 Bom. L. R. 548 = 72 I. C. 632 = (1923) M. W. N. 392.

——Parties to suit—Compromise by some only of—Decree in terms of, against all—Appeal from, by persons not parties to compromise. *See* MORTGAGE—SUIT TO ENFORCE—COMPROMISE OF, ETC.

(1926) 52 M. L. J. 407.

——Partition deed pursuant to—Setting aside of—Grounds.

The appellant's suit was to set aside a deed of partition, which had been executed by the appellant, and his brother, the respondent, and which partition was, as to the shares of the brothers, based on a *Solenamah*, or instrument of compromise of suit, ratified by the decree of the Sudder Court.

Held, that such a deed could only be set aside upon strong evidence, either of mistake, inequality, undue influence, coercion or fraud, and that the evidence adduced by the appellant was wholly insufficient for the purpose.

The Courts in India are very particular in requiring the strictest proof when a deed prepared and executed as this has been, especially where it is one in furtherance of a compromise of suit, is sought to be set aside; a precaution which should never be relaxed, where the spirit of litigation has so little check, and so much wider means of mischief, than it has here. (*Lord Justice Knight Bruce.*) **MAHA-RAJAH HETNARAIN SINGH v. BABOO MODNARAIN SINGH.**

(1859) 7 M. I. A. 311 = 3 W. R. 51 = 1 Suth. 355 = 1 Sar. 678.

——Plaintiff—Compromise by—Validity of, against person interested with plaintiff in subject-matter of suit—Money payable under compromise—Rights of that other person against plaintiff as regards.

The appellant sued S, a debtor of his deceased uncle, for the recovery of the debt, claiming to be exclusively entitled to the same. The respondent, the brother of the appellant, sought to intervene in that suit alleging that he was entitled to half of the debt sued for. Being unsuccessful in the attempt, the respondent sued the appellant for the recovery of his half-share of the estate of the uncle, including the said

COMPROMISE—(Contd.)**Suit—Compromise of—(Contd.)**

debt. That suit was compromised on the terms, amongst others, that the respondent was entitled to a 6 anna share in the money due from S, and a decree was passed in that suit on foot of that compromise. Prior to that compromise, the appellant's suit against S had ended in a decree for the full amount sued for. S appealed against that decree, and pending that appeal, but subsequent to the date of the compromise decree between the appellant and the respondent, the appellant entered into a compromise with S, under which S was to pay a certain amount to the appellant before a period fixed, and, in default the appellant was to enforce payment and to realise the amount. S defaulted, whereupon the appellant applied to enforce the original decree. Pending those proceedings in execution, the respondent sued the appellant and S for a declaration that he was entitled to a 6 anna share in the amount decreed to the appellant in the first Court against S.

Held, reversing the Court below, that the appellant must be treated as a trustee for the respondent; and that, in the absence of proof of fraud upon the respondent in effecting the compromise with S, or that it was not beneficial for all parties, the appellant was liable to the respondent for a 6 anna share of what he (appellant) had received, or might, thereafter receive, and what, if anything, he might at any time after the expiration of the time limited by the deed of compromise, without his wilful default, have recovered or received from S, for or in respect of the sum decreed and the interest thereon.

Held, also, that the respondent was at liberty to apply in the suit of the appellant against S for leave to enforce the decree in that cause as he might be advised for the recovery of a 6 anna share of the said sum and interest, in so far as the same had not been already recovered. (*Mr. Pemberton Leigh.*) **DOORGA PERSHAD ROY CHOWDRY v. TARRA PERSHAD ROY CHOWDRY.** (1849) 4 M. I. A. 452 = 1 Sar. 384.

——*Razinama* to be filed in Court by one of parties—Amount to be paid to him thereupon—Provisions for—Avoidance of, by refusal to execute and enter up *razinama*—Permissibility.

In a suit brought by the appellant claiming to be entitled to a certain share of what he stated to be the common and undivided property of the family, a proposal for a compromise was made. It came to a conclusion on 26-4-1819, on which date the appellant signed two documents, one of which was called a *farigh-kutti* (release), and the other an *ikrarnamah*. In the *farigh-kutti*, after certain introductions, the appellant said:—"I have, therefore, with my own free will and consent, settled this action among ourselves. By the terms of this settlement the sum of Rupees 2000 account, mine and my brother D's share, after deducting S's debts," and so on, "is due to me and to my brother by the defendants aforesaid, which, that is, the sum of 2,000 Sicca rupees in question, I have taken from the defendant aforesaid, and have received, and have appropriated and applied it to mine and my brother's uses, and have relinquished and withdrawn the residue of my claim in the above mentioned case, property, etc. Now, neither I nor my brother, nor our successors, have or shall have any right, title, claim in, or litigation for, the property etc., of the father of the defendants and their own. And neither the defendants aforesaid, nor their successors, have or shall have any right, title, claim in, or litigation for the property, etc., of myself, my brother, and of my uncles. The costs of the Court are agreed to be at the responsibility of the defendants."

On the same day (26-4-1819), the appellant executed the other instrument, called an *ikrar-nama*, and there he stated:

COMPROMISE—(Contd.)**Suit—Compromise of—(Contd.)**

"Whereas I entered an action for the division of and entry into the property and estates belonging to the house at the town of Shahabad, etc.; now, I, of my free will and consent, have taken rupees 2,000 as my share :..", and so on; "and the sum of Rs. 1,000 has been fixed by the defendants as the share of the widow of my brother . . . ; I therefore engage and give in writing that I will deliver in a razi-nama in my action, conformably to the above condition, to the Court, and will get a deed of *farigh-kutti* executed to the defendants by the widow of my brother, within two months, and deliver the same to them; at which time I will receive the sum aforesaid; and until I shall have got the said *farigh-kutti* executed by the widow of my brother, the rupees 1,000 in question shall remain in deposit with the said defendants."

Held that the two instruments, which were contemporaneous, taken together, amounted to a decided agreement to settle the action, that, after the execution of the *farigh-kutti*, the next step to be taken ought to have been taken by the appellant—that he ought to have given in a razeenama, in performance of his own contract; that he was entitled to receive the sum of Rs. 2,000 stipulated to be paid to him under the agreement of compromise only after he had given in the razeenama; and that he could not avoid the compromise by refusing to execute and enter up the razeenama (133-4). (*Lord Langdale.*) **MUNNI RAM AWASTY v. SHEO CHURN AWASTY.**

(1846) 4 M.I.A. 114 = 7 W.R. 29 P.C. = 1 Suth. 166 = 1 Sar. 323.

—Withdrawal of suit pursuant to—Plaintiff's application for—Order allowing, on payment of defendant's costs—Propriety—Defendant's Vakil not admitting compromise. *See* **SUIT—WITHDRAWAL OF.**

(1869) 2 B.L.R. 85 P.C. (86-7).

Terms real of—Evidence.

—Deed prior made upon stamped paper and executed by plaintiff and defendant but not registered because of refusal of third party to execute it—Admissibility—Value of.

On an issue as to whether the plaintiff executed the deed of compromise in question knowing that she was to take only a life interest in certain property or whether she did so induced by the false representations of the defendant, *held* that a copy of another compromise which was made upon stamped paper, which was executed by the plaintiff and the defendant as their agreement of compromise, but which was not registered because a third person, who was to be a party to it, refused to execute it, was admissible in evidence and afforded conclusive evidence as to the real agreement between the plaintiff and the defendant (137). (*Sir John Edge.*) **MARY LILIAN HIRA DEVI v. KUNWAR DIGBIJAI SINGH.** (1917) 7 L.W. 133 = 21 C.W.N. 1137 = (1917) M.W.N. 636 = 42 I.C. 236.

CONCUBINE.

—Meaning of, in India and Europe.

The word 'concubine' has long had a definite meaning, whether expressed in the language of India or of Europe. The persons described by it had, and have still where it remains applicable, a recognised status below that of wife and above that of harlot (158). (*Lord Darling.*) **BAI NAGUBAI v. BAI MONGHIBAI.** (1926) 53 I.A. 153 = 50 B. 604 = 24 A.L.J. 729 = (1926) M.W.N. 514 = 3 O. W. N. 599 = 44 C.L.J. 53 = 24 L.W. 309 = 28 Bom. L. R. 1143 = 31 C. W. N. 128 = A. I. R. (1926) P. C. 73 = 96 I. C. 20 = 51 M. L. J. 577.

CONDITION—Bond—Condition of—Breach by obligor of—Mesne profits to be realized in execution—Bond for

CONDITION—(Contd.)

payment of amount out of—Profits not realizable in execution or otherwise—Compromise by obligor giving up claim to profits in case of—No breach by reason of. *See* **BOND—MESNE PROFITS, ETC.**

(1894) 22 I.A. 68 (74) = 22 C. 434 (443).

CONFISCATION.

—Forfeiture of estate. *See* **BENGAL REGULATIONS—RESISTING PROCESS REGULATION XI OF 1796.**

—Meaning of—Forfeiture accruing upon conviction—Appropriation by Government as an act of State.

The word "confiscation" does not *per se*, necessarily import that the appropriation is to be made as penalty for a crime; and, even when used in that sense, it does not necessarily imply that the forfeiture has accrued upon conviction, but may also be properly used as applicable to appropriations by Government as an act of State of the property of a public enemy, or of a subdued or deposed ruler. (*Sir Barnes Peacock.*) **RAJAH SALIG RAM v. SECRETARY OF STATE FOR INDIA.**

(1872) Sup. I. A. 119 (125) = 12 B. L. R. 167 = 18 W. R. 389 = 3 Sar. 191 = 2 P. R. 1872 = 2 Suth. 726.

—Trustee—Confiscation decree against—*Cestui que trust*—Effect on. *See* **ODUH ESTATE—REGISTERED TALOOKDAR—CONFISCATION DECREE AGAINST.**

(1871) 14 M.I.A. 112 (127-8.)

CONQUEST.

—Inhabitants of conquered territory—Relation to new sovereign of. *See* **ALIENS—CONQUERED OR CEDED TERRITORY.**

(1836) 1 M.I.A. 175.

—Territory acquired by—Inhabitants of—Relation to new sovereign of. *See* **ALIENS—CONQUERED OR CEDED TERRITORY.**

(1836) 1 M.I.A. 175.

CONSENT.

—Arrangement—Mode of—Consent to—Meaning and effect of.

To consent to a mode of arrangement is to consent to an arrangement of the matter in dispute in a particular mode. It would really be absurd to say, I consent to any mode of arrangement you please to point out, but I will not be bound by what is done under it (464 5). (*Dr. Lushington.*) **ZEMINDAR OF RAMNAD v. ZEMINDAR OF YETTIAPPOO. RAM.**

(1859) 7 M.I.A. 441 = 1 Suth. 360 = 1 Sar. 701.

—Compromise—Consent of party to—Provision in agreement as to—Meaning and effect of—Consent to be taken when possible. *See* **LITIGATION—AGREEMENT TO FINANCE—COMPROMISE OF LITIGATION.**

(1924) 52 I.A. 1 = 48 M. 230 = 47 M. L. J. 93 (127 8).

—Decree by. *See* **DECREE—CONSENT.**

—Judgment—Consent to. *See* **JUDGMENT—CONSENT.**

—Legal Practitioner—Consent of. *See* **LEGAL PRACTITIONER—CONSENT OF.**

—Order—Consent—Order by. *See* **ORDER—CONSENT—ORDER BY.**

CONSEQUENCES.

—Argument from—Permissibility. *See* **ARGUMENTUM AB INCONVENIENTI.**

—Statute—Interpretation—Consequences—Regard for—Permissibility. *See* **STATUTE—INTERPRETATION—CONSEQUENCES—REGARD FOR.**

CONSIDERATION.

——Admission of—Receipt of. *See* ADMISSION—CONSIDERATION.

——Adequacy of—Stranger's right to question. *See* ASSIGNMENT—STRANGER TO—UNFAIR AND UNCONSCIONABLE BARGAIN—PLEA OF.

(1908) 35 I.A. 48 (56) = 35 C. 420 (427).

——Agreement—Consideration for. *See* AGREEMENT—VALIDITY OF. (1928) 56 I.A. 104 (109)

——Bond — Consideration for. *See* BOND—CONSIDERATION FOR.

——Compromise — Consideration for. *See* COMPROMISE—CONSIDERATION FOR.

——Covenant to pay money in future—Money which purchaser covenants to pay—Distinction. *See* T.P. ACT—S. 55 (4)—VENDOR'S LIEN UNDER—CONSIDERATION FOR SALE, ETC. (1903) 30 I.A. 238 (246) = 31 C. 57 (73).

——Deed — Consideration for. *See* DEED — CONSIDERATION FOR.

——Executed or executory—Test. *See* COMPROMISE—CONSIDERATION FOR—EXECUTED OR EXECUTORY. (1904) 31 I.A. 107 = 31 C. 584.

——Executory consideration — Failure of—Rights of parties on. *See* COMPROMISE—CONSIDERATION FOR—EXECUTED OR EXECUTORY. (1904) 31 I.A. 107 = 31 C. 584.

——Mortgage—Consideration for. *See* MORTGAGE—CONSIDERATION FOR.

——Sale deed—Consideration for. *See* SALE DEED—CONSIDERATION FOR.

CONSPIRACY.

——Exposure—Perpetration so as to cause needless — Improbability of—Conspirators—Communicativeness of—Unlikelihood of.

It seems little credible that a story of an act having been performed before a large audience which never took place should have been adopted by the conspirators in a fraudulent usurpation, as so much larger a scope for contradiction would thereby be given by such a mode of fabricating the story; and the falsehood of the alleged nomination would be needlessly exposed to many persons. It is still more improbable that the conspirators, without the slightest necessity, should be found so dangerously communicative of their conspiracy (546). (*Lord Chelmsford.*) NEELKISTO DEB BURMONO v. BEERCHUNDER THAKOOR.

(1869) 12 M.I.A. 523 = 12 W.R.P.C. 21 = 3 B.L.R.P.C. 13 = 2 Suth. 243 = 2 Sar. 523.

——Offence of—Gist of.

In conspiracy the concert or agreement of the two minds is the offence, the overt act is but the outward and visible evidence of it. (*Lord Atkinson.*) PETHERPERUMAL CHETTY v. MUNIANDI SERVAL.

(1908) 35 I. A. 98 (103) = 35 C. 551 (559) = 4 M. L. T. 12 = 7 C.L.J. 528 = 12 C.W. N. 562 = 10 Bom. L.R. 590 = 5 A. L. J. 290 = 14 Bur. L. R. 108 = 4 L.B.R. 266 = 18 M.L.J. 277.

CONTEMPT OF COURT.

——*See* ALSO PENAL CODE—S. 228.

——Civil Court—Warrant for detention of defendant —Refusal of—Obtaining of warrant from criminal Court on same subject-matter—No contempt of Civil Court. *See* LEGAL PRACTITIONER—MISCONDUCT — CONTEMPT OF COURT. (1912) 23 M.L.J. 194 (198).

CONTEMPT OF COURT—(Contd.)

——Commitment for—High Court—Jurisdiction—Appeal to Privy Council from order of commitment—Maintainability—Libel—Publication out of Court when Court is not sitting—Commitment for.

A contempt of High Court by a libel published out of Court when the Court is not sitting is an offence which is something more than mere defamation, and is of a different character. It is an offence which by the common law of England is punishable by the High Court in a summary manner by fine, or imprisonment, or both. That part of the common law of England was introduced into the Presidency towns when the late Supreme Courts were respectively established by the Charters of Justice. The High Courts in the Presidencies are Superior Courts of Record, and the offence of contempt, and the powers of the High Court for punishing it are the same in India as in England, not by virtue of the Penal Code for British India and the Code of Criminal Procedure, 1882, but by virtue of the common law of England (179). Where the High Court has jurisdiction to commit for contempt, no appeal lies to the Privy Council from its order of commitment (180-1). (*Sir Barnes Peacock.*) SURENDRANATH BANERJEA v. CHIEF JUSTICE AND JUDGES OF THE HIGH COURT OF BENGAL.

(1883) 10 I.A. 171 = 10 C. 109 (131-2) = 4 Sar. 474.

——Commitment for, by Court of Record—Privy Council appeal from order of.

A Court of Record is the sole and exclusive judge of what amounts to a contempt of Court. No appeal lies to Privy Council against an order of a Court of Record committing a person for contempt, except in cases where there is something in the order committing the appellant which rendered it improper, and therefore the subject of appeal (180-1). (*Sir Barnes Peacock.*) SURENDRANATH BANERJEA v. CHIEF JUSTICE AND JUDGES OF THE HIGH COURT OF BENGAL. (1883) 10 I.A. 171 = 10 C. 109 (132-3) = 4 Sar. 474.

——High Court—Contempt of, by libel published out of Court when Court is not sitting—Offence of—Nature of—Punishment of—Jurisdiction of High Court—Law governing.

A contempt of the High Court by a libel published out of Court when the Court is not sitting is something more than mere defamation, and is an offence of a different character. It is an offence which by the common law of England is punishable by the High Court in a summary manner by fine or imprisonment, or both. That part of the common law of England was introduced into the Presidency Towns when the late Supreme Courts were respectively established by the Charters of Justice. The High Courts in the Presidencies are Superior Courts of Record, and the offence of contempt, and the powers of the High Court for punishing it are the same there as in this country, not by virtue of the Penal Code for British India and the Code of Criminal Procedure, 1882, but by virtue of the common law of England (179). (*Sir Barnes Peacock.*) SURENDRANATH BANERJEA v. CHIEF JUSTICE AND JUDGES OF THE HIGH COURT OF BENGAL. (1883) 10 I.A. 171 = 10 C. 109 (131 2) = 4 Sar. 474.

——High Court—Libel upon Judges of, in their judicial capacity and in respect of their conduct in the discharge of their public duties—Punishment for.

The publication in a periodical of a libel reflecting upon the Judges of the High Court in their judicial capacity and in reference to their conduct in the discharge of their public duties constitutes a contempt of Court which may be dealt with by the High Court in a summary manner, by fine or

CONTEMPT OF COURT—(Contd.)

imprisonment, or both. (*Sir Andrew Scoble.*) S. B. SARBADHICARY, *In re.* (1906) 34 I.A. 41 (45) =

29 A. 95 (108) = 2 M.L.T. 1 = 5 C. L. J. 130 =

11 C.W.N. 273 = 9 Bom. L. R. 9 = 4 A. L.J. 34 =

5 Cr.L.J. 152 = 9 Sar. 173 = 17 M. L. J. 74.

—Judge—*Libel upon, in his judicial capacity—Publication of—Punishment for contempt for—Offence punishable as defamation—Effect.*

Chapter XXI of the Penal Code "Of Defamation," does not define "contempt of Court" or make any provision for the punishment of a contempt of Court by the publication of a libel reflecting upon a Judge in his judicial capacity or in reference to his conduct in the discharge of his public duties. The offence, as a case of defamation, might doubtless be punished under that chapter with simple imprisonment, not exceeding two years, or with fine, or with both. But it is not because the publisher might be punished for defamation, that he could not be punished summarily as for a contempt of Court (177). (*Sir Barnes Peacock.*) SURENDRANATH BANERJEA v. CHIEF JUSTICE AND JUDGES OF THE HIGH COURT OF BENGAL. (1883) 10 I.A. 171 = 10 C. 109 (130) = 4 Sar. 474.

—Libel—Publication of—Contempt of Court by—Offence amounting to defamation—Punishment summary for—Jurisdiction. See PENAL CODE—S. 499.

(1883) 10 I.A. 171 (177) = 10 C. 109 (130).

—Witness—Perjury—Summary proceeding for—Opportunity to explain—Necessity—Hong-Kong Ordinance III of 1873, S. 31—Effect.

The alternative course left open to the Judge by S. 31 of Ordinance No. III of 1873 of Hong-Kong of committing a witness as for contempt of the court, contemplates summary proceedings on the spot not involving a statement or trial of specially formulated issues. But before sentence is passed the accused should be given an opportunity of giving reasons against summary measures being taken. This need not involve the case being thereupon retried and witnesses called, but it would give an opportunity for explanation and possibly the correction of misapprehension as to what had been in fact said or meant. The giving of such opportunity is essential before a summary conviction for perjury unless the Statute dispensed with it. (*Lord Collins.*) CHAN HANG KIN : *In the matter of LAI HING FIRM.* (1909) 13 C. W. N. 685 = 6 M. L. T. 9 = 11 Cr.L.J. 277 = 4 I. C. 539 = 19 M. L. J. 324.

—Witness — Perjury — Summary proceeding for — Specific allegations of perjury—Formulation of — When not necessary.

On appeal from the Supreme Court of Hong-Kong, confirming an order committing (under S. 31 of Hong-Kong Ordinance No. III of 1873) the appellants to prison as for a contempt of Court in respect of perjury found to have been committed by them as witnesses, the appellants objected on the ground that they had not been informed what statements made by them respectively constituted the alleged perjury. It appeared, however, that the Judge had stated that the whole evidence given by the appellants on the issue as to whether a person was a partner convinced him of there being a conspiracy on their part to make it appear that the person was a partner and that all they had said essential to that issue was a tissue of deliberate falsehood.

Held that there was enough to bring the gist of the accusation clearly to the knowledge of the appellants, and that the nature of the charge did not admit of being formulated in a series of specific allegations of perjury. (*Lord Collins.*) CHAN HANG KIN : *In the matter of LAI HING FIRM.*

(1909) 13 C.W.N. 685 = 6 M.L.T. 9 = 11 Cr.L.J. 277 = 4 I. C. 539 = 19 M.L.J. 324.

CONTRACT.

—See ALSO CONTRACT ACT.

AGENT.

AGREEMENT.

BENAMIDAR—CONTRACT BY.

BOUGHT AND SOLD NOTES.

BREACH OF.

BUILDING CONTRACT.

COMPANY.

COMPLETED CONTRACT.

CONSTRUCTION OF.

CONTINGENT EVENT—LIABILITY ON A.

CUTCHA ADATIA TRANSACTIONS IN BOMBAY.

DAMAGES FOR BREACH OF.

DISCRETION VESTED IN GOVERNMENT BY, INVOLVING QUESTION OF CONSTRUCTION OF CONTRACT.

DISQUALIFIED PROPRIETOR.

DURESS.

ENFORCEABILITY OF.

ENFORCEMENT OF.

EVIDENCE OF.

EXPECTATIONS ON EACH SIDE—RAISING OF—DISTINCTION.

EXPERT TRIBUNAL SET UP BY.

FORMAL DOCUMENT—EXECUTION OF.

FORUM LOCI CONTRACTUS.

FRAUD.

FRUSTRATION OF.

FUTURE EVENTS—PROVISION FOR.

GOODS—CONTRACT FOR SALE OF.

GUARANTEE—CONTRACT OF.

HARD BARGAIN—RELIEF FROM.

HEIR—CONTRACT TO GIVE AND ACCEPT MINOR AS.

IMPORTED SUGAR—CONTRACT FOR SALE OF—TARIFF VALUATION OF SUGAR.

IMPRISONMENT—CONTRACT BY PERSON UNDER.

LABOUR CONTRACT.

LAW GOVERNING.

LOAN—UNDERTAKING TO PROCURE.

MANAGER OF ESTATE—PENSION ON RESIGNATION.

MEANING OF.

MEANING AND INTENTION OF PARTIES—ASCERTAINMENT OF.

MERCANTILE CONTRACT.

MERCANTILE USAGE—RESPECT DUE TO.

MINISTER.

MINOR.

MISTAKE.

OBLIGATIONS UNDER—ALTERATION OF—AGREEMENT FOR.

PART-PERFORMANCE.

PARTY TO.

PENSION TO MANAGER OF ESTATE ON RESIGNATION.

PERFECT CONTRACT—INTENTION TO MAKE.

PERFORMANCE OF.

PRINTED FORM OF.

PROPOSAL.

PUBLIC POLICY—CONTRACT OPPOSED TO.

PURCHASE OF PROPERTY—CONTRACT FOR—EVIDENCE OF.

RECOMMENDATION—TEST.

RIGHTS OF PARTIES TO.

SALE.

SECRETARY OF STATE FOR INDIA.

SETTING ASIDE OF.

SETTLEMENT OF PROPERTY UPON A PERSON IN CONSIDERATION OF HIS LIVING WITH SETTLOR—CONTRACT FOR.

SPECIFIC PERFORMANCE OF.

STATUTE.

STRANGER TO.

CONTRACT—(Contd.)

SUIT BASED UPON—AMENDMENT OF PLAINT IN.
TERMS OF.
TERMINATION OF.
TIME—BARGAIN.
VARIATION OF, AND OF STATUTORY PROVISIONS
APPLICABLE TO.
VERBAL CONTRACT—PROOF OF.
VESSEL NAMED—CONTRACT FOR.
VOID CONTRACT.
VOIDABLE CONTRACT.

Agent.

——Contract by. See PRINCIPAL AND AGENT—AGENT
—CONTRACT BY.

Agreement.

——*Distinction.*

The distinction between agreements and contracts is apparent from S. 2 of the Contract Act; by clause (e) every promise and every set of promises forming the consideration for each other is an agreement, and by cl. (h) an agreement enforceable by law is a contract. (*Sir Lawrence Jenkins*).
HARNATH KUAR v. INDAR BAHADUR SINGH.

(1922) 50 I. A. 69 (75) = 45 A. 179 (184) =
9 O. L. J. 652 = 37 C. L. J. 346 = A. I. R. 1922 P. C. 403 =
9 O. & A. L. R. 270 = 27 C. W. N. 949 = 5 Pat. L. T. 281 =
2 Pat. L. R. 237 = 33 M. L. T. 216 = 18 L. W. 383 =
26 O. C. 223 = 71 I. C. 629 = 44 M. L. J. 489.

Benamidar—Contract by.

——Covenants in—Effect on real owner of. See BENAMI
—BENAMIDAR—CONTRACT BY.

(1876) 3 I. A. 194 (198-9).

Bought and sold notes.

——Contract by—Evidence of—Falsification of notes by
vendor—Other evidence in case of—Admissibility.

Where, in a case in which a contract of sale of goods is completed by bought and sold notes, the bought and sold notes are falsified by a trick practised by the vendor on the buyer, the latter will be entitled to disregard them and prove his contract by other and antecedent material (124). (*Lord Robertson*).
DURGA PROSAD SUREKA v. BHAJAN LALL.

(1904) 31 I. A. 122 = 31 C. 614 (625) =
8 C. W. N. 489 = 6 Bom. L. R. 498 =
8 Sar. 684 = 14 M. L. J. 196.

——Contract by—Variation between the notes—Effect—
No binding contract—

We think that this must be considered as a transaction in the contemplation of the parties by bought and sold notes, and that the contract is contained in both of the notes, and not in one. If this be so, it is admitted that there is a material variation between the two notes, and then the consequence follows, from all legal principles, that no binding contract has been effected. To use the words of Mr. Baron Parke in another case, the parties never have contracted in writing *adidem* (467). (*Dr. Lushington*).
COWIE v. REMFRY. (1846) 3 M. I. A. 448 =

5 Moo. P. C. 232 = 10 Jur. 789 = 1 Sar. 302.

——Where, in a suit brought by the respondents against the appellants for damages for a breach of contract in not taking delivery of a large quantity of paddy sold by the former to the latter, it appeared that the bought-note signed by the appellants contained the term—expressed in Chinese which the respondents did not understand—that there should be no yellow grains, whilst the sold note signed by the respondents did not contain it, *held* that, if the respondents did not assent to this term there was no contract, while, if they did, the paddy tendered was not on the evidence in accordance with the term and that, in either

CONTRACT—(Contd.)**Bought and sold notes—(Contd.)**

view the suit must be dismissed. (*Sir Richard Couch*).
AH. SHAIN SHOKE v. MOOTHIA CHETTY.

(1899) 27 I. A. 30 = 27 C. 403 = 4 C. W. N. 453 =
2 Bom. L. R. 556 = 7 Sar. 669.

——Contract by, or by sold note only—Evidence—Custom
of contracting by bought and sold notes—Evidence in
case of.

C. & Co., and H. & Co., were merchants at Calcutta, where the custom prevailed of contracting by bought and sold notes. H. & Co., sold to C. & Co., a large quantity of indigo, through the medium of a broker, who drew up a sold note addressed to H. & Co., and submitted it to H for his approval, when H having objected to a particular word remaining, the broker took the sold note to C and informed him of H's objection. C struck his pen through the word objected to by H, placing his initials over that erasure, and returned it to the broker, who thereupon delivered it, so altered, to H. & Co. The broker delivered to C. & Co., on the following day, a bought note, which differed in certain material forms from the said note. In an action brought by H. & Co., against C. & Co., for non-performance of the contract contained in the sold note, *held*, reversing the Supreme Court, that the transaction was one of bought and sold notes, and that the circumstances attending C's alteration of the sold note, and affixing his initials, were not sufficient to make that note, alone, a binding contract, and that there being a material variation in the terms of the bought note with the sold note, they together did not constitute a binding contract. (*Dr. Lushington*).
COWIE v. REMFRY. (1846) 3 M. I. A. 448 =
5 Moo. P. C. 232 = 10 Jur. 789 = 1 Sar. 302.

——Contract entered into by telegrams but completed by
—Breach by vendor of—Damages for—Suit by purchaser
for—Cause of action—Rectification of the notes—Prayer for
—Necessity.

The suit was by a purchaser, under a contract of sale of goods completed by bought and sold notes, for delivery of the entire cargo contracted for or for damages. The notes had been falsified by the vendor by an alteration calculated to show that less goods than had been really contracted for were contracted for. The contract was entered into by means of telegrams, and, owing to the falsification of the notes by the vendor, the purchaser proved the contract by the evidence of the broker and by the telegrams. In his plaint, however, he gave the date of the notes as the date of the contract, and formally prayed for rectification of the notes by inserting the real quantity of goods contracted for.

Held that the suit was not founded on the bought and sold notes, and that the prayer for rectification thereof was unnecessary (126).

The purchaser's case rested not on the falsified bought and sold notes, which he was there to repudiate, but on the perfectly competent evidence, which, while disproving the bought and sold notes, proved the contract, which they falsely purported to record (126). (*Lord Robertson*).
DURGA PROSAD SUREKA v. BHAJAN LALL.

(1904) 31 I. A. 122 = 31 C. 614 (625-6) = 8 Sar. 684 =
8 C. W. N. 489 = 6 Bom. L. R. 498 = 14 M. L. J. 196.

——Contract of sale of goods by—Breach by vendor to
deliver entire goods—Purchaser's rights in case of—Falsi-
fication of notes by vendor by reduction of quantity of goods
—Effect.

In a case in which a contract of sale of Russian kerosine oil was completed by bought and sold notes, the vendor, by fraud, inserted in the bought and sold notes the figures 100,000 cases, as descriptive of the quantity of oil sold, whereas the truth was that the cargo amounted to 125,000,

CONTRACT—(Contd.)**Bought and sold notes—(Contd.)**

Held that, on the refusal of the vendor to deliver the whole cargo, the right of the purchaser was indisputable, viz., to have the whole cargo or damages (124).

The trick practised on the purchaser in the bought and sold notes had no legal effect on his original right nor did that right depend either for constitution or for evidence on the bought and sold notes (124). (*Lord Robertson.*) *DURGA PROSAD SUREKA v. BHAIJAN LALL.* (1904) 31 I.A. 122 = 31 C. 614 (624-5) = 8 C. W. N. 489 = 8 Sar. 684 = 6 Bom. L. R. 498 = 14 M. L. J. 196.

—Variation in terms between—Effect—No binding contract. See **CONTRACT—BOUGHT AND SOLD NOTES—CONTRACT BY—VARIATION BETWEEN THE NOTES.**

Breach of.

—Anticipatory breach—Damages for—Measure of—Ginning factory—Contract by defendants to place, at plaintiff's disposal—Breach of—Profits likely to have been made by plaintiff if proper measure of—Mitigation of damages—Plaintiff's duty to take steps for.

Suit by respondent against appellants to recover damages for breach of a contract to gin for him in their ginning factory raw cotton, which he contemplated buying and, when ginned, pressed and made up into bales, proposed to sell on the market in Bombay or elsewhere. The contract found by the Court was one made at the beginning of the cotton season, by which during six months or so the appellants were to place their mill at the plaintiffs' disposal for half its working time at fixed rates in order to gin cotton, which he contemplated buying and for his part undertook to procure and supply to them. The appellants contended that the plaintiff's expected profit was a speculative amount and too remote; that he had little or no cotton to be ginned and bought none; and that in any case he could get no more than the extra cost paid to other mills for ginning such cotton as he tendered to them.

Held, over-ruling the contention, (1) that essentially an estimate of profits would be the natural way of measuring the plaintiff's loss, and, though only an estimate, it could be correctly formed by the Court, the actual course of markets being known at the date of the trial; (2) that, though the plaintiff was bound to take reasonable steps to mitigate the loss, yet as the contract was repudiated almost as soon as it was made and the case was therefore one of anticipatory breach, the plaintiff was entitled to measure his damages as they then stood, and could not be required by the defendants to buy the cotton, which they had announced in advance they would not gin for him. (*Viscount Sumner.*) *RAMGOPAL v. DHANJI JADHAVJI BHATRA.* (1928) 55 I. A. 299 = 55 C. 1048 = 28 L. W. 55 = 32 C. W. N. 1117 = 30 Bom. L. R. 1389 = 111 I. C. 480 = 48 C. L. J. 567 = 24 N. L. R. 154 = (1928) M. W. N. 924 = A. I. R. 1928 P. C. 200 = 55 M. L. J. 248.

—Buyer's breach—Re-sale by seller in event of—Term in contract for—Effect of—Re-sale pursuant to—Benefit resulting from—Buyer's right to.

A contract for the sale of shares in a Company contained a term providing that in the event of the buyer not making payment on the settlement day the seller should have the option of re-selling the shares by auction, and any loss arising should be recoverable from the buyer.

Held that the contractual term as to re-sale was only a stipulation that the seller might, if he thought fit, liquidate the damages by ascertaining the value of the shares at the date of the breach by an auction sale as specified, and that if the seller availed himself of that option he would not be selling the purchaser's shares with a consequential obligation to account to him for the price but would be selling shares belonging to the seller which the purchaser ought to, but

CONTRACT—(Contd.)**Breach of—(Contd.)**

failed to, take up and pay for in order to ascertain what was the loss arising by reason of the purchaser not completing at the contract price.

Upon breach by the purchaser his contractual right to the shares fell to the ground. (*Lord Wrenbury.*) *JAMAL v. MOOLLA DAWOOD SONS & CO.*

(1915) 43 I. A. 6 (9-10) = 43 C. 493 = 3 L. W. 181 = 8 L. B. R. 343 = (1916) 1 M. W. N. 70 = 31 I. C. 949 = 19 M. L. T. 80 = 23 C. L. J. 137 = 14 A. L. J. 89 = 18 Bom. L. R. 315 = 9 Bur. L. T. 8 = 20 C. W. N. 105 = 30 M. L. J. 73.

—Damages for—Anticipatory breach—Damages in case of—Measure of. See **CONTRACT—BREACH OF—ANTICIPATORY BREACH.** (1928) 55 I. A. 299 = 55 C. 1048.

—Damages for—Buyer's breach—Re-sale—Damages to be arrived at by—Election by vendor to take.

On failure of the buyer to take delivery, on the agreed date, of the shares in a Company contracted to be purchased by him, the vendor by a letter tendered the shares to the buyer and asked payment of the price, adding that, in the event of default on the part of the purchaser, the shares would be sold by public auction and the purchaser would be held responsible for all losses which might result from such re-sale.

Held that that letter did not amount to an election by the seller to take a measure of damages to be arrived at by a re-sale, and that he was not thereby precluded, notwithstanding such re-sale, from recovering as damages for the breach the difference between the contract price of the shares and their market price on the date of the breach (10). (*Lord Wrenbury.*) *JAMAL v. MOOLLA DAWOOD SONS & CO.*

(1915) 43 I. A. 6 = 43 C. 493 (502-3) = 3 L. W. 181 = 8 L. B. R. 343 = (1916) 1 M. W. N. 70 = 19 M. L. T. 80 = 23 C. L. J. 137 = 14 A. L. J. 89 = 18 Bom. L. R. 315 = 9 Bur. L. T. 8 = 31 I. C. 949 = 20 C. W. N. 105 = 30 M. L. J. 73.

—Damages for—Buyer's breach—Re-sale by seller at a profit subsequent to date of breach—Benefit of—Buyer's right to, in mitigation of damages.

The defendants contracted to purchase certain shares in a company from the plaintiff, the stipulated date of delivery being 30-12-1911. The shares having largely fallen in value on that date, the defendants failed to take delivery of and pay for the said shares. The plaintiff sold the shares on various dates from 28-2-1912 onwards, the sales fetching in most instances higher prices than the market price on 30-12-1911.

In a suit by the plaintiff to recover as damages for breach the difference between the contract price of the shares and their market price on 30-12-1911, the date of the breach, *held*, reversing the Court below, that the plaintiff was entitled to recover the said sum as damages, and that the defendants were not entitled to the benefit of the higher prices obtained at the re-sales in mitigation of damages.

The loss to the seller (plaintiff) arising from the buyer's (defendants') breach of the contract is not loss generally but loss at the date of the breach. If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it. But the fact that by reason of the loss of the contract which the defendant has failed to perform the plaintiff has obtained the benefit of another contract which is of value to him does not entitle the defendant to the benefit of the latter contract (10-11). (*Lord Wrenbury.*) *JAMAL v. MOOLLA DAWOOD SONS & CO.*

(1915) 43 I. A. 6 = 43 C. 493 (503-4) = 3 L. W. 181 = 8 L. B. R. 343 = (1916) 1 M. W. N. 70 = 19 M. L. T. 80 = 31 I. C. 949 = 23 C. L. J. 137 = 14 A. L. J. 89 =

CONTRACT—(Contd.)**Breach of—(Contd.)**

18 Bom. L. R. 315 = 9 Bur. L. T. 8 =
20 C. W. N. 105 = 30 M. L. J. 73.

—Damages for—Buyer's breach—Re sale by seller at a profit subsequent to date of breach—Benefit of—Buyer's right to, in mitigation of damages—Term in contract for—Effect. See CONTRACT—CONSTRUCTION—SALE OF GOODS—CONTRACT FOR—RE-SALE, ETC.

(1915) 43 I. A. 6 (9-10) = 43 C. 493.

—Damages for—C. I. F. Contract—Breach of—Suit for damages for—Evidence given indefinite—Award of nominal damages on ground of—Propriety.

The suit was for damages for breach of a contract, which was a C. I. F. contract with this peculiarity, that the money was to be paid as the goods were inspected and before they were put on board. The provision in the contract with regard to the assessment of damages was: "It is also agreed that in case the said Sheo Bux (defendant) fails to take delivery of the timber in time the said Joseph & Company (plaintiff) will dispose of locally, and the said Sheo Bux will pay the difference in price what the said company may have suffered."

The Court below, after having decided in favour of the plaintiff to the effect that there was a breach and that he had taken proper steps to have the breach measured, came to the conclusion that he had not given sufficient evidence to show the cost; that he had made one or two small misstatements as regards some of his expenses; and that he could only get nominal damages.

Held, reversing the Court below, that the plaintiff was entitled to a very substantial verdict.

Under the contract the plaintiff had, for his money, still to provide tonnage and pay freight and pay the insurance; and, when he comes to estimate his loss, he has, first of all, on the one side to put the contract price of the amount of timber in question, then to add to it the expenses of the auction sale of the timber held by him in pursuance of the contract, then to deduct from it what was realised at the auction, and also to deduct from it his necessary expenditure in completing his bargain, which really comes under four heads: the freight, which was the biggest thing; the insurance; the loading charge; and certain port or customs duties. No doubt he was bound to give some evidence as to what those figures were. The evidence given by him was no doubt shadowy, and every presumption should be made against him; if there is any range, the range should be taken against him; but the defendant called no evidence on these points at all, and the Board is entirely without trace of any suggestion on the defendant's behalf that these expenses would have wiped out the otherwise apparent great loss. Without making the deductions for freight, loading, customs and insurance, if you simply take the gross cost, and deduct from it the sale price, here is a sum of Rs. 33,000 and to show that that is to be reduced to 1 rupee, the Court would have to be satisfied that the freight and the other minor charges would come to an approximately equal figure. It is quite obvious in this case, both on the evidence given, and, what this Board very much relies on, the way the case was conducted in the Court of first instance, that no such case was intended to be made. (*Lord Phillimore.*) JOSEPH v. SHEO BUX.

(1918) 10 L.W. 21 = 17 A. L. J. 158 =
25 M. L. T. 235 = 29 C. L. J. 348 = 23 C. W. N. 601 =
12 Bur. L. T. 2 = 21 Bom. L. R. 615 = 49 I. C. 691 =
36 M. L. J. 151.

—Damages for—Quality—Warranty as to—Breach of—Damages for—Purchaser's suit for—Onus on him—Acceptance of goods by him after examination—Sale thereof by him and delivery of same to buyer—Complaint as to quality not made till long after.

CONTRACT—(Contd.)**Breach of—(Contd.)**

Suit by respondents for damages for breach of warranties contained in five several contracts for sale of good catch.

The bags, the subject of the five contracts, were delivered in Calcutta between 5th April, 1879 and 26th April, 1880. In the course of the deliveries extending over that period an examination as to quality was made in the presence of one or other of the brokers and of the person selected by the respondents. Some was rejected, other catch substituted, and extra allowance made for weight. Thereupon the respondent having sent advices of their purchase to a New York firm, parcels of catch were sold to different buyers in America, to whom, under such "forward" contracts, the catch was shipped in separate shipments by the respondents. Throughout the course of delivery in New York, occupying from 13th April, 1880 to 21st October, 1880, no complaint whatever was made either of quality or package until 4th November, 1880, when the American buyers refused to take delivery, objecting to the quality of the catch. Hence the suit.

Held that, treating the question as a matter simply of fact and inference, it was impossible not to see that the evidence of the searching examination at Calcutta, and the period which was allowed to elapse from the time, and during the course of delivery, extending over the period referred to, rendered it at all events incumbent, by very cogent evidence on the part of the respondents, to rebut the inference which justly would be drawn from the acceptance in Calcutta after such searching examination that the goods delivered were according to the contract (63). (*Lord Halsbury.*) GAN KIM SWEE v. RALLI.

(1886) 13 I. A. 60 =
13 C. 237 (242-3, 244) = 4 Sar. 722

—Damages for—Sale of goods—Contract for—Seller's breach—Damages to buyer on—Measure of.

In a suit by the buyer for damages for breach of a contract to deliver indigo seed contracted for, the amount of damages to which the buyer is entitled depends upon the price of indigo seed at the time when the contract should have been performed. (*Lord Hobhouse.*) GRENON v. LUCHMEE-NARAIN AUGURWALLAH. (1896) 23 I. A. 119 (126-7) =
24 C. 8 (19) = 7 Sar. 66.

—Damages for—Sale of goods—Contract for, between chain of buyers and sellers—Breach of—Damages for—Measure of, ascertained between last buyer and seller—If same all along the chain. See DAMAGES—SALE OF GOODS. (1925) 49 M. 1.

—Damages for—Seller's breach—Buyer entering into contract with a view to perform his contract with a third party—Measure of damages in case of—English law—Rule under S. 73 of Contract Act.

In a case in which A contracts with B to sell and deliver to B certain commodities, and then contracts with C to buy from him similar commodities in order to implement his contract with B, informing C, at the time he buys, of the special purpose to which he intends to devote those commodities, if C does not deliver the commodities to A, questions may arise as to whether the damages to which he, C, would become liable for his breach of contract were not to be augmented by the extra loss A sustains by reason of the non-fulfilment of his contract with B. The authorities in England seem to go the length of holding that notice to C of the special purpose for which A requires the goods is not enough; that to make C liable for the additional damage, he must have, expressly or impliedly contracted to run the additional risk.

Quære: whether under S. 73 of the Indian Contract Act notice would be enough to make a vendor liable though he did not contract to run the risk. (*Lord Atkinson.*) KESHAV-LAL BROTHERS & CO. v. DEWANCHAND & CO.

(1923) 50 I. A. 142 (152) = 47 B. 563 (575-6) =

CONTRACT—(Contd.)**Breach of—(Contd.)**

25 Bom. L. R. 854 = A. I. R. (1923) P. C. 105 =

(1923) M. W. N. 583 = 27 C. W. N. 974 =

33 M. L. T. 342 = 1 Pat. L. R. 434 = 74 I. C. 396 =

45 M. L. J. 630.

— *Damages for—Seller's breach—Fixed quantity of goods—Contract to supply—Supply of lesser quantity—Liability in case of.*

Where the contract is for a fixed quantity and less than that quantity is delivered within the time fixed, the sellers must either find in the contract some matter of excuse or discharge, or they must pay damages. (*Lord Sumner.*) HURNANDRAI FULCHAND v. PRAGDAS BUDHSEN.

(1922) 50 I. A. 9 = 47 B. 344 (346) = 32 M. L. T. 171 =

38 C. L. J. 248 = 22 Bom. L. R. 537 = 27 C. W. N. 878 =

(1923) M. W. N. 547 = 18 L. W. 441 =

A. I. R. 1923 P. C. 54 = 75 I. C. 485 = 44 M. L. J. 498.

— *Damages for—Seller's breach—Government control of supply of goods—Indents supplied by actual customer—Condition of supply only on—Buyer furnishing indent signed by particular person—Measure of damages in case of.*

By an agreement dated 11th October, 1917, the respondent Company sold to the appellant Company, 1200 tons of steam coal, deliverable in equal monthly instalments of 200 tons from the respondents' stock to appellant's depot in Bombay. The agreement provided for an indent being furnished by the buyers. Owing to the war conditions then prevailing, the Government of India controlled the supply of coal, and notified that Railway waggons for transport of coal would only be supplied on indents signed by the actual customers and countersigned by the authority appointed by the committee to certify those indents. The appellants furnished a certified indent for the coal signed by an ice factory, and providing for the coal being unloaded at Byculla (Bombay) Railway Station. The respondents failed to deliver part of the coal contracted, whereupon the appellants sued them for damages. There was then a market for coal at Bombay. The High Court dismissed the suit on the ground that the parties must be held to have contracted on the footing that the coal contracted for was deliverable to the party who signed the indent (The Ice Factory) and could not be dealt with in the open market, that the measure of damages was only the difference between the suit contract and the appellants' contract with the Ice Factory, and that the appellants adduced no evidence of any loss sustained by them by reason of the undelivered coal not reaching the Ice Factory.

Held, reversing the High Court, that the appellants were entitled to recover the difference between the market price and the contract price on the date of the breach.

There was no contract between the appellants and the respondents or between the appellants and the Ice Factory that the appellants should deliver over to the ice factory the coal that should be delivered to them under the suit contract. The Ice Factory was not the appellants' only customer. Had the coal been delivered to them in pursuance of the suit contract, the appellants would have been entitled to sell them in the open market at the market price. (*Lord Atkinson.*) KESHAVLAL BROTHERS & CO. v. DEWANCHAND & CO.

(1923) 50 I. A. 142 = 47 B. 563 =

25 Bom. L. R. 854 = A. I. R. 1923 P. C. 105 =

(1923) M. W. N. 583 = 27 C. W. N. 974 =

33 M. L. T. 342 = 1 Pat. L. R. 434 = 74 I. C. 396 =

45 M. L. J. 630.

— *Damages for—Seller's breach—Profit made by buyer by other means—Benefit of—Seller's right to.*

In an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as, for instance, an

CONTRACT—(Contd.)**Breach of—(Contd.)**

intermediate contract entered into with a third party for the purchase or sale of the goods.

The appellant entered into an agreement to sell to the respondents railway sleepers which the latter had previously contracted to supply to the B. N. Railway. On a claim by the respondents for damages for sleepers not delivered according to the contract, the High Court held that the respondents were entitled to damages for the non-delivered portion on the calculation of the profit which they would have made comparing the price under the principal contract with the Railway Company with the price they had to pay under the contract with the appellant. The appellant contended that the damages could not be recovered, because as a matter of fact the respondents supplied the sleepers to the Railway Company from other wood which they had and made a profit on that supply greater than the profit which they would have made by the contract wood.

Held, that accidental circumstances could not be taken into account in estimating the damages payable by the appellant.

Had the appellant supplied the timber the respondents would have made their profit and would have still had the other timber to sell, upon which they were entitled to make such profit as they could (180-1). (*Lord Dunedin.*) MUHAMMAD HABIBULLAH v. BIRD & COMPANY.

(1921) 48 I. A. 175 = 43 A. 257 (262-3) = 14 L. W. 350 =

24 Bom. L. R. 687 = A. I. R. 1922 P. C. 178 =

63 I. C. 589.

— *Damages for—Suit for—Maintainability—Plaintiff wholly dispensing with performance—Effect.*

To a claim to recover damages for the breach of a promise to deliver the goods contracted for, it is, under S. 63 of the Contract Act, a complete answer that the party complaining of the breach has wholly dispensed with the performance of the promise to deliver the goods. (*Lord Atkinson.*) FIRM OF CHHUNNA MAL-RAM NATH v. FIRM OF MOOL CHAND-RAM BHAGAT.

(1928) 55 I. A. 154 =

9 Lah. 510 = 5 O. W. N. 466 = 26 A. L. J. 603 =

32 C. W. N. 738 = 47 C. L. J. 503 = 9 Lah. W. N. 24 =

29 Punj. L. R. 353 = 108 I. C. 678 =

30 Bom. L. R. 837 = 28 L. W. 251 =

A. I. R. 1928 P. C. 99 = 55 M. L. J. 1.

— *Damages for—Suit for—Proof of contract and of breach thereof by defendant in.*

In a suit by the plaintiff for damages for breach of a contract entered into with him by the defendant, *held*, on the evidence, that the plaintiff had proved the contract alleged in his plaint and the breach of that contract by the defendant. (*Sir John Edge.*) BANARSI DAS v. BANSI LAL.

(1912) 16 I. C. 75.

— *Damages for—Two contracts—Breach of both—Damages for breach of one of contracts—Measure of—Benefit resulting from breach of other contract if can be taken into account in ascertaining.*

The respondents were at fault in cancelling either of the two contracts. It is fortunate for them that it is in respect of one cancellation only that any loss has been sustained by the appellants. The fact that as the result of the respondents' wrongful act a benefit may have accrued to the appellants in connection with the other is a fact for which no credit can be claimed by the respondents. Upon this point the case of *Lacey v. Hill* (8 Ch. App. 921) may be usefully referred to. (*Lord Blanesburgh.*) DEWAN CHAND KIRPA RAM & COMPANY v. WELD & COMPANY.

(1925) 88 I. C. 54 = A. I. R. 1925 P. C. 150 (154-5) =

(1925) M. W. N. 459.

CONTRACT—(Contd.)**Breach of—(Contd.)**

——Party guilty of—Termination of contract by—Right of. See **CONTRACT—BREACH OF—RIGHTS OF PARTIES ON.** (1924) 52 I. A. 1 (16)=48 M. 230.

——Quality—Warranty as to—Breach of—Damages for—Purchaser's suit for—Onus on him—Acceptance of goods by him after examination—Sale thereof by him and delivery of same to buyer—Complaint as to quality not made till long after. See **CONTRACT—BREACH OF—DAMAGES FOR—QUALITY.** (1886) 13 I. A. 60 (63)=13 C. 237 (242-3, 244).

——Rights of parties on—Party guilty of breach—Termination of contract by—Right of.

Where one party to a contract commits a breach, it is open to the other party to elect to treat the contract as at an end. But, if he does not elect to treat the breach as a repudiation of the contract terminating it, it is not open to the party guilty of the breach to put an end to the contract simply by committing a breach of it (16). (*Lord Atkinson.*) **VATSAVAYA VENKATA JAGAPATI v. POOSAPATHI VENKATAPATHI.** (1924) 52 I. A. 1=48 M. 230=

20 L. W. 298=A. I. R. 1924 P. C. 162=

35 M. L. T. 210=(1924) M. W. N. 607=

26 Bom. L. R. 786=29 C. W. N. 57=80 I. C. 807=47 M. L. J. 93 (123).

——Termination of contract by mere. See **CONTRACT—TERMINATION OF—BREACH OF CONTRACT BY PARTY.**

——Termination of contract by party guilty of—Right of. See **CONTRACT—BREACH OF—RIGHTS OF PARTIES ON.** (1924) 52 I. A. 1 (16)=48 M. 230.

Building contract.

——Commission to owner of land on cost of materials used on completion of work within a fixed time—Provision for—Non-completion of work within time fixed owing to subsequent substantial additions by owner—Commission in case of—Owner's right to.

A contractor accepted the offer from the owner of certain land for the construction within 12 months of a one-storeyed house on the land for the price of Rs. 21,000, subject to a commission or rebate, computable upon completion of 10 per cent on the price of the materials in favour of the owner. As the work progressed, certain additions and alterations thereto were required by the owner which enhanced the cost of the work to nearly twice the original amount. Finally, the work was stopped and the buildings left unfinished as a result of differences and disputes between the contractor and the owner, the former alleging that the owner's refusal of further advances prevented him from proceeding with the work, and the owner declining to make further payments because he considered he had, after allowing for his aforesaid commission or rebate, overpaid by about Rs. 10,000. In an action brought by the owner against the contractor for refund of that excess, *held* that the commission or rebate was (1) only due in respect of the original contract for the building of a one-storeyed house, and not of the subsequent additions or alterations; (2) only exigible when the work was completed, and the final accounts between the parties at the end of the stipulated period of one year made up.

As the entire contract was not in fact, and in its nature was incapable of being, completed within the year, the conditions for computing such deduction never arose, and the failure to complete was not due to the contractor, but to the owner who forfeited the benefit of the stipulation as to the rebate. (*Lord Shaw.*) **SAHU RAM KUMAR v. MUHAMMAD YAQUB.** (1924) 20 L. W. 82=29 C. W. N. 461=

A. I. R. 1924 P. C. 123=26 Bom. L. R. 631=

(1924) M. W. N. 431=34 M. L. T. 102=80 I. C. 203=

47 M. L. J. 180.

CONTRACT—(Contd.)**Company.**

——Contract with. See **COMPANY—CONTRACT WITH. Completed Contract.**

——Company—Contract with—Offer by letter—Acceptance in minute—Incorporation of terms of offer in minute—Permissibility—Variance between letter and minute—Minute the only concluded contract in case of. See **COMPANY—CONTRACT WITH—OFFER BY LETTER.**

(1914) 27 M. L. J. 74.

——Future contract—Agreement contemplating—Correspondence—Construction.

One of two defendants in consideration of advances made to him by the plaintiff for the purpose of paying the cost of obtaining the lease of a forest in the name of his son, the other defendant, made an agreement with the plaintiff that "when my son returns I will make him to arrange for you in some way or other (or by any means) to go on working the forest within the years for which written permit has been obtained." The son was not a party to the agreement.

Held, in a suit for damages for breach of contract in not giving the working of the forest to the plaintiffs, that on its true construction the agreement contemplated the making of a contract for working the forest only on the return of the son and left all terms to be then arranged; and the plaintiff was entitled only to recover the advances with interest. (*Lord Davey.*) **MAUNG SHWE OH v. MAUNG TUN GYAW.** (1904) 31 I. A. 188=32 C. 96 (105-6)=9 C. W. N. 147=8 Sar. 704.

——Modification or revocation of—Consensus ad idem—Necessity.

A contract is concluded when in the mind of each contracting party there is a *consensus ad idem*, and a modification or revocation of the contract requires a like consensus. The buyer as one of the parties to the contract cannot avoid it of his own mere motion. The seller might either accept or reject the buyer's attempt to revoke it. (*Lord Wrenbury.*) **NOORBHAI v. KARAPPAN CHETTY.** (1925) 23 L. W. 182=A. I. R. 1925 P. C. 232.

——Proposal and counter-proposal—Test—Lease—Agreement for lease—Contract not amounting to—Contract of special character not requiring registration—Test.

The Port Canning Municipal Commissioners invited loans or debentures convertible into leasehold titles to lands in the town. The Port Canning Land Company subscribed to the loan declaring their desire to take land in lieu of the debentures. After the debentures were issued, a correspondence commenced between the parties with the object of effecting the conversion, in which correspondence the Commissioners intimated to the Company the construction they put upon the Company's tender, *viz.*, that they elected to take land to the full value of their debentures. The Commissioners also intimated to the Company that the latter had selected lots amounting to a part only of their debentures, and required them to select others, giving notice at the same time that they did not consider themselves liable to pay interest. The Company after this proposed to defer exchanging the debentures till their due date, and if the Commissioners consented, not to call for the interest in the meantime, but agreeing to pay a quit-rent equivalent to the interest. The Commissioners agreed to this and asked the Company to declare the lots which they would receive in commutation. A selection was made but not in accordance with the contract; the lots selected being of more value than the debentures. The Commissioners then proposed that the Company should return the debentures and pay quit-rent upon the additional lots. This was not accepted, and the matter was left in an imperfect state. The Company subsequently brought an action against the Municipality for 2 years' in-

CONTRACT—(Contd.)**Completed Contract—(Contd.)**

terest on the debentures. *Held* that the non-acceptance of the proposals to the additional lots could not affect the previous agreement to exchange debentures then held for equivalent lots; and that such previous agreement had been made involving quit-rent which extinguished the interest.

Held further that the letters did not require registration, for they did not amount to a lease, or any agreement for a lease, but were evidence of a contract of a special character not coming within any of the definitions found in the Registration Act. (*Sir Montague E. Smith.*) **PORT CANNING LAND INVESTMENT, RECLAMATION AND DOCK CO., v. SMITH.** (1874) 1 I.A. 124 = 21 W.R. 315 = 3 Sar. 359.

—Provisional arrangement—Test—Formal document—Execution of—Provision for—Effect. *See* CONTRACT—FORMAL DOCUMENT—EXECUTION OF.

Construction of.

—Ambiguity—Evidence parol—Admissibility.

In this case the trial judge considering that the terms of the documents left the matter ambiguous, admitted parol evidence. (*Lord Dunedin.*) **BALTHAZAR & SON v. ABOWATH.** (1919) 13 L.W. 537 (539) = 63 I.C. 521.

—Arbitration clause—Appointment of arbitrator—Provision for—Death or retirement of original arbitrator—Appointment of substitute on—Power of.

Held, on the construction of a contract containing an arbitration clause, that the expression "a failure by either party to appoint an arbitrator" included a failure to appoint a substituted arbitrator on the death or retirement of an arbitrator originally appointed. (*Viscount Cave.*) **SASSOON & CO. v. RAMDUTT RAMKISSEN DAS.**

(1922) 49 I.A. 366 (374) = 50 C. 1 (10-1) = 33 M.L.T. 19 = 37 C. L. J. 336 = 27 C. W. N. 660 =

(1922) M.W.N. 372 = 18 L.W. 537 =

A. I. R. 1922 P.C. 374 = 70 I.C. 777 = 44 M.L.J. 758.

—Business bargain—Interpretation of—Reasonable businessmen—Obligation likely to be undertaken by—Considerations of—Propriety.

To interpret a business bargain expressed in the language of commerce, it is no doubt important to appreciate the methods and the point of view of businessmen, but this is merely a prudent way of qualifying the mind to construe their words, and so to determine their meaning, and is a very different thing from postulating that reasonable men would have been likely to agree to one kind of liability and not to another, and from thus concluding that, whatever the words of the contract say, that kind of liability, and that alone, is the obligation of the contract. As a matter of fact there is nothing surprising in a merchant's binding himself to procure certain goods at all events. It is a matter of price and of market expectations. No doubt it is a speculation, but many dealings even in cotton goods are of that character. (*Lord Sumner.*) **HURNANDRAI FULCHAND v. PRAGDAS BUDHSEN.** (1922) 50 I. A. 9 (13) =

47 B. 344 (348) = 32 M.L.T. 171 = 38 C.L. J. 248 =

22 Bom. L.R. 537 = 27 C.W.N. 878 =

(1923) M.W.N. 547 = 18 L.W. 441 =

A.I.R. 1923 P. C. 54 = 75 I.C. 485 = 44 M.L.J. 498.

—Duration—Termination of—Right of—Debtor and creditor—Agreement between—Partnership at will—Principles applicable to case of—Applicability. *See* DEBTOR AND CREDITOR—AGREEMENT BETWEEN.

(1880) 7 I. A. 83 (105) = 2 M. 239 (262-3).

—Evidence—Correspondence prior and subsequent to contract—Admissibility of. *See* CONTRACT—TIME OF ESSENCE OF—INTENTION AS TO.

(1915) 43 I. A. 26 (33) = 40 B. 289 (299).

CONTRACT—(Contd.)**Construction of—(Contd.)**

—Evidence—Extrinsic evidence—Other contracts with same person or with another—Evidence of—Admissibility.

In a case in which the appellant had by a contract agreed to execute certain descriptions of work in accordance with specified conditions and in consideration of payment being made at the rate specified in a Schedule (a note being appended to the Schedule), the question arose as to the rate of payment to which the appellant was entitled for the carting of cement.

Held that, the contract being clear, the rate of payment must be determined by the terms of the contract and depended on the construction of the Schedule of rates and the note appended thereto, and that extrinsic evidence as to the rate of payment allowed for the carriage of cement to another contractor, or to the appellant under a different contract, was irrelevant; and, therefore, inadmissible. (*Lord Parmoor.*) **SETH JASWANT RAI v. SECRETARY OF STATE FOR INDIA.** (1915) 3 L. W. 297 (299) =

33 I. C. 924 = 23 C. L. J. 177 = 18 Bom. L. R. 355 =

19 M. L. T. 103 = (1916) 1 M. W. N. 201.

—Formal document—Preparation of—Condition precedent to enforceability of contract if a. *See* CONTRACT—FORMAL DOCUMENT.

—Goods contracted for. *See* CONTRACT—GOODS CONTRACTED FOR.

—Labour contract. *See* CONTRACT—LABOUR CONTRACT.

—Perfect contract—Intention to make—Ascribing to parties of—Court's duty.

Though contracts are not unfrequently found to be of an imperfect nature, it is more reasonable to ascribe to the parties the intention of making a perfect contract, especially when such a contract is of a very common kind, and suitable to the ordinary expectations of persons entering into a transaction of the kind in question (145). (*Sir Richard Couch.*) **MATHURA DAS v. RAJA NARINDAR BAHADUR PAL.** (1896) 23 I. A. 138 = 19 A. 39 (49) = 1 C. W. N. 52 = 7 Sar. 88 = 6 M. L. J. 214.

—Timber—Felling of, in instalments—Contract for, providing for felling of a named quantity in each instalment and another named quantity during the entire term—Former provision if as essential term of contract as latter.

A landowner sold to certain timber-cutters, called hereinafter the contractors, the right of cutting sleepers from a jungle belonging to the landowner, were as follows:—

"Clause 3. We, the second party, shall during the term each year from the month of Kartik up to the end of Asarh, get 15,000 sleepers of every measurement prepared every month and shall, after they are counted according to the contract, pay to the first party the price thereof according to the rates mentioned above, without any objection to this neither we, the second party, nor our representatives shall raise any objection. If we do so, the first party shall be competent to cancel this deed and stop the cutting of the trees in the lands specified below without waiting for the expiry of the term of this agreement. Be it noted that during the term (of the lease) every year from the month of Sravan to the end of Aswin, we, the second party, shall try our best to cause as many sleepers of different measurements prepared as possible and after getting them counted according to the contract, pay the price thereof in accordance with the rates mentioned above, to the first party on taking receipt therefor. The second party shall, on no account, without sufficient reason, willingly stop the preparation of sleepers during these three months. Let it be known that we, the second party, will have to prepare 1,35,000 sleepers of different measurements every year during the nine months from Kartik to Asarh, in accordance with the terms speci-

CONTRACT—(Contd.)**Construction of—(Contd.)**

fied above. If, through negligence on the part of us, the second party, we fail to prepare so many sleepers, no plea regarding deficiency in the number of sleepers, put forward by us, shall be entertained and we, the second party, shall be held liable to pay on demand, the price of the entire number of 1,35,000 sleepers to the first party.

"5. The sleepers, which we, the second party, shall get ready shall be counted every week on behalf of the first party and seals and numbers shall be put on them on behalf of the first party. If this work cannot be managed to be done every week, it should be done every month. But the second party shall, on no account, be entitled to take away the sleepers after they have been counted, sealed and numbered, unless they have paid the price thereof. The second party shall obtain receipt for whatever money they pay for the sleepers from the manager of the first party. If, through negligence, the sleepers may not be counted, sealed and numbered on behalf of the first party, the second party shall be at liberty to serve a formal notice on the first party giving two weeks' time, and it shall be incumbent on the first party to get the sleepers counted, sealed and numbered within the period of the notice issued by the second party who shall have to wait till then, but such delay shall not exceed more than two weeks after the expiry of the period fixed under the notice. If this be not done the second party shall then have the power to enter the measurement and number of sleepers in their own papers and take away the same and I, the first party, shall be entitled to get the price of the sleepers according to the entries made in the papers of the second party.

"6. Without paying in full the price of the sleepers that will be got ready every month and obtaining receipt therefor, the second party will not be entitled to cut trees or prepare sleepers in the succeeding month. In that case, on the expiry of the said succeeding month, I, the first party, shall be competent to bring the trees mentioned in the Schedule given below in my direct possession and to stop the cutting of the trees, without waiting for the expiry of the term of this agreement, and if in such circumstances, I, the first party, be put to any loss through some act on the part of the second party, the second party shall be liable to pay compensation for the loss to me, the first party, and the sum of Rs. 6,000 in deposit will be forfeited.

The contractors cut 1,055 sleepers only in the first month, and 3,432 sleepers in the second, and they did not pay the price of 30,000 sleepers as per their undertaking, whereupon the landowner gave them notice of determination of the contract.

Held that, on the right construction of the contract, the stipulation to cut 15,000 sleepers in any particular month was just as obligatory as the cutting of 1,35,000 sleepers in nine months, and that the landowner was justified in cancelling the contract. (*Lord Phillimore*). **HOMESHWAR SINGH v. JUGAL KISHORE MARWARI.**

(1925) A. I. R. 1925 P. C. 223 = 90 I. C. 596 =

43 C. L. J. 8 = 28 Bom. L. R. 187 = 49 M. L. J. 800.

Words—Confirmed credit—Irrevocable—Use of—Effect. See AGREEMENT—CONFIRMED CREDIT.

(1927) 54 I. A. 317 (330) = 1 Luck. 241.

Contingent event—Liability on a.

Event rendered impossible by contractor—Obligee's right to enforce contract forthwith. See BOND—LIABILITY UNDER—PAYMENT OF OBLIGEE OUT OF PROCEEDS ETC. (1881) Bald. 396.

Cutchia Adatia transactions in Bombay.

Course of business in—Position of parties in.

There is no dispute that as regards *cutchia adatia* transactions the course of business and the relative positions of

CONTRACT—(Contd.)**Cutchia Adatia transactions in Bombay—(Contd.)**

the parties are as follows:—when a *cutchia adatia* enters into transactions under instructions from and on behalf of his up-country constituent with a third party in Bombay, he makes privity of contract between the third party and the constituent, so that each becomes liable to the other, but also he renders himself responsible on the contract to the third party. He does not ordinarily communicate the name of his constituent to the third party, but he informs the constituent of the name of the third party. The position, therefore, as between himself and the third party is that he is agent for an unnamed principal with personal liability on himself. His remuneration consists solely of commission, and he is in no way interested in the profits or losses made by his constituent on the contracts entered into by him on his constituent's behalf (243). (*Lord Justice Warrington*). **SOBHAGMAL GIANMAL v. MUKUNDCHAND BALIA.**

(1926) 53 I. A. 241 = 51 B. 1 = (1926) M. W. N. 830 =

28 Bom. L. R. 1376 = 98 I. C. 338 =

A. I. R. 1926 P. C. 119 = 44 C. L. J. 509 =

38 M. L. T. 16 (P. C.) = 51 M. L. J. 809.

Damages for breach of

See CONTRACT—BREACH OF—DAMAGES FOR.

Discretion vested in Government by, involving question of construction of contract.

Opinion of Government on question—Court's interference with—Power of.

A contract provided that certain payments made by the Government were to be deducted from the consideration moneys, the payments being such as the Government should be satisfied were due and owing in respect of claims for 'labour and supplies.' *Held* that the question whether any particular sums mentioned in the contract were or were not properly described as for labour and supplies was a question of construction, and therefore of law for the courts, and that the Government's decision in the matter was liable to be questioned in a court of law. (*Sir George Farwell*). **EASTERN TRUST CO. v. MC KENZIE MAUN & CO., LTD.**

(1915) 20 C.W.N. 457 (460-1) =

35 I.C. 378 = 84 L. J. P.C. 152.

Disqualified proprietor.

Contract by or with. See COURT OF WARDS—DISQUALIFIED PROPRIETOR.

Duress.

Contract entered into under. See CONTRACT—IMPRISONMENT.

Enforceability of.

Statute—Contract prohibited by—Jurisdiction of Court over contract of particular description—Statute imposing restriction on—Repeal of statute—Enforceability of contract on—Distinction between two cases.

If, according to the true intent and meaning of a statute, it operates as a prohibition of a loan to a Zemindar without the consent of the Revenue Officers registered as therein mentioned, the loan itself is illegal, and the subsequent repeal of the statute will not give a right to sue upon it; but if it amounts to nothing more than a restriction upon the jurisdiction of the court over transactions of that description, unless sanctioned and registered as above-mentioned, the repeal of the restriction will open to the parties the right to seek any remedy in the court, which, according to the general principles of the law, will be applicable to their case. (*Mr. Justice Bosanquet*). **GOPEE MOHUN THAKOOR v. RAJA RADHANAT.**

(1834) 5 W.R. 72 =

1 Suth. 8 (11) = 1 Sar. 42.

Stipulation which contractee represented would not be enforced—Contract containing—Enforceability of.

CONTRACT—(Contd.)**Enforceability of—(Contd.)**

If there is any stipulation in a contract which the contractee told the contractor would not be enforced, the latter cannot be held to have assented to it, and the contract is not the real agreement between the parties, and cannot be enforced (237-8). (*Sir Richard Couch*). **PERTAB CHUNDER GHOSE v. MOHENDRA PURKAIT.**

(1889) 16 I.A. 233 = 17 C. 291 (297) = 5 Sar. 444.

Enforcement of.**—Court's duty.**

It is the primary duty of law to enforce contracts (135). (*Mr. Baron Parke*). **DOOLUBDASS PETTEMBERDASS v. RAMLOLL THACKOORSEYDASS.** (1850) 5 M.I.A. 109 = 7 Moo. P.C. 239 = Perry, O.C. 232 = 1 Sar. 403.

Evidence of.

—See also **CONTRACT — CONSTRUCTION — EVIDENCE.**

—*Hearsay evidence—Admissibility—Evidence as to what was said by contracting parties at time of alleged contract.*

The question was whether *D*, a deceased childless Hindu, covenanted with defendant's father (*G*) on his behalf to make the defendant his heir and owner of the property, and in the event of his having issue, to give a portion of the property to the defendant.

Held that the evidence of *D*'s widows as to what said by *D* and *G* when the alleged covenant or agreement was made was only hearsay, and, to use the language of the Indian Evidence Act, was not relevant (51). (*Sir Richard Couch*). **LALA NARAIN DAS v. LALA RAMANUJ DAYAL.**

(1897) 25 I.A. 46 = 20 A. 209 (216) = 2 C.W.N. 193 = 7 Sar. 257.

Expectations on each side—Raising of—Distinction.

—*Evidence — Heir—Agreement to give and accept minor as.*

The question was whether *D*, a childless Hindu, covenanted with defendant's father (*G*) on his behalf to make the defendant his heir and owner of the property, and in the event of his having issue, to give a portion of the property to the defendant.

Held, on the evidence reversing the High Court and restoring the Sub-Judge, that there was no contract or agreement; that there was only an expectation on each side—on the part of *D* that if the respondent continued to live with him, and was brought up and educated under his care and control, the defendant would be induced, by the prospect of becoming his heir, to continue to live with him; and on the part of *G*, that if he gave up the boy (defendant), *D* would have him educated and make him his heir (52-3). (*Sir Richard Couch*). **LALA NARAIN DAS v. LALA RAMANUJ DAYAL.**

(1897) 25 I.A. 46 = 20 A. 209 (217-8) = 2 C.W.N. 193 = 7 Sar. 257.

Expert tribunal set up by.

—*Decision of, on matters within its competence—Court's interference with—Grounds.*

Where an implied term of a contract for the sale of goods by the plaintiff to the defendant was that the rate payable for goods not delivered was to be fixed by a Panchayat of experts, *held* that very much more than error was required to upset the decision of the Panchayat as to the rate payable for goods not delivered.

Very much more than error would be required to upset the decision of an expert tribunal voluntarily set up for the decision of matters of skill. The plaintiff has entirely failed to prove fraud, either in the inception or the proceedings of that body. The fact that the Panchayatdars, when examined as witnesses, have not been able to give a

CONTRACT—(Contd.)**Expert tribunal set up by—(Contd.)**

lucid exposition of their *rationes decidendi* is not inconsistent with the honesty and validity of their conclusion. (*Lord Robertson*). **PESTONJI JEHANGIRJI v. THE FIRM OF JAISINGDAS HANSRAJ.**

(1903) 8 C.W.N. 57 =

22 Bom. L.R. 420 = 76 I.C. 63.

Formal document—Execution of.

—*Condition precedent to enforceability of contract—If and when a.*

An agreement for the grant of a lease of property vested in a manager appointed by virtue of the Chota Nagpur Encumbered Estates Act contained a proviso to the effect that an agreement embodying the terms agreed upon should be prepared and executed by (1) the Deputy Commissioner or such other officer, representing the Court of Wards, as was authorised to sign such an agreement, (2) the disqualified proprietor, and (3) the intending lessees.

Held that the said proviso was a condition precedent and more than a condition precedent to the enforceability of the agreement.

The execution of the agreement provided for was a condition or term of the bargain, and there would be no enforceable contract because the condition was unfulfilled. (*Lord Shaw*). **HUKUM CHAND v. RAN BAHADUR SINGH.**

(1924) 51 I.A. 208 (211-2) = 3 Pat. 625 = A.I.R. (1924) P.C. 156 = 34 M.L.T. 120 = (1924) M.W.N. 710 = 22 A.L.J. 935 = 5 Pat. L.T. 639 = 21 L.W. 1 = 29 C.W.N. 342 = 3 Pat. L.R. 157 = 80 I.C. 841 = 47 M.L.J. 562.

—Whether an agreement is a completed bargain or merely a provisional arrangement depends on the intention of the parties as deducible from the language used by the parties on the occasion when the negotiations take a concrete shape. The fact of a subsequent agreement being prepared may be evidence that the previous negotiations did not amount to an agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the *proposition* that they cannot be bound by a previous agreement (30-1).

Held, affirming the High Court, that the two documents in question in the case constituted a completed and binding agreement between the parties, and that the reservation in respect of a formal document to be prepared by a Vakil only meant that it should be put into proper shape and in legal phraseology, with any subsidiary terms that the Vakil might consider necessary for insertion in a formal document (31).

The provision in the agreement in regard to this matter was not a condition to which the bargain was subject (30). (*Mr. Ameer Ali*). **HARICHAND MANCHARAM v. GOVIND LUXMAN GOKHALE.**

(1922) 50 I.A. 25 = 47 B. 335 (342-3) = 32 M.L.T. 175 = 28 C.W.N. 73 = 17 L.W. 572 = 37 C.L.J. 440 = 25 Bom. L.R. 531 = A.I.R. (1923) P.C. 47 = 71 I.C. 763 = 44 M.L.J. 608.

Forum loci contractus.

—*Obligation to accept, irrespective of domicile or residence of parties—Implication of.*

An obligation to accept the *forum loci contractus*, as having, by reason of the contract, a conventional jurisdiction against the parties in a suit founded upon that contract for all future time, wherever they might be domiciled or resident, cannot, unless expressed, be implied (187-8). (*Earl of Selborne*). **SIRDAR GURDAYAL SINGH v. RAJAH OF FARIDKOTE.**

(1894) 21 I.A. 171 = 22 C. 222 (240) = 112 P.R. 1894 = 6 Sar. 503 = 4 M.L.J. 267.

Fraud.

—*Contract secured by—Proof of—Setting aside of contract on that ground—Terms of.*

CONTRACT—(Contd.)**Fraud—(Contd.)**

In 1859, G entered into negotiations with respect to the purchase of a certain talook at a premium of Rs. 42,411 and an annual rent of Rs. 48,070, and, in January, 1860, he signed a sale bond which contained an enumeration of the mouzahs purchased, the actual sale being completed on the 2nd June following. Until his death in December, 1861, he paid the stipulated rent according to the terms of the deed. Subsequently, his widow brought a suit for reforming the contract of sale entered into by her husband, on the ground that he was induced to enter into it by fraudulent misrepresentation. In her plaint she prayed for an abatement of rent and a refund of the consideration money in proportion. *Held*, in view of the probabilities of the case, of the fact that the action was not brought until the person who alone was able to throw much light upon it (*viz.*, the plaintiff's husband), as far as the plaintiff's case was concerned, was dead, and of the character of the evidence that, although there might be some suspicion of misrepresentations having been made to the deceased, no sufficient case of fraud had been made out.

Their Lordships further observed that they must not be understood as intimating any opinion that even if the plaintiff would have been entitled to set aside the contract on the ground of fraud, she would have been entitled to such relief as she sought in the suit. (*Sir Robert Collier.*) **DARIMBYA DEBBYA v. MAHARAJAH NILMONEY SINGH DEO BAHADUR.** (1879) 3 *Suth.* 677 = **Bald.** 316 (321) = 6 *C. L. R.* 465.

———*Contract secured by—Representations any one of which is untrue—Contract entered into on faith of, if such a contract.*

Where one party induces the other to contract on the faith of representations made to him, any one of which is untrue, the whole contract is, in a Court of Equity, considered as having been obtained fraudulently (237). (*Sir Richard Couch.*) **PERTAB CHUNDER GHOSE v. MOHENDRA PURKAIT.** (1889) 16 *I. A.* 233 = 17 *C.* 291 (297) = 5 *Sar.* 444.

———*Exoneration from liability under contract on ground of—Condition.*

Law does not exonerate parties from their contracts on the ground of fraud, except where they are distinctly shown to be in violation of the ordinary rules of morality (135). (*Mr. Baron Parke.*) **DOOLUBDASS PETTAMBERDASS v. RAMLOLL THACKOORSEYDASS.** (1850) 5 *M. I. A.* 109 = 7 *Moo. P. C.* 239 = **Perry, O. C.** 232 = 1 *Sar.* 403.

Frustration of.

———*Doctrine of—Applicability—Goods to be manufactured and supplied by named mills—Contract for supply of—Mills giving preference to Government orders and failing to supply to contractor—Inapplicability of doctrine to case of.*

The respondents entered into an agreement with the appellants for the sale of a stated quantity of goods to be manufactured at and obtained from named mills. Only a portion of the goods contracted for was supplied by the respondents, and the appellants sued them for damages for failure to deliver the remaining quantity.

The mills named remained in existence and at work, and the looms which could otherwise have manufactured goods deliverable under the suit contract were fully occupied in making goods for the Government of India. There was no evidence that the mills named were requisitioned, and that the Government were empowered to require their contract work to take precedence of other contract work. In fact all that appeared was that the Government placed an order with the said mills, and that it was executed by the mills in preference to the order of the respondents. There would

CONTRACT—(Contd.)**Frustration of—(Contd.)**

have been nothing illegal in the receipt of the goods by the respondents, if they could have got them, or in the delivery of them over to the appellants.

Held, reversing the High Court, that the doctrine of frustration had no application to the case, and that the respondents were liable for damages (12-4). (*Lord Sumner.*) **HURNANDRAI FULCHAND v. PRAGDAS BUDHSEN.**

(1922) 50 *I. A.* 9 = 47 *B.* 344 (348-9) = 32 *M. L. T.* 171 = 38 *C. L. J.* 248 = 22 *Bom. L. R.* 537 = 27 *C. W. N.* 878 = (1923) *M. W. N.* 547 = 18 *L. W.* 441 = 75 *I. C.* 485 = *A. I. R.* (1923) *P. C.* 54 = 44 *M. L. J.* 498.

———*War—Frustration by—"Syndicate rates"—Regulation of price with reference to—Term as to—Cessation of publication of rates by Syndicate owing to war—Effect of.*

A contract, dated 21st April 1914, for the purchase of alizarine dyes between vendor and purchaser both resident in India stipulated for a certain rebate and then proceeded:—

"The goods are to be invoiced as usual at Rs. 321-4 which will be paid within 15 days of delivery without interest. If the payment is delayed after that time an interest of 9 per cent. per annum will be paid by us (purchasers.) *If there should be any fluctuation in the Syndicate rates the conditions laid down in this (contract) regarding the price and/or bonus will be void and they will be fixed at such a time of fluctuation by mutual agreement.*"

There was a Syndicate composed of an important German firm of alizarine producers and an English member or members, and that Syndicate had been in the practice of regulating the supply and fixing the prices as regards India and elsewhere, and the "Syndicate rates" referred to in the contract were the rates fixed and publicly announced by that Syndicate. On the outbreak of the German war, the said rates ceased to be issued by the Syndicate.

On a question arising whether the war frustrated the contract, either generally or by destroying the Syndicate, *held*, that there was nothing in the contract which in terms made any modification of the obligation of the sellers depend upon the continuance of the Syndicate, that, as there was no fluctuation or alteration in the Syndicate rates, by reason of the Syndicate not having been operative, or for some other reason, the condition avoiding the contract, if there was such fluctuation, never came into operation, and the result was that the contract continued on the footing of the rates specified in the contract, and that as the contract was broken the buyers were entitled to recover damages for breach. (*Viscount Haldane.*) **TOOLSIDAS TEJPAL v. VENKATACHALAPATHY AIVAR.** (1920) 13 *L. W.* 1 = (1920) *M. W. N.* 557 = 25 *C. W. N.* 26 = 28 *M. L. T.* 410 = 59 *I. C.* 27.

Future events—Provision for.

———*Human life—Uncertainty—Parties' knowledge of—Presumption as to.*

Contracting parties when providing for possible future events must be presumed to bear in mind the uncertainty of human life (21). (*Lord Atkinson.*) **VATSAVAYA VENKATA JAGAPATI v. POOSAPATHI VENKATAPATHI.**

(1924) 52 *I. A.* 1 = 48 *M.* 230 = 20 *L. W.* 298 = *A. I. R.* (1924) *P. C.* 162 = 35 *M. L. T.* 210 = (1924) *M. W. N.* 607 = 26 *Bom. L. R.* 786 = 29 *C. W. N.* 57 = 80 *I. C.* 807 = 47 *M. L. J.* 93 (127).

Goods—Contract for sale of.

———*Breach of—Damages for—Suit for—Maintainability—Plaintiff wholly dispensing with performance—Effect. See CONTRACT—BREACH OF—DAMAGES FOR—SUIT FOR—MAINTAINABILITY.* (1928) 55 *I. A.* 154 = 9 *Lah.* 510

CONTRACT—(Contd.)**Goods—Contract for sale of—(Contd.)**

—Breach by buyer of—Damages for. *See* CONTRACT—BREACH OF—DAMAGES FOR—BUYER'S BREACH.

—Breach by seller—Damages for—Profits made by buyer by other means—Benefit of—Seller's right to. *See* CONTRACT—BREACH OF—DAMAGES FOR—SELLER'S BREACH—PROFITS, ETC. (1921) 48 I. A. 175 (180-1) = 43 A. 257 (262-3).

—Breach by seller—Damages to buyer for—Liability for—Fixed quantity of goods—Contract to supply—Supply of lesser quantity. *See* CONTRACT—BREACH OF—DAMAGES FOR—SELLER'S BREACH—FIXED QUANTITY OF GOODS. (1922) 50 I. A. 9 = 47 B. 344 (346).

—Breach by seller—Damages to buyer on—Measure of. *See* CONTRACT—BREACH OF—DAMAGES FOR—SALE OF GOODS. (1896) 23 I. A. 119 (126-7) = 24 C. 8 (19).

—Breach by seller—Damages to buyer for—Measure of—Buyer entering into contract with a view to perform his contract with a third party. *See* CONTRACT—BREACH OF—DAMAGES FOR—SELLER'S BREACH. (1923) 50 I. A. 142 (152) = 47 B. 563 (575-6).

—Breach by seller—Damages to buyer for—Measure of—Government control of supply of goods—Indents supplied by actual customer—Condition of supply only on—Buyer furnishing indent signed by particular person—Measure in case of. *See* CONTRACT—BREACH OF—DAMAGES FOR—SELLER'S BREACH—GOVERNMENT, ETC. (1923) 50 I. A. 142 = 47 B. 563.

—Chain of buyers and sellers—Contract between—Breach of—Damages for—Measure of, ascertained between last buyer and seller—If same all along the chain. *See* DAMAGES—SALE OF GOODS. (1925) 49 M. 1.

—C. I. F. contract—Breach of—Damages for—Suit for—Evidence given indefinite—Award of nominal damages on ground of—Propriety. *See* CONTRACT—BREACH OF—DAMAGES FOR—C. I. F. CONTRACT. (1918) 36 M. L. J. 151.

—Description of goods—Part of—Goods packed in wooden boxes lined with tin—Contract for—Packing in those cases if part of description.

Quære, whether, in the case of a contract for the delivery of goods (shirting) packed in wooden boxes lined with tin, the packing in those cases is part of the description of the goods contracted for, and whether the buyer can decline to accept goods of the contract quality merely on the ground that they were packed in bales instead of in wooden boxes lined with tin. (*Lord Atkinson.*) FIRM OF CHUNNA MAL-
RAM NATH v. FIRM OF MOOL CHAND-RAM BHAGAT. (1928) 55 I. A. 154 = 9 Lah. 510 = 5 O. W. N. 466 = 26 A. L. J. 603 = 32 C. W. N. 738 = 47 C. L. J. 503 = 9 Lah. W. N. 24 = 29 Punj. L. R. 353 = 108 I. C. 678 = 30 Bom. L. R. 837 = 28 L. W. 251 = A. I. R. (1928) P. C. 99 = 55 M. L. J. 1.

—Indent—Goods to be indented from England—Contract to supply—Terms of indent if imported into contract. The appellants, a firm of merchants dealing in piecegoods, entered into contracts with the respondents, a native firm in Madras, for the supply to them of prints and sarees at certain agreed prices. The goods were, as both parties were aware, to be shipped from England. Each contract contained a stipulation in the following words, viz., "Terms cash, less three months discount equal to $1\frac{3}{4}$ per cent. Per Indent Nos. 906, 907, 908, 909," the numbers referring to indents which under those numbers were the contracts made by the appellants with English manufacturers for the supply of the goods. The question for decision was whether, upon the proper interpretation of the contract, the stipulation referred to was meant to incorporate the terms of the indents as terms of the contract.

CONTRACT—(Contd.)**Goods—Contract for sale of—(Contd.)**

Held, reversing the Court below, that the words "Per Indent 906," etc., did not import the terms of the indent into the contract. (*Lord Dunedin.*) WILLIAM ALEXANDER v. GOCUL DAS. (1918) 23 C. W. N. 1091.

—Description or quality of goods—Essential part of—Bales of long cloth bearing certain numbers—Description of—Numbers if essential part of.

In the case of a contract for the purchase of bales of long cloth bearing certain numbers, the question was whether the numbers were an essential part of the description of the contract goods, and whether the purchasers were entitled to refuse to take the bales merely on the ground that they did not bear the numbers specified in the contract.

Held, affirming the High Court on its appellate side, that the numbers were merely reference numbers and did not give any warranty or indication of the quality or description of the goods, and that the purchaser was not entitled to reject the bales tendered merely on the ground that they did not bear the numbers specified in the contract. (*Lord Atkinson.*) RAMJIVAN NEVATIA v. BHIKAJI. (1924) 48 B. 519 = 26 Bom. L. R. 442 = 10 O. & A. L. R. 607 = (1924) M. W. N. 430 = 20 L. W. 424 = 35 M. L. T. 140 = 28 C. W. N. 537 = A. I. R. (1924) P. C. 143 = 80 I. C. 381 = 46 M. L. J. 655.

—F. O. B. (Free on Board) contract—Incidents of—Rights of parties on. *See* CONTRACT ACT, SS. 99, 100. (1845) 3 M. I. A. 422.

—Manufacture by named mills—Goods under—Contract for supply of, as and when same might be received from mills—Absolute contract for supply of whole of goods mentioned therein or contract for supply of only so much thereof as might be received from the mills named.

An agreement for the sale of future goods to be manufactured at and obtained from named mills, provided for the quantity and descriptions of those goods, for the prices at which the different descriptions were sold, and for the time and rate of delivery. The provision for delivery, after the words which completed the description of the goods, namely, "goods under manufacture are sold", ran as follows:—"The same are to be taken delivery of as and when the same may be received from the mills. Delivery is to be caused to be given in full by December 31 in the year 1918".

Held, that the contract was an absolute one to deliver the whole of the goods mentioned therein, whether or not the whole of the goods was received from the mills during the remainder of the year 1918.

The words "as and when the same may be received from the mills" do not mean "if and when the same may be received from the mills." The words regulate the manner of performance, but they do not reduce the fixed quantity sold to a mere maximum, or limit the sale to such goods, not exceeding 864 bales, as the mills might deliver to the contractors during the remainder of the year. (*Lord Sumner.*) HURNANDRAI FULCHAND v. PRAGDAS BUDHSEN. (1922) 50 I. A. 9 (11) = 47 B. 344 (346) = 32 M. L. T. 171 = 38 C. L. J. 248 = 27 C. W. N. 878 = 22 Bom. L. R. 537 = (1923) M. W. N. 547 = 18 L. W. 441 = A. I. R. (1923) P. C. 54 = 75 I. C. 485 = 44 M. L. J. 498.

—Manufacture and supply by named mills—Goods subject of—Contract to supply—Mills giving preference to Government orders and failing to supply to contractor—Frustration of contract by. *See* CONTRACT—FRUSTRATION OF—DOCTRINE OF. (1922) 50 I. A. 9 (12-4) = 47 B. 344 (348-9).

—Parol proof of—Permissibility.

In India a contract of sale of goods can be proved by parol. (*Lord Robertson.*) DURGA PROSAD SUREKA v.

CONTRACT—(Contd.)**Goods—Contract for sale of—(Contd.)**

BHAJAN LALL. (1904) 31 I. A. 122 (124) =
31 C. 614 (625) = 8 C. W. N. 489 = 8 Sar. 684 =
6 Bom. L. R. 498 = 14 M. L. J. 196.

———*Passing of, by named persons—Provision in contract for—Scope and effect of—What amounts to such passing.*

A contract for the supply of goods contained a clause to the following effect: "The passing of our (the supplier's) Moulmein and Rangoon friends, the Bombay Burmah Trading Corporation, Ltd., is as usual final as regards both measurement and quality".

Held, that the right conferred by the clause on the suppliers amounted merely to the right to determine by and through the skilled and experienced persons whom they should necessarily employ for the purpose, acting honestly and impartially according to the best of their judgment whether the goods supplied were in conformity with the requirements of the contract under which they were so supplied.

The point is not whether the men employed to pass acted honestly according to the best of their skill and judgment, but whether they ever approached the question they had to determine, namely, the conformity of the goods supplied with the contract under which they were supplied. If the persons employed never applied their minds to that but merely determined that the sleepers were fit to be sent on as the manufactures of their employers, there cannot be said to be any "Passing" of the sleepers within the meaning of the contract. (*Lord Atkinson.*) BOMBAY BURMAH TRADING CORPORATION, LIMITED *v.* AGA MAHOMED KHALEEL SHIRAZEE. (1911) 38 I. A. 169 = 34 M. 453 =

8 A. L. J. 1208 = 15 C. W. N. 181 = 10 M. L. T. 150 =
(1911) 2 M. W. N. 111 = 13 Bom. L. R. 813 =
14 C. L. J. 326 = 12 I. C. 44 = 21 M. L. J. 1110.

———*Patta Patti—Meaning of.*

A good deal of evidence was given as to the meaning of the words "patta patti with," and it appears certain that when once *patta patti* is made the buyer has no longer a right to demand the goods themselves, nor is the seller obliged to deliver them, but the matter should be settled by the payment and acceptance of the difference resulting from the sale and re-sale of the goods. (*Lord Darling.*) SUK-DEVDOS RAMPRASAD *v.* GOVINDOSS CHATURBHUJA DOSS & CO. (1927) 55 I. A. 32 = 51 M. 96 =

5 O. W. N. 195 = 107 I. C. 29 = 30 Bom. L. R. 238 =
27 L. W. 453 = 1 L. T. 40 M. 138 = 26 A. L. J. 484 =
47 C. L. J. 144 = A. I. R. (1928) P. C. 30 =
54 M. L. J. 130 (134).

———*Portion of, not supplied—Rate payable for—Expert tribunal's decision as to—Provision in contract for—Decision of such tribunal—Court's interference with—Grounds.* See CONTRACT—EXPERT TRIBUNAL SET UP BY.

(1903) 8 C. W. N. 57.

———*Purpose particular—Goods required for—Warranty in case of.* See CONTRACT—GOODS—CONTRACT FOR SALE OF—RAILWAY SLEEPERS.

———*Quantity—Specification as to, in labels affixed by vendor—Mistake in—Liability of vendor for—Purchaser if under duty to ascertain exact quantity or if entitled to rely upon specification on label.*

The plaintiffs placed an order with the defendants, a firm of good business reputation, for a certain quantity of arsenite of soda, for making "dip" for cattle. The defendants delivered 56 lbs., but the drums containing the soda were wrongly labelled as containing 8½ lbs. only. The label contained instructions as to the quantity of water to be used for mixing up with the soda. The plaintiffs' servant acted up to the instructions, with the result that a strong "dip" was prepared and the cattle were injured. In an action to re-

CONTRACT—(Contd.)**Goods—Contract for sale of—(Contd.)**

cover damages, the defendants pleaded *inter alia* that plaintiffs were guilty of contributory negligence in not making enquiries and detecting the mistake. *Held*, that plaintiffs were justified in relying on the specification as to quantity on the label that no duty was cast on them to make enquiries to ascertain the exact quantity delivered, and hence, there was no contributory negligence on their part. (*Lord Sumner.*) BRITISH SOUTH AFRICA CO. *v.* LENNON LIM. (1915) 34 I. C. 278.

———*Quality of—Stipulation as to—Fibre of certain quantity with requisite percentages deliverable in instalments—Total quantity to contain requisite percentages or each delivery to contain same—Acceptance of certain deliveries by buyer—Effect of, on his right to complain of absence of requisite percentages—Right to complain that article was not of contract quality at all—Effect on.*

A contract for the sale and purchase of aloe fibre was in the following terms, the words italicised being in writing, and the rest being a printed form:—

"I have this day agreed to sell you Aloe Fibre and within the dates mentioned below, to deliver into *my godowns* at *Coimbatore*, in quality, dryage, etc., such as you shall approve at the rate of Rs. 3-7-9 a maund of 25 lbs.

Should you consider the *said stuff* on delivery is not sufficiently dry, clean and free from *pith, black, short* or not to your satisfaction, you shall be at liberty to reclean, etc., the same and to debit the cost to my account. *Cart-hire from my godown to yours to be paid by me.*

Provisional payment, if required on delivery into your godown, not to exceed:—

Rs. per

The whole quantity now contracted for (*ten thousand maunds*) 10,000 maunds guaranteeing 70 per cent. A. 15 per cent. B and 15 per cent. C to be delivered within two months from this date."

Held that the contract was not, as held by the High Court, a contract for 10,000 maunds, each delivery if not each maund to contain 70 per cent. A, 15 per cent. B, and 15 per cent C, or that each delivery had to be proportionate, but that the contract was a contract to supply a lump quantity of fibre, the total quantity of which was to contain the requisite percentages, while the part deliveries might be in any proportion, and that, accordingly, the purchaser could not, when taking deliveries, refuse to take parcels because they did not contain the requisite percentages, until there came to be an absolute excess of one of the inferior qualities.

In respect of some of the deliveries made and taken under the contract, *held*, on the other hand, that the acceptance of the deliveries by the purchaser could not be held to bind the purchaser to nothing except the actual weight of the fibre transferred, and that the purchaser having taken the fibre away from the vendor's godown as being fibre deliverable under the contract, it was not thereafter open to him to say afterwards that some of the fibre taken was neither A nor B nor C but of an inadmissible quality, D. (*Sir Walter Phillimore.*) PEIRCE LESLIE & CO. *v.* GIRIAH CHETTIAR. (1917) 46 I. C. 576 = 22 C. W. N. 282.

———*Quality—Warranty as to—Breach of—Damages for—Purchaser's suit for—Onus on him—Acceptance of goods by him after examination—Sale thereof by him and delivery of same to buyer—Complaint as to quality not made till long after.* See CONTRACT—BREACH OF—DAMAGES FOR—QUALITY. (1886) 13 I. A. 60 (63) =

13 C. 237 (242-3, 244).

———*Railway sleepers—Contract for supply of—Warranty in case of—Passing of goods by persons named by supplier—Clause for—Meaning and effect of.*

CONTRACT—(Contd.)**Goods—Contract for sale of—(Concl'd.)**

Where the persons who enter into a contract for the supply of goods to be used for a particular purpose (*e.g.*, sleepers for railways) are informed of the purpose for which the goods are wanted, they must be taken to have impliedly warranted that the goods supplied are reasonably fit for that purpose.

A contract for the supply of sleepers for the Railway contained the following clause: "The passing of our (the supplier's) Moulmein and Rangoon friends, the Bombay Burmah Trading Corporation, Limited, as usual final as regards both measurement and quality."

Held that the meaning of the clause was not that the contractors could supply anything they chose, but that the supply should be according to the standard set up expressly or impliedly under the contract or at least the requirement that the sleepers were reasonably fit as sleepers of dimensions described for use by the Railway Company; that the right conferred by the clause on the suppliers amounted merely to the right to determine by and through the skilled and experienced persons whom they should necessarily employ for the purpose, acting honestly and impartially according to the best of their judgment whether the goods supplied were in conformity with the requirements of the contract under which they were so supplied. (*Lord Atkinson.*) BOMBAY BURMAH TRADING CORPORATION, LTD. *v.* AGA MAHOMED KHALEEL SHIRAZEE. (1911) 38 I. A. 169 =

34 M. 453 = 8 A.L.J. 1208 = 15 C. W. N. 181 =

(1911) 2 M. W. N. 111 = 10 M.L.T. 150 =

13 Bom. L. R. 813 = 14 C.L.J. 326 = 12 I. C. 44 =

21 M.L.J. 1110.

Guarantee—Contract of.

—*Bank—Dealing by, with customer in way of its business as a Bank—Continuance of—Undertaking to pay certain sums to Bank in consideration of—Failure of Bank to continue to deal with customer—Liability of guarantor in case of.*

The material clauses of a contract of guarantee was as follows:—

In consideration of the Royal Bank of Canada agreeing or continuing to deal with Antoni Brothers, herein referred to as "the customer" in the way of its business as a Bank, the undersigned hereby jointly and severally guarantee payment to the Bank of the liabilities which the customer has incurred or is under or may incur or be under to the Bank, whether arising from dealing between the bank and the customer or from other dealings by which the bank may become in any manner whatsoever a creditor of the customer; including in such liabilities all interest, computed with quarterly or other rests according to the bank's usual customs charges for commission and other expenses, and all costs, charges and expenses which the Bank may incur in enforcing or obtaining payment of any such liabilities (the joint and several liability of the undersigned hereunder being limited to the sum of forty thousand dollars without interest).

Held that the deed of guarantee, on its true construction, really contained two covenants or contracts, one being the consideration for the other, the first covenant being that if the Bank continued to deal with the firm as their customer in the way of its business as a Bank, the guarantor would pay to the Bank the £40,000 at the times and in the manner specified and do the other things he had undertaken to do, and that, as the Bank had failed to perform their covenant by not continuing to deal with the firm as their customer in the way of their business as a Bank, the guarantor had not received the consideration, *i.e.*, the whole of the consideration upon which his covenant was based, and he was not therefore bound to perform that covenant by reason of that failure.

CONTRACT—(Contd.)**Guarantee—Contract of—(Contd.)**

The words "continuing to deal with Antoni Brothers in the way of its business as a Bank" in the deed of guarantee must involve some *bona fide* fresh transaction between the parties. It is impossible to confine these words to merely keeping the account of this firm open, that is, merely receiving payment from any one who chooses to pay in money to the Bank to the firm's credit. (*Lord Atkinson.*) ROYAL BANK, CANADA *v.* J. SALVATORI.

A. I. R. (1927) P. C. 272 = 30 Bom. L. R. 760 =
47 C. L. J. 300 = 107 I.C. 346.

—*Bank cashier—Discharge of duties by, one of them being reporting on credit and solvency of Bank's customers—Surety for—Cashier himself a customer and insolvent—Loss caused by—Guarantor's liability for.*

G stood surety for the due and faithful performance by his son of the duties of the office of a *khazanchee* (native cashier) of a Bank. One of such duties was to report on the credit and solvency of customers of the Bank having dealings through his agency. The *khazanchee* also carried on a money-lending business either as a partner or as sole member of a firm, and was a customer of the Bank within the meaning of the agreement under which G stood surety for him. For sums overdrawn by him as such customer, the *khazanchee* furnished security which generally took the form of promissory notes executed by third parties in his favour, the notes being indorsed and handed over to the Bank. As security for such overdrafts he did indorse and hand over to the Bank six promissory notes. The makers of the notes, however, paid him the amounts due thereunder, and he received the sums so paid without informing the makers that the notes had been indorsed and handed over to the Bank or the Bank that the notes had been paid. Though the sums paid by the makers found their way to the *khazanchee's* account with the Bank, and to that extent reduced his debit balance, the Bank was left in the belief that it still had those notes as good security, with the result that the *khazanchee* was allowed larger overdrafts than he would otherwise have been allowed. All this took place while the *khazanchee* held office as such. He subsequently resigned his office, and was adjudicated insolvent.

Held that, upon the right construction of the guarantee agreement, the liability of G thereunder extended to the losses caused to the Bank by the above-mentioned fraudulent conduct of the *khazanchee* (175). (*Lord Phillimore.*) SEN *v.* BANK OF BENGAL. (1919) 47 I. A. 164 =

32 C. L. J. 233 = 28 M. L. T. 124 = 13 Bur. L. T. 94 =
58 I.C. 1.

—*Consideration for.*

Anything done, or any promise made for the benefit of the principal, may be a sufficient consideration to a surety for giving a guarantee (653). (*Sir John Edge.*) KALI CHARAN *v.* ABDUL RAHMAN (1918) 50 I.C. 651 =
23 C. W. N. 545 = 10 L.W. 34 = 1 U.P.L.R. (P.C.) 53.

—*Continuing guarantee—Employee—Discharge of duties by—Security for—Contract giving, if such a guarantee.*

On the appointment of a person as *khazanchee* (native cashier) in a Bank, he was required to find security. The security was found by his father for him upon the terms of a tripartite agreement to which the father, the son and the Bank were parties.

Held, that the instrument of security was not a continuing guarantee within the meaning of S. 129 of the Contract Act, and as such was not revoked by the death of the surety according to S. 131 of that Act (169-70).

The words of S. 129 are "a guarantee which extends to a series of transactions is called a continuing guarantee".

CONTRACT—(Contd.)**Labour Contract—(Contd.)**

and unloading explosives, the appellant is entitled to payment at the rate of 7 pies per maund per mile or part of a mile. The contention of the appellant is that the note places cement in the same description as explosives. This contention cannot be accepted. The note does not fix the rate of payment, but the conditions of carriage. The conditions which attach to the carriage of cement are not the same as those which attach to the carriage of explosives. It is true that both explosives and cement are to be carried under special instructions, and that the cartage of cement may consequently be more costly than the cartage of other permanent-way materials, but the rate of 1½ pies per maund per mile is fixed as an over-all-price, and the fact that one article may be more costly to handle than another does not affect the question of the rate of payment under the terms of the contract. (*Lord Parmoor*). *SETH JASWANT RAI v. SECRETARY OF STATE FOR INDIA*.

(1915) 3 L. W. 297 (299-300) = 33 I. C. 924 =
23 C. L. J. 177 = 18 Bom. L. R. 355 =
19 M. L. T. 103 = (1916) 1 M. W. N. 201.

Law Governing.

———*Interpretation and effect of contract—Law governing.*

Beyond doubt in a case where at the time when an obligation is contracted the obligors are within a foreign country, but leave it before the suit to enforce the obligation is instituted, the laws of the country in which the obligation is contracted may bind the parties, so far as the interpretation and effect of the obligation is concerned, in whatever *forum* the remedy might be sought (187). (*Earl of Selborne*). *SIRDAR GURDYAL SINGH v. RAJAH OF FARIDKOTE*. (1894) 21 I. A. 171 = 22 C. 222 (240) = 112 P. R. 1894 = 6 Sar. 503 = 4 M. L. J. 267.

———*Law at the time subsequently found to be erroneous—Liability under contract—Effect on.*

But if the respondent has contracted an obligation to account in this suit for the subsequent profits claimed, he cannot escape from it, because when he contracted it the course and practice of the courts proceeded upon a construction of a statute which has since been pronounced to be erroneous (232). (*Sir James W. Colville*). *SADASIVA PILLAI v. RAMALINGA PILLAI*. (1875) 2 I. A. 219 = 15 B. L. R. 383 = 24 W. R. 193 = 3 Sar. 519 = 3 Suth. 190.

———*Law in force at the time—Alteration subsequent of—Effect.*

The rights of the parties to a contract are to be judged of by that law which they intended, or rather by which they may justly be presumed to have bound themselves. (*Sir Andrew Scoble*). *ABDUL AZIZ UHAN v. APPAYASAMI NAICKER*. (1903) 31 I. A. 1 (9) = 27 M. 131 (142-3) = 6 Bom. L. R. 7 = 8 C. W. N. 186 = 8 Sar. 568.

———*Lex Loci.*

No doubt, speaking generally, all matters relating to a contract are to be decided by the law of the country where the contract is made (65). (*Sir Montague E. Smith*). *MOUNG SHOAY ATT v. KO BYAW*.

(1876) 3 I. A. 61 = I. C. 330 (334) = 3 Sar. 597.

———*Mortgagor and Mortgagee—Contract between. See MORTGAGE—MORTGAGOR AND MORTGAGEE—CONTRACT BETWEEN.* (1879) 7 I. A. 51 (53) = 2 A. 593 (597).

———*Principles of universal application—Applicability to contracts wherever made.*

No doubt, speaking generally, all matters relating to a contract are to be decided by the law of the country where

CONTRACT—(Contd.)**Law Governing—(Contd.)**

the contract is made, but there are principles of universal application by which all contracts, wherever made, must be judged. The first principle of contracts is, that there should be voluntary consent to it (65). (*Sir Montague E. Smith*). *MOUNG SHOAY ATT v. KO BYAW*.

(1876) 3 I. A. 61 = 1 C. 330 (334) = 3 Sar. 597.

Loan—Undertaking to procure

———*Conditional or unconditional. See BROKER—LOAN.* (1912) 39 I. A. 152 = 36 B. 387.

Manager of estate—Pension on resignation

———*Binding contract to pay—What amounts to. See HINDU LAW—IMPARTIBLE ESTATE—WIDOW IN POSSESSION OF.* (1921) 15 L. W. 589.

Meaning of

———*Personal obligations—Real rights—Transaction creating. See BENGAL ACTS—VILLAGE CHAUKIDARI ACT OF 1870, S. 51—CONTRACT.*

(1918) 45 I. A. 162 (167) = 46 C. 173 (181-2)

Meaning and intention of parties—Ascertainment of

———*Court's duty—Difficulty in ascertaining same—Effect*

Though there is hardly anything which is more difficult than to arrive at a certain conclusion with regard to the meaning and intention of the parties to a written contract, if the words of the contract are in any way capable of more than one interpretation, still the court is obliged, as well as it can, to ascertain what was the meaning of the parties (263). (*Sir John Patteson*). *CHOTAYLOLL v. MANICKCHUND*. (1856) 6 M. I. A. 251 = 10 Moo. P. C. 124 = 1 Sar. 538.

———*Data for—Language of contract—Surrounding circumstances.*

The meaning of the parties to a written contract must be ascertained from the contract itself and the surrounding circumstances (263). (*Sir John Patteson*). *CHOTAYLOLL v. MANICKCHAND*. (1856) 6 M. I. A. 251 = 10 Moo. P. C. 124 = 1 Sar. 538.

———*Difficulty in regard to—Ambiguity in wording of contract.*

Undoubtedly, there is hardly anything which is more difficult than to arrive at a certain conclusion with regard to the meaning and intention of the parties to a written contract, if the words of the contract are in any way capable of more than one interpretation (263). (*Sir John Patteson*). *CHOTAYLOLL v. MANICKCHAND*. (1856) 6 M. I. A. 251 = 10 Moo. P. C. 124 = 1 Sar. 538.

Mercantile contract

———*Customary mode of entering into—Presumption in favour of—Deviation from—Onus of proof of.*

If may be true, that merchants dealing *inter se* are not bound by any customary mode of contracting, and that they may adopt another and a different mode of contracting, if they think fit; but the presumption is strongly in favour of the custom, and any alleged deviation therefrom must be strictly proved (463). (*Dr. Lushington*). *COWIE v. REMFRY*. (1846) 3 M. I. A. 448 = 5 Moo. P. C. 232 = 10 Jur. 789 = 1 Sar. 302.

———*Printed form of—Deletion of words in—Addition express of words to—Effect.*

There is a good deal of authority, now old, about the effect of deleting words in a printed form of mercantile contract. It is well settled that the effect is the same as if the deleted words had never formed part of the print at all. The words expressly added, of course, remain to be

CONTRACT—(Contd.)**Mercantile Contract—(Contd.)**

construed (327). (*Viscount Sumner.*) SASSOON AND SONS, LTD. v. INTERNATIONAL BANKING CORPORATION. (1927) 54 I. A. 317=1 Luck. 241=29 Bom. L. R. 1181=25 A. L. J. 655=46 C. L. J. 61= (1927) M. W. N. 648=32 C. W. N. 30=96 L. J. P. C. 153=A. I. R. 1927 P. C. 195=53 M. L. J. 42.

Mercantile usage—Respect due to

—Departure from—Inference of—Propriety—Conditions.

The established usage of dealing in the mercantile world should be held in high respect; the very existence of such usage shows that in practice it has been found useful and beneficial; the presumption is in its favour, and no departure from it is to be inferred from doubtful circumstances, and especially not from circumstances, which, in the opinion of mercantile men generally, would not be conceived to produce any such consequences (465). (*Dr. Lushington.*) COWIE v. REMFRY. (1846) 3 M. I. A. 448=5 Moo. P. C. 232=10 Jur. 789=1 Sar. 302.

Minister.

—Contract by, involving provision of funds by Parliament—Sanction of Lieutenant-Governor—Necessity—Requisites of valid contracts in such cases. See LEGISLATION—RESPONSIBLE GOVERNMENT. (1922) 31 M. L. T. 87.

Minor.

—Contract by—Voidable or void under Contract Act.

Under the Indian Contract Act, a contract by a minor is void, and not voidable only (124).

The Act makes it essential that all contracting parties should be "competent to contract," and expressly provides that a person who by reason of infancy is incompetent to contract cannot make a contract within the meaning of the Act. The question whether a contract is void or voidable presupposes the existence of a contract within the meaning of the Act, and cannot arise in the case of an infant (124). (*Sir Ford North.*) MOHORI BIBEE v. DHURMODAS GHOSE. (1903) 30 I. A. 114=30 C. 539 (547-8)=7 C. W. N. 441=5 Bom. L. R. 421=8 Sar. 374.

—According to the Indian law the contract of an infant is not voidable but void (244). (*Lord Macnaghten.*) MOOSA GOOLAM ARIFF v. EBRAHIM GOOLAM ARIFF. (1912) 39 I. A. 237=16 I. C. 70=23 M. L. J. 215.

—Contract by—Voidable or void under old Hindu law.

A contract by a minor is void, and not voidable only, under the old Hindu law as declared in the laws of Manu (126). (*Sir Ford North.*) MOHORI BIBEE v. DHURMODAS GHOSE. (1903) 30 I. A. 114=30 C. 539 (549-50)=7 C. W. N. 441=5 Bom. L. R. 421=8 Sar. 374.

—Mortgage by—Age—False representation as to—Money obtained on mortgage by—Damages in case of—Liability for.

In a suit to enforce a mortgage the defendant pleaded that he was an infant at the time when he executed the suit mortgage. Thereupon the mortgagee contended that he was induced to lend upon the mortgage by the fraudulent misrepresentation of the defendant that he was then of age, and that if he was in fact then an infant the amount claimed was recoverable as damages. Held, that, on the principle of the decision in (1904) 3 K. B. 607, the mortgagee's claim based on the misrepresentation of the defendant must fail (264). (*Lord Shaw.*) MAHOMED

CONTRACT—(Contd.)**Minor—(Contd.)**

SYEDOL ARIFFIN v. YEOH OOI GARK.

(1916) 43 I. A. 256=21 C. W. N. 257= (1917) M. W. N. 162=19 Bom. L. R. 157=39 I. C. 401.

—Mortgage deed executed by—Cancellation of, in suit by minor—Money advanced under mortgage—Restoration to mortgagee of—Provision for—Discretion of courts below as to—Privy Council's interference with.

The respondent executed a mortgage deed in favour of B to secure the repayment of a certain sum with interest on some houses belonging to the respondent. At that time the respondent was an infant; and he did not attain the age of majority until a few months afterwards. The respondent commenced the action out of which the appeal arose against B, stating that he was under age when he executed the mortgage, and praying for a declaration that it was void and inoperative, and should be delivered up to be cancelled. The defendant pleaded, *inter alia*, that in any case the court should not grant the plaintiff any relief without making him repay the moneys advanced.

The courts below found the facts alleged by the plaintiff, and granted the relief asked. With reference to the defendant's claim for refund of the moneys received by the plaintiff under the mortgage, they held that the case was not one in which justice required that the respondent should make compensation in accordance with Ss. 38 and 41 of the Specific Relief Act.

On the claim for compensation being again pressed on appeal to the Privy Council, held that there was no reason for interfering with the discretion of the courts below (125).

Ss. 38 and 41 of the Specific Relief Act, no doubt, give a discretion to the Court to award compensation on the rescission of a contract or the cancellation of an instrument; but the court of first instance, and subsequently the Appellate Court, in the exercise of such discretion, came to the conclusion that under the circumstances of this case justice did not require them to order the return by the respondent of money advanced to him with full knowledge of his infancy, and their Lordships see no reason for interfering with the discretion so exercised (125). (*Sir Ford North.*) MOHORI BIBEE v. DHURMODAS GHOSE.

(1903) 30 I. A. 114=30 C. 539 (549)=7 C. W. N. 441=5 Bom. L. R. 421=8 Sar. 374.

—Mortgage deed executed by—Nullity.

A mortgage deed executed by, amongst other persons, a minor, is as against him and his interest in the mortgaged property not merely voidable, but void and of no effect, and must be regarded as a mortgage deed to which he was not even an assenting party and as a mortgage deed which does not affect him or his interest in the estate (120-1). (*Sir John Edge.*) BALWANT SINGH v. CLANCY.

(1912) 39 I. A. 109=34 A. 296 (306)= (1912) M. W. N. 462=11 M. L. T. 344=9 A. L. J. 509=15 C. L. J. 475=16 C. W. N. 577=14 Bom. L. R. 422=14 I. C. 629=23 M. L. J. 18.

(*Lord Salveson.*) SADIQ ALI KHAN v. JAI KISHORI. (1928) 47 C. L. J. 628=26 A. L. J. 685=32 C. W. N. 874=5 O. W. N. 547=28 L. W. 17=109 I. C. 387 (2)=30 Bom. L. R. 1346=A. I. R. 1928 P. C. 152=55 M. L. J. 88 (95).

—Necessaries supplied to—Liability for—Personal liability—Liability of minor's property.

It is clear from the Contract Act that a minor is not to be liable even for necessaries and that no demand in respect thereof is enforceable against him by law, though a statutory claim is created against his property (124). (*Sir Ford North.*) MOHORI BIBEE v. DHURMODAS GHOSE. (1903) 30 I. A. 114=30 C. 539 (548)=7 C. W. N. 441=5 Bom. L. R. 421=8 Sar. 374.

CONTRACT—(Contd.)**Minor—(Contd.)**

—Person incapable of entering into a contract within meaning of S. 68 of Contract Act if a.

It is beyond question that an infant falls within the class of persons referred to in S. 68 as incapable of entering into a contract (124). (*Sir Ford North.*) **MOHORI BIBEE v. DHURMODAS GHOSE.** (1903) 30 I. A. 114 = 30 C. 539 (548) = 7 C.W.N. 441 = 5 Bom. L.R. 421 = 8 Sar. 374.

—Promissory note by—Void and not voidable merely.

Under the Indian Contract Act, where a minor purports to contract, his alleged contract is void and not merely voidable; he is a person who is not competent to contract.

In a suit upon a promissory note by a person who was a minor when the promissory note was made, *held* that the suit should have been dismissed on that ground if there was no other ground for dismissing it. (*Sir John Edge.*) **MA HNIT v. HASHIM EBRAHAM METER.**

(1919) 18 A.L.J. 335 = 32 C.L.J. 214 = 27 M.L.T. 190 = 22 Bom. L.R. 531 = 55 I.C. 793 = 38 M.L.J. 353 (359).

—Promissory note executed by, while a—Renewal of, on attaining majority—Effect.

The respondent was a minor at the time of the execution of the first promissory note and he was not liable upon it unless he chose, having come of age, to voluntarily incur a new liability (6-7). (*Lord Morris.*) **HURRICHURN BOSE v. MONINDRA NATH GHOSE.**

(1891) 19 I.A. 4 = Bald. 517 = 6 Sar. 130.

Mistake.

—Setting aside of contract on ground of—Status quo—Restoration of—Necessity.

If this case was at all to be dealt with upon the footing of mistake, it would follow that the contract must be wholly undone, and the parties be restored to their original rights (426). (*Lord Justice Turner.*) **EAST INDIA COMPANY v. ROBERTSON.** (1859) 7 M.I.A. 361 = 12 Moo. P.C. 400 = 4 W.R. 10 = 1 Suth. 332 = 1 Sar. 652.

Obligations under—Alteration of—Agreement for.

—Consideration—Necessity. See CONTRACT ACT—SS. 47 TO 49—PLACE OF PERFORMANCE OF CONTRACT. (1925) 53 I.A. 58 (63) = 53 C. 88.

Part-performance.

—Doctrine of. See PART-PERFORMANCE.

Party to.

—Consent of third party necessary to entering into contract by one of parties—Third party if party to contract—Contract made with his consent—Suit on contract—Right of, in whom vested in such a case. See SECRETARY OF STATE FOR INDIA—CONTRACT WITH. (1913) 17 C.W.N. 735 (740) = 19 I.C. 765.

—Person drawing up and signing contract—Intention undisclosed on his part to contract on behalf of another. See SPECIFIC PERFORMANCE—SUIT FOR—PARTIES—DEFENDANTS IN. (1907) 17 M.L.J. 454 (461-2).

Pension to manager of estate on resignation.

—Binding contract to pay—What amounts to. See HINDU LAW—IMPARTIBLE ESTATE—WIDOW IN POSSESSION OF. (1921) 15 L. W. 589.

Perfect contract—Intention to make.

—Ascribing to parties of—Court's duty. See CONTRACT—CONSTRUCTION—PERFECT CONTRACT. (1896) 23 I. A. 138 (145) = 19 A. 39 (49).

CONTRACT—(Contd.)**Performance of.**

—Condition precedent to—Grant by Government of 12 Oil sites—Sale of 3 out of the 12 to be granted—Contract for—Grant of total of 12 sites if condition of performance of.

In 1903 the appellant agreed to sell to the respondent two sets of oil wells, which he expected to be granted to him by the Government. The first set to be supplied were out of the 12 sites granted to the appellant for 1902, and the contract was duly satisfied as regards that set. The second set to be supplied were 3 out of the 12 sites that the appellant would obtain for 1903. 4 only of those sites were allotted by the Government in 1904, and a further 6 were allotted in 1905. 8 of those were resumed by the Government in July, 1907, and 1 was resumed in March, 1908. All the 9 were re-granted before February, 1912, and in March, 1912, a further 23 sites were granted to the appellant, who thus became possessed of all the sites which she would have received had they been annually allotted to her according to the usual practice in groups of 12 at a time. None of these sites were conveyed to the respondent. In a suit instituted by him in 1913 for specific performance of the contract, *held* that the allocation of the total of the 12 sites was not a condition precedent to the grant by the appellant of the 3 sites under the contract with regard to the second set.

The correct view is that when the power of selection rested with the appellant, and so soon as she was able to allocate 3 sites she was in a position to satisfy the bargain, and that she could have then been compelled to obey it. On the facts of the case she could have satisfied the contract in 1904. (*Lord Buckmaster.*) **MA SHWE MYA v. MAUNG MO HNAUNG.** (1921) 48 I. A. 214 (218) =

48 C. 832 (837) = (1921) M. W. N. 396 = 30 M. L. T. 28 = 24 Bom. L. R. 682 = A.I.R. (1922) P. C. 249 = 63 I. C. 914.

—Party wholly dispensing with—Suit for damages for breach of contract by—Maintainability. See CONTRACT—BREACH OF—DAMAGES FOR—SUIT FOR—MAINTAINABILITY. (1928) 55 I. A. 154 = 9 Lah. 510.

—Place of. See CONTRACT ACT, S. 49.

Printed form of.

—See CONTRACT—MERCANTILE CONTRACT—PRINTED FORM.

Proposal.

—Actual proposal on acceptance of which contract might result—Writing in case of—Necessity.

The law of India does not require writing at all in regard to such a bargain, namely, an actual proposal upon the acceptance of which a contract might result (147). (*Lord Shaw.*) **MALRAJU LAKSHMI VENKAYAMMA v. VENKATA NARASIMHA APPA RAO.** (1916) 43 I. A. 138 =

39 M. 509 = 20 M. L. T. 137 = (1916) 2 M. W. N. 23 = 4 L. W. 58 = 20 C. W. N. 1054 = 24 C. L. J. 229 = 14 A. L. J. 797 = 18 Bom. L. R. 651 = 35 I. C. 921 = 31 M. L. J. 58.

—Condition—Proposal with—Acceptance of—Binding contract on—Settlement of property in consideration of person living with settlor—Contract for—Living of that person with settlor pursuant to—Title to property of that person in case of.

A wealthy childless Hindu widow, who had brought up the plaintiff, her grandniece, and who valued her companionship, was anxious that, notwithstanding her marriage, the plaintiff should continue to live with her. The plaintiff's husband was not agreeable to that proposal. To induce him to consent to the proposal, the widow agreed to make presents of jewellery to the plaintiff, and to make provision

CONTRACT—(Contd.)**Proposal—(Contd.)**

for her apparently on a fairly large scale, by the purchase of immoveable property for her. Upon that footing an arrangement was made and matters were settled in the year of the plaintiff's marriage. The arrangement was indefinite. Following upon it however the plaintiff and her husband did reside with the widow for about 7 years. During that period, the widow purchased two properties. In each instance she took the property in the first place in her own name, and after a period of about 2 years she granted a conveyance thereof to the plaintiff. Those properties were, however, not sufficient consideration for plaintiff and her husband continuing to reside with the widow. The widow purchased the suit village, Repudi, but took the title in her own name. The plaintiff's husband became dissatisfied with the widow taking the conveyance in respect of that village in her own name, instead of directly in plaintiff's name, and therefore left the widow and went to reside in his own village. Thereupon negotiations ensued between the widow and the plaintiff's husband, the same culminating in a letter written by the widow in her own hand to the plaintiff herself. In that letter the widow distinctly stated that the village of Repudi had been purchased for the plaintiff alone, that the ownership thereof was to be in the plaintiff, and that possession of the village would be given to the plaintiff immediately on the expiry of the life interest therein, which the widow reserved to herself. The evidence showed that, but for the promise by the widow contained in that letter, the plaintiff and her husband would not have consented to return to live with the widow, that plaintiff and her husband consented to do so on the faith of that promise, and that they did live with the widow for a period of about 7 years until the widow's death.

Held that the letter aforesaid written by the widow constituted a binding contract by the widow, and that the plaintiff was entitled to the suit village as from and after plaintiff's death (146-7).

P accomplished her desire, and she obtained the continuation which she had so much at heart. Acceptance of her terms and compliance with her stipulation were made. The words of Lord St. Leonards in *Maunsel v. Hedges* might be asked here: "Was it not a proposal, with a condition, which being accepted, was equivalent to a contract?" Their Lordships do not doubt that it was (146). (*Lord Shaw.*) *MALRAJU LAKSHMI VENKAYAMMA v. VENKATA NARASIMHA APPA ROW.* (1916) 43 I. A. 138 = 39 M. 509 = 20 M. L. T. 137 = (1916) 2 M. W. N. 23 = 4 L. W. 58 = 20 C. W. N. 1054 = 24 C. L. J. 229 = 14 A. L. J. 797 = 18 Bom. L. R. 651 = 35 I. C. 921 = 31 M. L. J. 58.

Un-accepted proposal—Resiling from—Right of—Actings of parties on faith of proposal—Effect—Part-Performance—Doctrine of—Applicability to India. See PART-PERFORMANCE—UNACCEPTED PROPOSAL.

(1916) 43 I. A. 138 (148) = 39 M. 509.

Public policy—Contract opposed to.

Criminal charge—Imprisonment on—Person under—Contract by, giving benefit to another to release him from that charge. See CONTRACT—IMPRISONMENT—CONTRACT BY PERSON UNDER—CRIMINAL CHARGE.

(1867) 3 I. A. 61 (65-6) = 1 C. 330 (334-5).

Prosecution—Stifling of—Guarantee obtained by—Validity.

Quære: whether a creditor can or cannot by stifling a prosecution obtain a valid guarantee for his debt from third parties. (*Lord Sinha.*) *SETH MAGAMMAL v. DARBARILAL CHOWDHRY.* (1927) 5 O.W.N. 226 = 107 I.C. 113 = 30 Bom. L. R. 296 = 47 C. L. J. 222 = 27 L. W. 523 = I. L. T. 40 C. 124 = 24 N. L. R. 40 = A. I. R. 1928 P. C. 39 = 54 M. L. J. 208 (218).

CONTRACT—(Contd.)**Purchase of property—Contract for—Evidence of.**

Appropriation by purchaser of money answering to contract not communicated to vendor if.

In a suit for the specific performance of an agreement alleged to have been entered by the East India Company to pay the Mirasidars of certain villages compensation for the loss of their mirasi rights in a tract of land taken possession of by the Madras Government, it appeared that the East India Company had themselves appropriated money for the purpose of answering the suit contract. There was, however, no evidence of any communication being made to the claimants that any such appropriation had been made.

Held that the appropriation itself was evidence of an intention on the part of the East India Company to contract for the purchase, but that it was no evidence of any such contract having been actually made (233). (*Vice-Chancellor Turner.*) *EAST INDIA COMPANY v. NUTHUMBADOO VEERASAWMY MOODELLY.* (1851) 5 M. I. A. 217.

Recommendation—Test.

Pension for manager—Ekrarnama by Hindu widow providing for—Contract binding her executor or administrators or successors in estate—Recommendation to them merely—Test. See HINDU LAW—IMPARTIBLE ESTATE—WIDOW IN POSSESSION OF—MANAGER OF ESTATE.

(1921) 15 L. W. 589.

Rights of parties to.

Ascertainment of—Contract subsequent of parties—Reference to—Permissibility of—Purpose of.

Their Lordships very much incline to the opinion that this contract does not provide for the event which has occurred, and that in order to determine the rights of the parties, what has subsequently occurred must be looked at, not, indeed, for the purpose of varying the contract, but for the purpose of supplying what has been left unprovided for by it (418). (*Lord Justice Turner.*) *EAST INDIA COMPANY v. ROBERTSON.* (1859) 7 M. I. A. 361 = 4 W. R. 10 = 12 Moo. P. C. 400 = 1 Suth. 332 = 1 Sar. 652.

Law governing. See CONTRACT—LAW GOVERNING.

Setting aside of contract—Rights on. See CONTRACT—SETTING ASIDE OF.

Subsistence of contract—Rights during.

So long as the contract subsists, each party can claim the fulfilment of the provisions which are in his favour, just as he remains bound to answer for his disregard of obligations which he ought to satisfy (269-70). (*Lord Sumner.*) *BLONDE ETC., In the matter of THE STEAMSHIPS.*

(1922) 31 M. L. T. 260 P. C.

Sale.

Contract for. See SALE—CONTRACT FOR AND ALSO VENDOR AND PURCHASER.

Secretary of State for India.

Contract with. See SECRETARY OF STATE FOR INDIA—CONTRACT WITH.

Setting aside of.

Compensation on—Grant of—Discretion as to—Privy Council's interference with. See CONTRACT—MINOR—MORTGAGE—DEED EXECUTED BY—CANCELLATION OF.

(1903) 30 I. A. 114 (125) = 30 C. 539 (549).

Condition entitling, not coming into existence—Liability on original contract. See CONTRACT—FRUSTRATION.

(1920) 13 L. W. 1.

Fraud—Contract secured by—Setting aside of—Terms of, See CONTRACT—FRAUD—CONTRACT SECURED BY—PROOF OF.

(1879) 6 C. L. R. 465.

CONTRACT—(Contd.)**Setting aside of—(Contd.)**

—Grounds—Coercion, undue influence, Fraud, Misrepresentation—Mixing up of—Permissibility.

Under the contract law of India, as well as by ordinary principles, coercion, undue influence, fraud, and misrepresentation are all separate and separable categories in law. It is true that they may overlap or may be combined. But in the present case it is impossible to discover what ground or grounds are really taken up (151). (*Lord Shaw.*) **BAL GANGADAR TILAK v. SHRINIVAS PANDIT.**

(1915) 42 I. A. 135 = 39 B. 441 (467) = 17 Bom. L. R. 527 = 19 C. W. N. 729 = 22 C. L. J. 1 = 13 A. L. J. 570 = 18 M. L. T. 1 = (1915) M. W. N. 554 = 2 L. W. 611 = 29 I. C. 639 = 29 M. L. J. 34.

—Mistake—Setting aside on ground of—*Status Quo*—Restoration of—Necessity. See **CONTRACT—MISTAKE—SETTING ASIDE OF CONTRACT ON GROUND OF.**

(1859) 7 M. I. A. 361 (426).

—Rights of parties on—Breach by one party—Setting aside by other on ground of.

The breach of an agreement by one of the parties thereto is a good ground for an action for damages, or for a specific performance, but it does not render the contract void or constitute any ground for setting it aside, or for declaring it to be null and void (160). (*Sir Barnes Peacock.*) **SREE NARAIN MITTER v. SREEMUTHY KISHEN SOONDORY DASSEE.** (1873) Sup. I. A. 149 = 11 B. L. R. 171 = 19 W. R. 133 = 3 Sar. 203 = 2 Suth. 774.

Settlement of property upon a person in consideration of his living with settlor—Contract for.

—Living of that person with settlor pursuant to—Title to property of that person in case of. See **CONTRACT—PROPOSAL—CONDITION.** (1916) 43 I. A. 138 (146) = 39 M. 509.

Specific Performance of.

—See **SPECIFIC PERFORMANCE.**

Statute.

—Contract prohibited by—Jurisdiction of court over contract of particular description—Statute imposing restriction on—Repeal of Statute—Enforceability of contract on—Distinction between cases. See **CONTRACT—ENFORCEABILITY OF—STATUTE.** (1834) 5 W. R. 72.

—Provisions of—Conflict between—Which prevail. See **STATUTE—CONTRACT OF PARTIES.**

(1924) 52 I. A. 109 (115) = 4 P. 244.

—Provisions of, applicable to contract—Variation of, by reason of general considerations or administrative rules not having sanction of statute—Permissibility. See **CONTRACT—VARIATION OF, ETC.**

(1912) 39 I. A. 177 (182) = 39 C. 981 (992).

Stranger to.

—Benefit conferred by contract—Right to enforce—Benefit charged on immoveable property—*Tweedle v. Atkinson*—Rule in—Inapplicability of, to such a case.

Prior to, and in consideration of the marriage of the plaintiff with his son, the defendant executed an agreement, which recited that the said marriage was fixed for the following November, and that "therefore" the defendant declared of his own free will and accord that he "shall continue to pay Rs 500 per month in perpetuity" to the plaintiff for "her betel-leaf expenses, etc., from the date of the marriage, i.e. from the date of her reception," out of the income of certain properties therein specifically described, which he then proceeded to charge for the payment of the allowance. The plaintiff and the defendant's son were both minors at the time, and the plaintiff was not a party to the agreement

CONTRACT—(Contd.)**Stranger to—(Contd.)**

Held, in a suit brought by the plaintiff to recover from the defendant the arrears of the allowance provided for by the said agreement, that, although no party to the agreement, the plaintiff was clearly entitled to proceed in equity to enforce her claim.

Tweedle v. Atkinson was an action of assumpsit, and the rule of common law on the basis of which it was dismissed is not applicable to the facts and circumstances of the present case. Here the agreement executed by the defendant specifically charges immoveable property for the allowance which he binds himself to pay to the plaintiff; she is the only person beneficially entitled under it. (*Mr. Ameer Ali.*) **KHWAJA MUHAMMAD KHAN v. HUSAINI BEGUM.**

(1910) 37 I. A. 152 = 32 A. 410 (413, 414-5) = 8 M. L. T. 147 = 12 C. L. J. 205 = 14 C. W. N. 865 = 12 Bom. L. R. 638 = 7 A. L. J. 871 = 7 I. C. 237 = 20 M. L. J. 614.

—Benefit of contract—Right of.

As to the similar agreement by the 1st defendant, G, that an adopted son of his shall not take by descent, it has been very properly admitted for the plaintiff that, not being a party to that agreement, he cannot take advantage of it (99). (*Sir Barnes Peacock.*) **SRI RAJA RAO VENKATA MAHAPATI SURYA RAO BAHADUR v. THE HON. SRI RAJA RAO VENKATA MAHAPATI GANGADHARA RAMA RAO BAHADUR.** (1886) 13 I. A. 97 = 9 M. 499 (505) = 4 Sar. 725.

—Suit to enforce contract—Right of—Hindu Law—Co-widows—Adoptions by—Contract between widows conferring rights upon minor adopted sons during their lives—Suit to enforce, by one of adopted sons against other widow and son adopted by her—Maintainability. See **HINDU LAW—ADOPTION—WIDOW—CO-WIDOWS—ADOPTION BY—CONTRACT BETWEEN WIDOWS.**

(1892) 19 I. A. 108 (132-3) = 19 C. 513 (534-6.)

—Suit to enforce contract—Right of—Purchaser of property undertaking to pay off charges on other property sold by vendor to third party—Omission to pay—Third party obliged to pay—Suit by him to recover amount from purchaser.

Property which was sold to the appellants free from incumbrances was in fact subject to incumbrances. The vendor subsequently sold other property of his to one B, with a stipulation that the purchase price should be discharged by the payment of a considerable number of debts, which included among others those owing upon the property already sold to the appellants. B did not discharge the incumbrances upon the property sold to the appellants, and the latter paid sums of money to avert the sale of their property at the instance of the mortgagees who held the prior charges upon the property. The appellants, not being paid the sums so paid by them, sued their vendor, B, and others for the recovery of the sums paid by them against the properties and persons of the defendants.

Held that the suit as against B was misconceived, for the appellants were no parties to the deed of sale in favour of B, and no trust was created thereby in their favour. (*Lord Buckmaster.*) **NATHU KHAN v. THAKUR BURTONATH SINGH.**

(1921) 15 L. W. 635 = 20 A. L. J. 301 = 26 C. W. N. 514 = L. R. 3 P. C. 82 = 24 Bom. L. R. 571 = (1922) M. W. N. 323 = 35 C. L. J. 417 = (1922) P. C. 176 = 66 I. C. 107 = 42 M. L. J. 444 (446).

—Validity of Contract—Right to question—Assignment—Unfair and unconscionable bargain—Right to question on ground of. See **ASSIGNMENT—STRANGER TO—UNFAIR AND UNCONSCIONABLE BARGAIN.**

(1908) 35 I. A. 48 (56) = 35 C. 420 (427).

CONTRACT—(Contd.)**Stranger to—(Contd.)**

——Validity of contract—Right to question—Void and voidable deeds—Distinction. *See* SALE-DEED—VALIDITY OF—STRANGER'S RIGHT TO QUESTION.

(1905) 32 I.A. 113 (120-1) = 27 A. 271 (289).

Suit based on—Amendment of plaint in.

——Contract alleged—Plaintiff's failure to prove—Different and independent contract—Amendment so as to raise—Permissibility.

The real question in controversy between the parties in these proceedings was the existence and the character of an agreement alleged to have been made in 1912 for the delivery of certain sites of oil wells specified and identified by the numbers stated in the plaint, which could only have been delivered in respect of that bargain. When once that contract has been negatived, to permit the plaintiff to set up and establish another and an independent contract altogether would be to go outside the provisions established by the Code of Civil Procedure (217). (*Lord Buckmaster.*) *MA SHWE MYA v. MAUNG MO HNAUNG.*

(1921) 48 I. A. 214 = 48 C. 832 (836) =

(1921) M. W. N. 396 = 30 M. L. T. 28 =

24 Bom. L. R. 682 = (1922) P. C. 249 = 63 I. C. 914.

Terms of.

——Addition to—Court's power of.

If the parties to an agreement have abstained to insert express provisions for the fair and reasonable working of their supposed agreement, the Court called upon to enforce it cannot supply them. (*Sir James Colville.*) *PALLI-KELAGATHA MARCAR v. SIGG.* (1880) 7 I. A. 83 = 2 M. 239 = 3 Suth. 742 = 4 Sar. 131.

——Company—Contract with—Offer by letter—Acceptance in minute—Incorporation of, terms of offer in minute—Permissibility—Variance between letter and minute—Minute the only concluded contract in case of. *See* COMPANY—CONTRACT WITH. (1914) 27 M. L. J. 74.

——Express terms—Control of, by custom. *See* LEASE—TERMS EXPRESS OF. (1867) 11 M. I. A. 295 (314).

——Fair and reasonable working of Contract—Terms necessary for—Supplying of—Courts power of. (1880) 7 I. A. 83 (104-5) = 2 M. 239 (261-2).

——Implication of, to give effect to intention of parties—Permissibility. *See* LITIGATION—AGREEMENT TO FINANCE. (1924) 52 I. A. 1 (21-2) = 48 M. 230.

——Incorporation by reference of. *See* COMPANY—CONTRACT WITH. (1914) 27 M. L. J. 74.

——Incorporation by reference of—Goods to be indented from England—Contract to supply—Terms of indent if imported into contract. *See* CONTRACT—GOODS CONTRACTED FOR—INDENT. (1918) 23 C. W. N. 1091.

——Offer general—Acceptance specific and clear and subject to stated conditions—Effect. *See* LEASE—TERMS OF—APPLICATION FOR GENERAL. (1867) 11 M. I. A. 295 (310).

——Re-sale by seller in event of buyer's breach—Effect of—Re-sale pursuant to—Benefit of—Purchaser's right to. *See* CONTRACT—BREACH OF—BUYER'S BREACH—RE-SALE IN EVENT OF. (1915) 43 I. A. 6 (9-10) = 42 C. 493.

——Variation of—Court's power of—Corrupt advantages stipulated for by contract unenforceable—Effect. *See* HINDU LAW—MINOR—GUARDIAN—CHARGE ON MINOR'S ESTATE—IKRAR CREATING. (1866) 10 M. I. A. 454 (475).

Termination of.

——Breach of Contract—Party guilty of—Termination

CONTRACT—(Contd.)**Termination of—(Contd.)**

of contract by—Right of. *See* CONTRACT—BREACH OF—RIGHTS OF PARTIES ON. (1924) 52 I. A. 1 (16) = 48 M. 230.

——Breach of contract by party—Termination of it by mere.

One party to a contract cannot of his own choice put an end to it by disregarding its obligations (269). (*Lord Sumner.*) *BLONDE, ETC., In the matter of THE STEAM-SHIPS.* (1922) 31 M. L. T. 260 P. C.

——A party to a contract cannot put an end to it simply by committing a breach of it (16). (*Lord Atkinson.*) *VAT-SAVAYA VENKATA JAGAPATI v. POOSAPATHI VENKATA PATHI.* (1924) 52 I. A. 1 = 48 M. 230 = 20 L. W. 298 = A. I. R. (1924) P. C. 162 = 35 M. L. T. 210 = (1924) M. W. N. 607 = 26 Bom. L. R. 786 = 29 C. W. N. 57 = 80 I. C. 807 = 47 M. L. J. 93 (123).

——Debtor and creditor—Agreement between—Termination of—Principles applicable to—Partnership at will—Principles applicable to termination of—Applicability of. *See* DEBTOR AND CREDITOR—AGREEMENT BETWEEN. (1880) 7 I. A. 83 (105) = 2 M. 239 (262-3).

——Notice prior to—Provision for—Object of—Waiver of notice by agreement of parties—Effect of, on validity of termination—Termination without notice—Validity of—Objection to, by person who has contracted with one of parties on faith of such contract—Maintainability.

By an agreement dated 31-5-1911, David Sassoon & Co., Ltd., appointed the respondent and his partner to their brokers for the sale and purchase of sugar for a period of 5 years from the date of the agreement, subject, however, to the condition that the agreement might be sooner ended by three calendar months' notice on either side. The agreement provided for the appointment by the respondent's firm of such under-brokers as might be required for the purpose of the sugar business, the under-brokers to be under the control of the company, but liable to be dismissed by the respondent's firm.

On the 8th June, 1911, the respondent's firm entered into an agreement with the appellants constituting them under-brokers. The agreement recited the original contract, and stated that the appointment it effected was for "the sale and purchase of sugar in respect of all contracts to be entered into by them (*i. e.*, the respondent) on behalf of the said David Sassoon & Co., Ltd., under the aforesaid agreement (*i. e.*, the agreement of the 31st May, 1911) and during the subsistence of the said agreement, or for such further period as the said brokers and the said Company may further extend."

On the 2nd December, 1912, the original contract between David Sassoon & Co., and the respondent was terminated, and a new contract was entered into between them. The termination of the original contract was, however, without the three calendar months' notice on either side, as provided for therein.

In a suit brought by the appellants against the respondent for damages for wrongful termination of their agency, the question was whether the appellants could rely upon the absence of the three calendar months' notice for contending that the original contract (*i. e.*, of the 31st May, 1911) had not been validly terminated on the 2nd December, 1912.

Held, that the appellants were not so entitled (297-8).

Whether or no this latter contract followed a termination by three months' notice of the earlier contract pursuant to the provisions which it contained is immaterial. The provision as to notice was a means by which either party to the contract might bring it to a close against the will of the other. It was always competent to them both by agree-

CONTRACT—(Contd.)**Termination of—(Contd.)**

ment to end it when they pleased; and whether it was ended by one means or the other no breach has been committed of the respondent's duties under his contract with the appellants, since such contract never expressly created nor impliedly involved any obligation not to agree with Messrs Sassoon to a new contract of brokerage, if and when it was thought fit (297-8). (*Lord Buckmaster.*) *LACHMANDAS KHANDELWAL v. RAGHUMULL.*

(1919) 47 C. 290 = 24 C. W. N. 577 = 11 L. W. 551 = 58 I.C. 851.

——Right of—Contract indefinite in point of time.

The contract was one which being indefinite in point of time, it would seem might be put an end to by either party (63). (*Sir Richard Couch.*) *SIRDAR SUJAN SINGH v. GANGA RAM.*

(1881) 9 I. A. 58 = 8 C. 337 (347) = 4 Sar. 307 = 7 P. R. 1882 (Civil).

Time-bargain.**——Meaning of.**

Where there is a contract for goods to be delivered on a given day, at a given price, that is not what is properly called a time-bargain. What is generally understood as such, is where there is a fictitious sale of goods, at a particular price, and an agreement to pay or receive the difference between that price, and the price at which the goods shall be, on a particular day (346-7.) (*Per Lord Campbell.*) *RAMLOLL THACKOORSEYDASS v. SOOJUNMUL DHOND-MULL.*

(1848) 4 M. I. A. 339 = 6 Moo. P. C. 300 = Perry. O. C. 193 = 1 Sar. 361.

Variation of, and of statutory provisions applicable to.**——General considerations or administrative rules not having sanction of Statute—Variation by reason of—Permissibility.**

No variation of the contract of parties and the Statutory provisions applicable thereto is possible by reason of general considerations or administrative rules which have not the sanction of Indian Statute (182). (*Lord Shaw.*) *HAJI BUKSH ELAHI v. DURLAV CHANDRA KAR.*

(1912) 39 I.A. 177 = 39 C. 981 (992) = 16 C.W.N. 842 = 23 M.L.J. 206.

Verbal contract—Proof of.**——Evidence required—Nature of.**

It is the plain duty of every litigant who endeavours to set up a verbal contract to lay before the Court, not the mere impressions of the witnesses who heard the communings of the parties, but in so far as possible the particulars of what was said or done, so as to enable the Court to form its own conclusions upon the question whether these did or did not import a binding agreement in the terms alleged.

Eliciting merely the conclusions derived by the witnesses from what they heard or supposed that they heard is not enough (42).

Held that the parole proof which plaintiffs adduced failed to establish the partnership agreement which they alleged (42-3). (*Lord Watson.*) *TANJORE RAMACHANDRA ROW v. VELLAYANADAN PONNUSAMI.*

(1891) 18 I.A. 37 = 14 M. 258 (264) = 6 Sar. 30.

Vessel named—Contract for.

——Implied warranty in case of. *See* SHIP (SHIPPING) —VESSEL NAMED. (1922) 32 M.L.T. 190 (195-6) P.C.

Void Contract.

——Contract which contractor is not able to fulfil—Test —Mortgage—Contract to grant—Property agreed to be mortgaged taken under direct management of Collector under S. 326 of C. P. C. of 1882—Effect. *See* MORTGAGE —CONTRACT TO GRANT. (1889) 17 C. 432.

CONTRACT—(Contd.)**Void Contract—(Contd.)****——Ratification of.**

A contract which in itself is void cannot in law be ratified by anything that can be subsequently done. (*Viscount Dunedin.*) *SKIPP v. KELLY.*

(1926) 24 L. W. 18 =

(1926) M.W.N. 382 = 3 O.W.N. 453 = 43 C.L.J. 430 =

94 I.C. 331 = 28 Bom. L.R. 873 = 30 C.W.N. 841 =

A. I. R. 1926 P.C. 27 = 50 M.L.J. 498 (502).

Voidable contract.

——Avoidance of, when right of action properly open to party entitled and when he knows the facts—Necessity.

In all cases of voidable contracts there is a general equitable doctrine common to all systems that he who has the right to complain must do so when the right of action is properly open to him and he knows the facts (86). (*Lord Dunedin.*) *RANGASAMI GOUNDEN v. NACHIAPPA GOUNDEN.*

(1918) 46 I.A. 72 = 42 M. 523 (538) =

26 M.L.T. 5 = (1919) M.W.N. 262 = 17 A.L.J. 536 =

21 Bom. L.R. 640 = 23 C.W.N. 777 = 29 C.L.J. 539 =

10 L.W. 105 = 50 I.C. 498 = 36 M. L. J. 493.

CONTRACT ACT (IX OF 1872).

——(*See also* UNDER CONTRACT.)

——Amending as well as Consolidating Act—Section of Act if intended to consolidate or amend—Test to find out whether.

It was contended that the Indian Contract Act was primarily a Consolidating Act, and therefore ought, in default of a clear expression to the contrary, to be read as embodying the law as existing when it was passed. No weight can be attached to this contention. The Indian Contract Act recites the expediency of defining and amending certain parts of the law relating to contracts. It is therefore an amending as well as a Consolidating Act, and beyond the reasonable interpretation of its provisions there is no means of determining whether any particular section is intended to consolidate or amend the previously existing law (170-1.) (*Lord Parker.*) *RAMDAS VITHALDAS DURBAR v. S. AMEERCHAND AND CO.*

(1916) 43 I.A. 164 =

40 B. 630 (636-7) = 18 Bom. L.R. 670 =

20 C.W.N. 1182 = 24 C. L. J. 820 = 14 A.L.J. 1045 =

(1916) 2 M.W.N. 110 = 20 M. L. T. 194 = 4 L.W. 342 =

35 I. C. 954 = 31 M.L.J. 541.

——Code complete not a, (1891) 18 I. A. 121 (129) =

18 C. 620 and (1929) 56 M. L. J. 739 (749).

——Drafting of—Expressions different to convey same idea—Use of—Illustration of. *See* CONTRACT ACT, Ss. 102, 103, 108, 178—DOCUMENT SHOWING TITLE.

(1916) 43 I.A. 164 (171-2) = 40 B. 630 (638).

——Exhaustive and imperative so far as it goes.

The Contract Act, so far as it goes, is exhaustive and imperative (125). (*Sir Ford North.*) *MOHORI BIBEE v. DHURMODAS GHOSE.*

(1903) 30 I.A. 114 =

30 C. 539 (548) = 7 C. W. N. 441 = 5 Bom. L.R. 421 =

8 Sar. 374.

——Not exhaustive of law of Contracts.

The Contract Act of 1872 does not profess to be a complete Code dealing with the law relating to contracts. It purports to do no more than to define and amend certain parts of that law. There is nothing to show that the Legislature intended to deal exhaustively with any particular chapter or sub-division of the law relating to contracts (129). (*Lord Macnaghten.*) *IRRAWADY FLOTILLA CO. v. BUG-WANDASS.*

(1891) 18 I. A. 121 = 18 C. 620 (628-9) =

6 Sar. 40.

——*See also* (*Viscount Dunedin.*) *JWALADUTT v.*

BANSILAL MOTILAL. (1929) 27 A. L. J. 579 =

49 C. L. J. 485 = 31 Bom. L. R. 687 = 115 I.C. 707 =

A. I. R. (1929) P.C. 132 = 56 M. L. J. 739 (749).

CONTRACT ACT (IX OF 1872)—(Contd.)

—Section of—Consolidation or amendment of existing law by—Test to find out. *See* CONTRACT ACT—AMENDING AS WELL AS CONSOLIDATING ACT.

(1916) 43 I. A. 164 (170-1) = 40 B. 630 (636-7).

—Tort or law common to both contract and tort—Not dealt with by Act.

If in codifying the law of contract the Legislature had found occasion to deal with tort or with a branch of the law common to both contract and tort, there was all the more reason for making its meaning clear (129-30). (*Lord Macnaghten.*) *IRRAWADY FLOTILLA Co. v. BUGWANDASS.* (1891) 18 I. A. 121 = 18 C. 620 (629) = 6 Sar. 40.

—Unwritten law in force at date of Act—Effect on.

The unwritten law in force at the date of the Contract Act of 1872 was hardly within the scope of the Act which was intended to define and amend the law relating to contracts (129). (*Lord Macnaghten.*) *IRRAWADY FLOTILLA Co. v. BUGWANDASS.* (1891) 18 I. A. 121 =

18 C. 620 (629) = 6 Sar. 40.

—S. 1—"Incident of contract inconsistent with provisions of Act"—Implied term if an, while same if expressed in contract would not be.

S. 1 of the Contract Act of 1872 provides:—"But nothing herein contained shall affect any incident of any contract not inconsistent with the provisions of this Act."

Held that a term of a contract could not be inconsistent with the provisions of the Act of 1872 if it was implied, while it would not be inconsistent if it were expressed in the contract (131). (*Lord Macnaghten.*) *IRRAWADY FLOTILLA Co. v. BUGWANDASS.* (1891) 18 I. A. 121 =

18 C. 620 (630-1) = 6 Sar. 40.

—"Not inconsistent with the provisions of this Act"—Applicability of, to "nor any usage or custom of trade."

The words "not inconsistent with the provisions of this Act," are not to be connected with the clause "nor any usage or custom of trade." Both the reason of the thing and the grammatical construction of the sentence seem to require that the application of those words should be confined to the subject which immediately preceded them (127). (*Lord Macnaghten.*) *IRRAWADY FLOTILLA Co. v. BUGWANDASS.* (1891) 18 I. A. 121 = 18 C. 620 (626-7) = 6 Sar. 40.

—S. 2—Minor—Promissory note executed while a—Renewal of, on attaining majority—Effect. *See* CONTRACT—MINOR—PROMISSORY NOTE EXECUTED BY, WHILE A MINOR. (1891) 19 I. A. 4 (6-7).

—S. 2 (e) and (h)—Agreement—Contract—Distinction. *See* CONTRACT—AGREEMENT.

(1922) 50 I. A. 69 (75) = 45 A. 179 (184).

—S. 8—Proposal. *See* CONTRACT—PROPOSAL.

—S. 11—Minor—Contract by. *See* CONTRACT—MINOR.

—S. 15—Coercion—Meaning of—Applicability to word when used in other surroundings—S. 72 of Act—Meaning of word in—Distinction. *See* UNDER THIS ACT, S. 72—COERCION. (1913) 40 I. A. 56 (65-6) = 40 C. 598 (611-2).

—S. 16—Daughter—Mother—Position to dominate will of—Presumption of—Propriety—Gift deed by latter to former—Setting aside of—Conditions.

The mere relation of daughter to mother in itself suggests nothing in the way of special influence or control.

Deeds of gift executed by a Mahomedan lady in favour of her daughter were sought to be set aside on the ground that at the time of the execution of the deeds the mother was entirely under the control and domination of her daughter, and that the latter had unscrupulously used her power over her mother in order to get her mother's property into her own hands,

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Held that the evidence adduced was quite insufficient to establish any general case of domination on the part of the daughter, and subjection of the mother, such as to lead to a presumption against any transaction between the two, and that with regard to the actual transactions in question, there was no evidence whatever of undue influence brought to bear upon them. (*Sir Arthur Wilson.*) *ISMAIL MUSSAJEE MOOKEEDUM v. HAFIZ BOO.* (1906) 33 I. A. 86 =

33 C. 773 (783-4) = 10 C. W. N. 570 = 3 A. L. J. 353 =

3 C. L. J. 484 = 8 Bom. L. R. 379 = 1 M. L. T. 137 =

9 Sar. 94 = 16 M. L. J. 166.

—Debtor—Borrowing by—Terms of, unconscionable or not—Test of—Ultimate result of dealings not only insufficient but misleading—Capitalisation of interest if and when a test.

A borrower who obtains a loan secured by a promissory note on quite reasonable terms, by neglecting to pay the note at maturity, further neglecting to pay the accruing interest for the several years following, and then giving a renewal note for the original debt plus the capitalised interest, could produce a result which might at first sight appear oppressive, and yet there would be nothing harsh or unconscionable in the creditor's demand, since the added interest only accumulated while he forebore to enforce the payment of the sums from time to time due from him (618-9.)

On the other hand, it would be quite possible for a money-lender by making loans for short periods on apparently fair terms, and then insisting on capitalising the interest immediately on its becoming payable, to pile up compound interest on the initial debt at such a rate as would make the result after a few years most oppressive and unconscionable. But there is nothing inherently wrong or oppressive in a lender's securing for himself compound interest after the borrower has for a considerable time neglected to pay the debt he owes or the interest accruing due upon it which he has contracted to pay. The borrower cannot acquire merit simply by breaking his contract (619).

The mere fact that the amount claimed in a suit on a promissory note exceeds enormously the amount originally advanced will be no ground for holding the transaction unconscionable. It must also appear that there was something unconscionable either in the original dealings, or in the subsequent stages of the transaction. It is not enough—indeed, it is misleading—to look at the result alone (618).

Their Lordships restored the judgment of the District Judge which, in a suit for the recovery of Rs. 61,000 and odd under promissory notes for the principal sum of Rs. 4,400 and odd only, decreed the plaintiff's claim in full. In their Lordships' opinion neither the rate of interest reserved, 30 per cent per annum, nor the capitalisation of overdue interest at lengthy intervals, nor the two combined, were sufficient to lead to the conclusion that the making of the notes sued on was on the face of it an unconscionable contract within the meaning of S. 16, sub-S. (3) of the Indian contract Act of 1872, as amended (622). (*Lord Atkinson.*) *LALA BALLA MAL v. AHAD SHAH.* (1918) 16 A. L. J. 905 =

124 P. E. 1918 = 23 C. W. N. 233 = 25 M. L. T. 55 =

180 P. W. R. 1918 = 29 C. L. J. 165 =

1 U. P. L. R. (P. C.) 25 = 21 Bom. L. R. 558 =

48 I. C. 1 = 35 M. L. J. 614.

—Debtor—Creditor's position to dominate will of—Creditor being creditor for large amount and in a position to sue debtor at any moment—Effect.

Quare whether a creditor acquires the position of dominating the will of his debtor within the meaning of S. 16 of the Contract Act by reason of his being the latter's creditor to a large amount, holding various negotiable securities given by the debtor which almost at any time he might have put in suit, in a case in which there is nothing to suggest

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that he did not deal with the debtor in regard to the transaction in question on perfectly equal terms. (*Lord Atkinson.*) *LALA BALLA MAL v. AHAD SHAH.*

(1918) 25 M.L.T. 55 = 16 A. L. J. 905 = 23 C.W.N. 233 = 29 C.L.J. 165 = 180 P.W.R. 1918 = 21 Bom. L. R. 558 = 124 P. R. 1918 = 1 U. P. L. R. (P.C.) 25 = 48 I. C. 1 = 35 M. L. J. 614 (624).

—Debtor—Creditor's position to dominate will of—
Evidence of—Compromise of claims of other creditors—
Terms of—Admissibility in Evidence of.

The debtor was undoubtedly a spendthrift of depraved and licentious habits. He undoubtedly became heavily indebted to several creditors during the years covered by the transactions dealt with in this appeal. It was legitimate to prove these facts in order to establish that he was a person of weak and debauched character, unable to resist the pressure of creditors if applied, or to resist the temptation to borrow money recklessly to gratify his lusts; but it was wholly illegitimate to give any evidence as to the terms on which he succeeded in compromising with creditors other than the plaintiffs. From what appears, it may well have been that these other creditors were rather tricked into making easy settlements. (*Lord Atkinson.*) *LALA BALLA MAL v. AHAD SHAH.*

(1918) 16 A. L. J. 905 = 124 P. R. 1918 = 23 C. W. N. 233 = 25 M. L. T. 55 = 180 P. W. R. 1918 = 29 C. L. J. 165 = 1 U. P. L. R. (P. C.) 25 = 21 Bom. L. R. 558 = 48 I. C. 1 = 35 M. L. J. 614 (623).

—Debtor—Creditor's position to dominate will of—
Need of debtor—Effect merely of.

In a suit to enforce a mortgage, the mortgagor pleaded, *inter alia*, that the bond was obtained from him by undue influence within the meaning of S. 16 of the Contract Act of 1872, as amended by Act VI of 1899, S. 2. There was no evidence of any actual exercise of undue influence by the mortgagees or of any special circumstances from which an inference of undue influence could be legitimately drawn, except that the mortgagor was in urgent need of money. *Held* that the mortgagees were not thereby placed in a position to "dominate the will" of the mortgagor.

Their Lordships are not prepared to hold that urgent need of money on the part of the borrower will of itself place the parties in that position. (*Lord Davey.*) *SUNDAR KOER v. SHAM KRISHEN.*

(1906) 34 I. A. 9 (16) = 34 C. 150 (155-6) = 2 M. L. T. 75 = 5 C. L. J. 106 = 11 C. W. N. 249 = 9 Bom. L. R. 304 = 4 A. L. J. 109 = 17 M. L. J. 43.

—The mere fact that the borrower is in need of money does not put a money-lender, to whom she applies for an advance, in a position to dominate her will within the meaning of S. 16 of the Indian Contract Act. (*Sir John Wallis.*) *MUSST. BARKATUNNISSA v. DEBI BAKHSH.*

(1927) 25 A. L. J. 314 = 31 C. W. N. 693 = 4 O. W. N. 523 = 8 Pat L. T. 480 = 26 L. W. 147 = 101 I. C. 29 = A. I. R. (1927) P. C. 84 (86).

—Disqualified proprietor—Position to dominate will of—Presumption of.

The respondent was declared a disqualified proprietor under the provisions of the Oudh Land Revenue Act, 1876 and his property was placed under the management of the Court of Wards in 1886. While the estate was so under management, the respondent, without the sanction of the Court of Wards, borrowed money from A, and executed a registered bond in his favour, stipulating to repay the amount in two years, with interest at 2 per cent. per mensem, payable half yearly out of the maintenance allowance granted to him by the Court of Wards, and to pay compound interest at the same rate in default. Nothing was paid in pursuance of the bond, an account was settled of the amount due thereunder, and for the amount so found due and for an

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advance then made to him, the respondent, without the sanction of the Court of Wards, executed another registered bond in favour of A, with stipulations for interest at Rs. 1-8 per cent. per mensem payable half-yearly, and for compound interest in default. The estate was even then under the management of the Court of Wards.

The evidence was to the effect that the respondent, through his improvidence, was in urgent need of money, and owing to his estate being under the care of the Court of Wards, he was in a helpless position. There was no fraud in the matter, and no pressure was put upon the respondent by A or his agents to induce him to accept the conditions offered to him; but the respondent was compelled by his circumstances to accept the terms which were offered to him on both occasions. A was aware that, although the respondent was left free to contract debt, yet he was under a peculiar disability and placed in a position of helplessness by the fact of his estate being under the control of the Court of Wards. It was found that the charging of compound interest in the circumstances was unconscionable.

Held, in a suit brought to enforce the later bond, that A was "in a position to dominate the will" of the respondent within the meaning of the amended S. 16 of the Contract Act, and that he used his position to obtain more onerous terms than were reasonable.

The suit bond was set aside, and simple interest at 18 per cent. per annum allowed throughout on the sums advanced by A. (*Lord Davey.*) *DHANIPAL DAS v. RAJA MANESHAH BAKHSH SINGH.*

(1906) 33 I. A. 118 (126-7) = 28 A. 570 (582-4) = 10 C. W. N. 849 = 4 C. L. J. 1 = 3 A. L. J. 495 = 8 Bom. L. R. 491 = 1 M.L.T. 205 = 9 O. C. 188 = 9 Sar. 60 = 16 M. L. J. 292.

—Disqualified proprietor—Position to dominate will of—Use of—Bond obtained by—Validity of.

In a suit to enforce a bond executed by a disqualified proprietor without the knowledge or consent of the Court of Wards after his estate had been taken over, the courts below held that the onus of proving undue influence was upon the proprietor.

Held, that the view of the courts below was directly opposed to the decision of the Board in Dhanipal Das' case (L. R. 33 I. A. 118) in which it was held that, in the case of a disqualified proprietor whose estate was under the control of the Court of Wards, a lender who knew the facts was *prima facie* "in a position to dominate the will" of the borrower within the meaning of the amended S. 16 of the Contract Act. (*Lord Collins.*) *MANESHAH BAKHSH SINGH v. SHADI LAL.*

(1909) 36 I. A. 96 = 31 A. 386 = 10 C. L. J. 76 = 13 C. W. N. 1069 = 6 M. L. T. 71 = 11 Bom. L. R. 864 = 6 A. L. J. 707 = 12 O. C. 300 = 3 I. C. 385 = 19 M. L. J. 438.

—See UNDER THIS SECTION—DISQUALIFIED PROPRIETOR—POSITION TO DOMINATE WILL OF—PRESUMPTION OF. (1906) 33 I. A. 118 (126-7) = 28 A. 570 (582-4).

—In a suit to enforce a bond executed by a disqualified proprietor without the knowledge or consent of the Court of Wards after his estate was taken over, *held*, reversing the court below, that the borrower was placed in such a condition of helplessness that the lender was "in a position to dominate his will", and that he used that position to obtain an unfair advantage over the proprietor. (*Lord Collins.*) *MANESHAH BAKHSH SINGH v. SHADI LAL.*

(1909) 36 I. A. 96 = 31 A. 386 = 10 C. L. J. 76 = 13 C. W. N. 1069 = 6 M. L. T. 71 = 11 Bom. L. R. 864 = 6 A. L. J. 707 = 12 O. C. 300 = 3 I. C. 385 = 19 M. L. J. 438.

—Donee—Position of, to dominate will of donor—
Evidence of—Presumption from—Onus of rebutting—

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Nature and quantum of proof required—Independent legal advice—What constitutes—If only means of discharging onus.

Where the relations between the donee and donor have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor, the court sets aside the gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the court in holding that the gift was the result of a free exercise of the donor's will.

Independent legal advice is not the only way in which the above presumption can be rebutted. It is not correct to lay down that independent legal advice when given does not rebut the presumption, unless it be shown that the advice was taken. It is necessary for the donee to prove that the gift was the result of the free exercise of independent will. The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing; and in cases where there are no other circumstances this may be the only means by which the donee can rebut the presumption. Independent legal advice, to satisfy the rule in cases where such advice is relied upon, must be given with a knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the donor.

Appellant sued to set aside a deed of gift of substantially all her properties executed by her in favour of the respondent, a nephew by marriage of the appellant. Appellant was wholly illiterate; she was a feeble old woman, unable to leave the house, relying entirely upon the respondent for everything—even for her food and clothes—leaving the management of her affairs to him, so that she had no knowledge of her own affairs or as to the value of her properties, and so that she was totally and completely in the respondent's hands.

Held that the relation between the appellant and the respondent were amply sufficient to raise the presumption of the influence of the respondent over the appellant and to render it incumbent on him to prove that the gift was the spontaneous act of the appellant, acting under circumstances which enabled her to exercise an independent will and which justified the court in holding that the gift was the result of the free exercise of her will.

Where the evidence adduced by the respondent to show that the appellant, before executing the deed, had independent legal advice consisted in the fact that she had been advised by a lawyer, but it appeared that, though that lawyer acted in good faith, he received a good deal of his information from the respondent by whom he was paid, that he was not made aware of the material fact that the lady was parting with practically the whole of her estate, that he did not bring home to her mind the consequences to herself of what she was doing, or the fact that she could more prudently, and equally effectively, have benefited the donee without undue risk to herself by retaining the property in her own possession during her life and bestowing it upon him by her will, *held further* that the facts proved by the respondent were not sufficient to rebut the presumption of undue influence which was raised by the relationship proved to have been in existence between the parties. (*Lord Chancellor.*) **INCHE NORIAH v. SHAIK ALLIE BIN OMAR.** (1928) 26 A. L. J. 1384 =

A. I. R. (1929) P. C. 3 = 56 M. L. J. 349.

—English courts of Equity—Principles applied by—

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Inapplicability of, to cases arising under Act.

In a case in which the question was whether a bargain represented by a simple debt bond was an unconscionable one, and procured by the exercise of undue influence within the meaning of S. 16 of the Contract Act, 1872, as amended by S. 2 of Act VI of 1899, the subordinate Judge decided that it was a "hard bargain" in accordance with what he supposed to be English equitable doctrine.

Held that he ought to have considered the terms of the amended S. 16 only. (*Lord Davey.*) **DHANIPAL DAS v. RAJA MANESHAR BAKHSH SINGH.**

(1906) 33 I. A. 118 (127) = 28 A. 570 (583) =

10 C. W. N. 849 = 4 C. L. J. 1 = 3 A. L. J. 495 =

8 Bom. L. R. 491 = 1 M. L. T. 205 = 9 O. C. 188 =

9 Sar. 60 = 16 M. L. J. 292.

—Questions such as whether a contract was procured by the exercise of undue influence and whether a contract was an unconscionable bargain made with an expectant heir, and therefore liable to cancellation must be decided on the provisions of the Indian Contract Act of 1872, as amended by the Indian Contract Amendment Act of 1899, and on those alone. The principles upon which English courts of Equity deal with similar questions are therefore entirely inapplicable. (*Lord Atkinson.*) **LALA BALLA MAL v. AHMAD SHAH.** (1918) 16 A. L. J. 905 =

124 P. R. 1918 = 23 C. W. N. 233 = 25 M. L. T. 55 =

180 P. W. R. 1918 = 29 C. L. J. 165 =

1 U. P. L. R. (P. C.) 25 = 21 Bom. L. R. 558 =

48 I. C. 1 = 35 M. L. J. 614 (617).

—English Money-lenders Act—Decisions under—*Inapplicability of, to cases arising under Act.*

The question whether a contract has been induced by undue influence must be decided with reference to S. 16 of the Contract Act as amended, and not by reference to the legislation of other countries, *e. g.*, the English Money-lenders Act, or to cases decided under that Act. It is accompanied with danger to invoke as authority in an Indian case expressions which merely connote the principles which underlie a particular English statute, and form a guide to its interpretation. (*Lord Shaw.*) **RAGHUNATH PRASAD v. SARJU PRASAD.** (1923) 51 I. A. 101 (103) = 3 Pat. 279 = A. I. R. (1924) P. C. 60 = 22 A. L. J. 105 = 19 L. W. 470 = 34 M. L. T. 57 = 26 Bom. L. R. 595 = 28 C. W. N. 834 = 11 O. L. J. 122 = 5 Pat. L. T. 72 = (1924) M. W. N. 638 = 2 Pat. L. R. 87 = 10 O. & A. L. R. 1395 = 82 I. C. 817 = 46 M. L. J. 610.

—Expectant heir—Who is an—Person dealing with, on strength of expectancy—If in a position to dominate will of heir.

In a suit upon promissory notes executed by the deceased defendant in favour of the plaintiff, the courts below held.

1. That the deceased defendant was in the position of an expectant heir within the meaning of the decision in *Chesterfield v. Janssen* (2 Ves. Sen. 124) and the authorities following it;

2. That the said plaintiff dealt with him on the strength of that expectancy; and

3. That a person so doing would be in a position to dominate the will of the expectant heir within the meaning of S. 16 (1) of the Contract Act as amended.

The deceased defendant was a Mahomedan, and was, on the dates of the suit notes, about 29 years of age. At those dates he had been employed for 6 years as permanent copying clerk in the Office of the Divisional Judge of Amritsar at a salary of Rs. 40 per mensem. The defendant's father was headman of the Kunjar or prostitute caste.

Quaere whether, on those facts, the courts below were right in holding as stated above (624-5). (*Lord Atkinson.*) **LALA BALLA MAL v. AHMAD SHAH.**

(1918) 25 M. L. T. 55 = 16 A. L. J. 905 =

CONTRACT ACT (IX OF 1872), S. 16—(Contd.)

23 C. W. N. 233 = 29 C. L. J. 165 = 180 P. W. R. 1918 =
 21 Bom. L. R. 558 = 48 I. C. 1 = 124 P. R. 1918 =
 1 U. P. L. R. (P. C.) 25 = 35 M. L. J. 614.

———*Expectant heir—Person dealing with, and in a position to dominate will of—Onus on.*

The Contract Act throws upon the person dealing with an expectant heir and in a position to dominate his will the burden of showing that he has not used his position to obtain an unfair advantage over the expectant heir with whom he so deals. (*Lord Atkinson.*) LALA BALLA MAL v. AHMAD SHAH. (1918) 25 M.L.T. 55 = 16 A.L.J. 905 = 23 C. W. N. 233 = 29 C. L. J. 165 = 180 P. W. R. 1918 = 21 Bom. L. R. 558 = 48 I. C. 1 = 124 P. R. 1918 = 1 U. P. L. R. (P. C.) 25 = 35 M. L. J. 614 (624-5).
 ———*Illustrations to—Part of Act. See STATUTE—ILLUSTRATIONS TO—PART OF STATUTE.*

(1918) 35 M. L. J. 614 (617).

———*Mortgage—Improvident transaction—Relief from—Conditions.*

In a suit for redemption, of a mortgage, held that, although the transaction was undoubtedly improvident, yet, in the absence of any evidence to show that the money-lender had unduly taken advantage of his position, it was difficult for a Court of Justice to give relief on grounds of simple hardship (131). (*Mr. Amcer Ali.*) AZIZ KHAN v. DUNI CHAND. (1918) 23 C. W. N. 130 = 48 I. C. 933 = 21 O. C. 104 = 5 O. L. J. 440 = 101 P. R. 1918 = 165 P. W. R. 1918.

———It has been contended that the terms of the mortgage were unconscionable and unenforceable in equity. There is no doubt that the mortgage is in some respects peculiar in its drafting and that it conferred very wide powers on the managers of the mortgaged property appointed by the mortgagor on the nomination of the mortgagee; but the mortgagor executed the mortgage and there is nothing to suggest that he was misled and did not thoroughly understand the contract which he made, or granted the mortgage under undue influence or from pressure, and their Lordships hold that the mortgage was enforceable (271). (*Sir John Edge.*) MATI LAL DAS v. EASTERN MORTGAGE AND AGENCY COMPANY, LTD. (1920) 25 C. W. N. 265 = (1920) M. W. N. 631 = 28 M. L. T. 351 = 61 I. C. 486.

———*Mortgage—Interest on, usurious—Presumption of undue influence from—Propriety—Position to dominate will—Absence of proof of.*

The fact that a mortgage for ample security provides for excessive usurious interest does not in itself raise a presumption of undue influence until the question has first been settled as to the lender being in a position to dominate the borrower's will. (*Lord Shaw.*) RAGHUNATH PRASAD v. SARJU PRASAD. (1923) 51 I.A. 101 (108) = 3 Pat. 279 = A.I.R. (1924) P. C. 60 = 19 L. W. 470 = 22 A.L.J. 105 = 34 M. L. T. 57 = 26 Bom. L. R. 595 = 28 C. W. N. 834 = 11 O. L. J. 122 = (1924) M. W. N. 638 = 5 Pat. L. T. 72 = 2 Pat. L. R. 87 = 82 I. C. 817 = 10 O. & A. L. R. 1395 = 46 M. L. J. 610.

———*Mortgage—Unconscionable bargain—Relief from—Position to dominate will—Absence of proof of—Effect.*

A mortgage deed provided for interest at 2 o/o per mensem to be paid annually, and, in case of non-payment of the annual interest, for interest on the arrears of interest at 2 o/o per mensem. Eleven years after the date of the mortgage, a suit was instituted on the mortgage for an amount which, owing to the stipulation for interest at 24 o/o compound, had become eleven times the sum secured by the mortgage-deed.

The mortgagor was, at the time of the execution of the mortgage, a member of a joint Hindu family consisting of himself and of his father and owning property of considerable value. He was *sui juris*, he had the full power of

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bargaining and binding his estate. His estate was not under the Court of Wards, and he lay under no disability. There was no evidence whatever, of his helplessness except the bare fact that he, being a man of wealth as owner of one-half of certain joint family property, wished to obtain and did obtain certain monies. The only relation between the parties that was proved was that they were lender and borrower. There was not even an attempt at proving that the mortgagee was in a position to dominate the will of the mortgagor.

Held that the mortgagor was not entitled to the protective relief provided by S. 2 of the Contract (Amendment) Act, 1899.

Even though the bargain had been unconscionable (and it has the appearance of being so) a remedy under the Indian Contract Act does not come into view until the initial fact of a position to dominate the will has been established. (*Lord Shaw.*) RAGHUNATH PRASAD v. SARJU PRASAD.

(1923) 51 I. A. 101 = 3 P. 279 = 22 A. L. J. 105 =

A. I. R. (1924) P. C. 60 = 19 L. W. 470 =

34 M. L. T. 57 = 26 Bom. L. R. 595 =

28 C. W. N. 834 = 11 O. L. J. 122 = 5 Pat. L. T. 72 =

(1924) M. W. N. 638 = 2 Pat. L. R. 87 =

10 O. & A. L. R. 1395 = 82 I. C. 817 = 46 M. L. J. 610.

———*Position to dominate will—Use of, to obtain unfair advantage—Onus of proof as to.*

The District Judge held that, even on the assumption that the plaintiff was in a position to dominate the will of the defendant, he did not, to use the words of S. 16 of the Contract Act as amended, use that position to obtain an unfair advantage over the defendant by extorting from him unconscionable bargains or otherwise, and that the defendant had utterly failed to prove, as he was bound to do, that the plaintiff had in fact exercised undue influence upon him in any of the transactions out of which his liability for the debt sued for ultimately resulted.

Their Lordships concur with the District Judge as to all these conclusions. (*Lord Atkinson.*) LALA BALLA MAL v. AHMAD SHAH. (1918) 25 M.L.T. 55 = 16 A.L.J. 905 = 23 C. W. N. 233 = 29 C. L. J. 165 = 180 P. W. R. 1918 = 21 Bom. L. R. 558 = 124 P. R. 1918 = 48 I. C. 1 = 1 U. P. L. R. (P.C.) 25 = 35 M. L. J. 614 (623-4).
 ———*Position to dominate will—Use of—Onus of proof as to—Bargain with influencer and in itself unconscionable.*

When it is proved that one of the parties to a contract was in a position to dominate the will of the other, and that the bargain is with the former ("influencer"), and in itself unconscionable, then the onus is very heavy on the party in a position to dominate the will of establishing affirmatively that no domination was practiced so as to bring about the transaction, but that the other party to the contract was scrupulously kept separately advised in the independence of a free agent (4). (*Lord Shaw.*) POOSATHURAI v. KANNAPPA CHETTIAR. (1919) 47 I. A. 1 =

43 M. 546 (548-9) = 18 A. L. J. 344 = 55 I. C. 447 =

27 M. L. T. 316 = 13 Bur. L. T. 28 = 38 M. L. J. 349.

———*Position to dominate will—Use of, to obtain unfair advantage—Question as to—Points to be considered in case of—Order of—Change of—Permissibility.*

Three matters are dealt with by S. 16 (3) of the Contract Act as amended. In the first place the relations between the parties to each other must be such that one is in a position to dominate the will of the other. Once that position is substantiated, the second stage has been reached, namely, the issue whether the contract has been induced by undue influence. Upon the determination of this issue a third point emerges, which is that of the *onus probandi*. If the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to

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dominate the will of the other. Error is almost sure to arise if the order of these propositions be changed. The unconscionableness of the bargain is not the first thing to be considered. The first thing to be considered is the relation of the parties. (*Lord Shaw.*) **RAGHUNATH PRASAD v. SARJU PRASAD.** (1923) 51 I. A. 101 (105-6) =

3 Pat. 279 = A. I. B. (1924) P. C. 60 = 19 L. W. 470 =
22 A. L. J. 105 = 34 M. L. T. 57 = 26 Bom. L. R. 595 =
28 C. W. N. 834 = 11 O. L. J. 122 = (1924) M. W. N. 638 =
5 Pat. L. T. 72 = 2 Pat. L. R. 87 = 82 I. C. 817 =
10 O. & A. L. R. 1395 = 46 M. L. J. 610.

—*Purdanashin—Mortgage in favour of mooktar by—Interest exorbitant and unconscionable—Relief against—Assignee of mortgage—Suit by.*

A purdanashin executed two mortgages, on different dates to a benamidar of her mooktar. The first mortgage was to secure the repayment, within one month, of Rs. 12,000, with interest at 4 per cent per mensem. The second was to secure the repayment, within one year, of Rs. 24,000 with compound interest at 27 per cent per annum, calculated at quarterly rests.

In suits brought to enforce the mortgages by the assignees thereof, held that the rate of interest exacted amounted to a hard and unconscionable bargain such as a Court of Equity would give relief against (226).

The equitable doctrine laid down by the Master of the Rolls in *Beynon v. Cook* has a strong application to the facts of this case. Here we have the borrower, a purdanashin lady; the lender, her own mooktar, under the cloak of a benamidar; the security an ample one; the interest on both mortgages, especially the compound interest on the latter, exorbitant and unconscionable; and a purchaser, with full notice of these circumstances (226.) (*Sir Robert P. Collier.*) **SRIMATI KAMINI SOONDARI CHOWDHARANI v. KALI PROSUNNO GHOSE.** (1885) 12 I. A. 215 =

12 C. 225 (238-9) = 4 Sar. 652.

—*Undue influence—Adult male with capacity to transact business—Plea of—Maintainability.*

The plea of undue influence cannot succeed. The appellant, at the time of the transaction in question, was twenty-three years of age, was a man of some intelligence, and had for some years had the active management of his estates. (122.) (*Viscount Cave.*) **LAL JAGDISH BAHADUR SINGH v. MAHABIR PRASAD SINGH.** (1920) 47 I. A. 116 =

42 A. 422 (428) = 24 C. W. N. 529 = 13 L. W. 19 =
23 O. C. 54 = 58 I. C. 845.

—*Undue influence—Exercise of that influence in conspiracy with or through agency of strangers to contract included in.*

There is no doubt that in the category of cases of undue influence might be covered cases where the party to a transaction exercised that influence in conspiracy with or through the agency of others (5). (*Lord Shaw.*) **POOSATHURAI v. KANNAPPA CHETTIAR.** (1919) 47 I. A. 1 =

43 M. 546 (549) = 18 A. L. J. 344 = 27 M. L. T. 316 =
13 Bur. L. T. 28 = 55 I. C. 447 = 38 M. L. J. 349.

—*Undue influence—Proof of—Position to dominate will—Proof of, by itself insufficient.*

Undue influence is not established by a proof of the relations of the parties having been such that the one naturally relied upon the other for advice, and the other was in a position to dominate the will of the first in giving it. Up to that point "influence" alone has been made out. Whether by the law of India or by the law of England, more than mere influence must be proved so as to render influence, in the language of the law, "undue". It must be proved that the person in a position of domination has used that position to obtain unfair advantage for himself, and so to cause injury to the person relying upon his authority or aid (3-4). (*Lord Shaw.*) **POOSATHURAI v. KANNAPPA CHETTIAR.**

CONTRACT ACT (IX OF 1872), S. 16—(Contd.)

(1919) 47 I. A. 1 = 43 M. 546 (548) = 18 A. L. J. 344 =
27 M. L. T. 316 = 13 Bur. L. T. 28 = 55 I. C. 447 =
38 M. L. J. 349.

—**S. 19, Exception.**—*Execution sale—Misrepresentation of officer of Court conducting—Purchase induced by—Inapplicability of exception to case of.*

In a suit to set aside an execution sale, it appeared that the plaintiff bid at the auction under the impression that the property sold was a substantial property freed and discharged from all incumbrances, while, in fact, what was sold and purchased by the plaintiff was a shadowy equity of redemption not worth one farthing. It further appeared that the misapprehension of the plaintiff was caused by a misrepresentation on the part of the auctioneer, an officer of Court.

The appellate Court refused to set aside the sale, holding that, although there was a misrepresentation as defined by S. 18, Cl. 3, of the Contract Act, the case fell within the exception in S. 19, which provides that in case of "consent caused by misrepresentation," the contract is not voidable, if the party, whose consent is so caused, had the means of discovering the truth with ordinary diligence, and the plaintiff had such means,

Held, that the exception in S. 19 had no application to the case, and there was no defence to the suit.

The plaintiff was perfectly justified in relying on what was said by the auctioneer in the presence of the Officer of Court, who had charge of the sale. (*Lord Macnaghten.*) **MAHOMED KALU MEA v. HARPERINK.**

(1908) 36 I. A. 32 = 36 C. 323 (333) = 5 M. L. T. 126 =
9 C. L. J. 165 = 13 C. W. N. 249 = 11 Bom. L. R. 227 =
6 A. L. J. 34 = 5 L. B. R. 25 = 1 I. C. 122 = 19 M. L. J. 115.

—**S. 23—Public policy—Contrary opposed to.** See **CONTRACT—PUBLIC POLICY.**

—**S. 27—Legal practitioner—Contract by, not to practise for a time—Validity—Practitioner both a barrister and a solicitor.** See **LEGAL PRACTITIONER—CONTRACT NOT TO PRACTISE FOR A TIME.** (1912) 19 I. C. 822 =

17 C. W. N. 215.

—**S. 27, Exception 1.—Goodwill—Sale of a real—Contract for—What amounts to—Validity of.**

The appellant and the respondent, who had each of them passenger ferry-boats on a river, entered into agreements, by one of which, executed by the respondent in favour of the appellant, the former purported to buy from the latter for a stated sum the good-will of his trade in plying the ferry-boats, and every description of interest and ownership which the appellant had acquired in several landing-places for plying the boats, as well as the settlements obtained for the collection of tolls. In addition to the transfer of good will and other assets, the appellant executed on or about the same date a document in favour of the respondent, under which the appellant contracted that, in consideration of the sum fixed in the first document, he sold his rights in the landing-places and settlements and in the goodwill of the business of plying the ferry-boats, and that he ceased to have any rights thereto. The document further provided that the respondent was to be able to enjoy and possess those rights by exercising whatever right the appellant had in them, and the latter was not to be able to make any obstacle in the respondents' enjoyment of the same. The appellant further undertook to close the business of plying the particular ferry-boats.

Held, that the transaction amounted to a sale of a real goodwill within the meaning of S. 27 of the Contract Act, Exception 1, and that it was therefore not void under that section as being in restraint of trade. (*Viscount Haldane.*) **CHANDRA KANTA DAS v. PARASULLAH MULLICK.**

CONTRACT ACT (IX OF 1872), S. 27, Expn. 1—
(Contd.)

(1921) 48 I.A. 508 = 48 C. 1030 = 26 C.W.N. 345 =
24 Bom. L. R. 603 = (1922) P.C. 167 = 65 I.C. 271 =
41 M. L. J. 657.

S. 30—Cutcha Adatia and Tej Mandi transactions in Bombay—Legality of.

The plaintiff carried on business in Bombay as a merchant and agent on commission. The defendant was a merchant and at all material times resided in the Native State of Bhopal. The plaintiff acted as commission agent for the defendant on what are known in Bombay on *cutcha adatia* terms, the defendant being his up-country constituent. The plaintiff, acting as *cutcha adatia* for the defendant, made forward contracts on his behalf for purchase and sale of Broach and Bombay Cotton, and he also had dealings on his behalf in options on Broach Cotton, known as *Tej Mandi* transactions.

The contracts for sale and purchase of cotton were, so far as the third parties were concerned genuine contracts, and not mere gambling transactions. So also were the *Tej Mandi* transactions. Under those contracts both the defendant and the plaintiff were bound to the third parties either to perform their obligations or to pay damages for their breach. The plaintiff having entered into those contracts as agent for the defendant, the latter was *prima facie* bound to indemnify the former against any liability incurred in respect of them. He was, on the other hand, exclusively entitled to the benefit of them—a gain to the defendant would involve no loss to the plaintiff, nor would a loss to the defendant result in a gain to the plaintiff. The only remuneration to the plaintiff was his commission. The understanding between them merely meant that the plaintiff would, by covering contracts or otherwise, provide for or take the goods or pay the difference on the defendant's behalf. The only circumstances relied on in support of the contention that as between the defendants and the plaintiff their contract was a wagering contract, was that there was between them an understanding that the plaintiff would not call upon the defendant either to give or take delivery.

Held that the contract between the defendant and the plaintiff was not a wagering contract within the meaning of S. 30 of the Contract Act.

The very essence of a wager between them is absent, (Lord Justice Waddington.) SOBHAGMAL GIANMAL v. MUKUND CHAND BALIA. (1926) 53 I.A. 241 = 51 B. 1 = (1926) M. W. N. 830 = 28 Bom. L. R. 1376 = 98 I.C. 338 = A.I.R. 1926 P. C. 119 = 44 C.L.J. 509 = 38 M.L.T. 16 (P. C.) = 51 M.L.J. 809.

First Government sale—Price at—Wager on—First advertised sale proving abortive—Conditions of first actual sale different—Effect.

The suit was on foot of wagerring contracts entered into in October and November, 1846, that the average price which a chest of Patna opium should be sold for and realize, at the first Government sale, should exceed a certain fixed price.

The course was, that all sales of opium, of which the East India Co., had the monopoly, took place at stated periods, which were advertised. At the time of the suit contracts the first sale of opium was advertised for 30—11—1846, subject to certain conditions. That sale turned out to be abortive, and the sale intended for the 30th November was postponed till the 7th December, and fresh conditions were prescribed for that sale, which took place then; all the opium was sold, and the average price of a chest exceeded that which the plaintiffs and the defendants had fixed upon in their wagers.

The defendants contended that the first sale mentioned in the contracts was meant to be a first sale, subject to the three usual conditions, and as there had been no such sale,

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the event contemplated had never occurred, and, therefore, the wager had not been lost.

Held, that, according to the true construction of the contracts, the price of the first actual sale was the object of the wager, and that the intended sale on the 30th November was not a sale, but the sale on the 7th of December was the first sale (125-6). (Mr. Baron Parke.) DOOLUBDASS PETTAMBERDASS v. RAMLOLL THACKOORSEYDASS. (1850) 5 M. I. A. 109 = 7 Moo. P. C. 239 =

Perry O. C. 232 = 1 Sar. 403.

Law enacted by—English law.

S. 30 of the Contract Act is substantially a transference of English law into the Indian Statute Book. There is no distinction between the expression "gaming and wagering" used in the English Statute and in the earlier Indian Act (21 of 1848) and the expression "by way of wager" in S. 30 of the Contract Act. (Lord Hobhouse.) KONG YEE LONE & CO. v. LOWJEE NANJEE.

(1901) 28 I. A. 239 (244) = 28 C. 461 (466-7) = 5 C.W.N. 714 = 3 Bom. L.R. 476 = 8 Sar. 101.

Market price—Wager on—Enhancement or depression of price by parties themselves or their agents—Right of—Provision in contract for—What amounts to.

In the case of wager contracts between the plaintiffs and defendants upon the price that Patna opium would fetch at the next Government sale at Calcutta, the Chief Justice in the Court below was of opinion that the defendants knew well when they made the wagers, that the plaintiffs would use all their efforts and all the powers which their command of capital gave them, to run up the prices at the sale, and that the defendants contracted with them on those terms, and that the wagers were in fact nothing more than one speculator backing his own opinion against that of another, on an event to be operated upon by the wealth, faculties and judgment of both parties; that according to their mutual understanding, each, therefore, had a right to use the means in his power, one to elevate the market price by bidding and inducing others to bid; the other to depress it, by persuading persons not to bid, always supposing that such means were otherwise legal.

Held, that the view taken by the Chief Justice was the correct one (129-30.)

The evidence does not show that the parties were to be confined to their own personal effects, by bidding themselves, or inducing others not to bid, but that they are at liberty to employ agents, and not one agent only, for these purposes, without breaking the contract between them (130-1.) (Mr. Baron Parke.) DOOLUBDASS PETTAMBERDASS v. RAMLOLL THACKOORSEYDASS.

(1850) 5 M. I. A. 109 = 7 Moo. P. C. 239 = Perry O. C. 232 = 1 Sar. 403.

Market price—Wager on—Party raising prices by his own acts, and acts of his agents, if can win wager.

The Chief Justice correctly states that if the event on which both parties were speculating was the market price, as it should be governed by the ordinary cases of supply and demand, or as it should be governed by the contests of speculators, wholly unconnected with the plaintiffs, then, undoubtedly, the plaintiffs would, in raising the prices by their own acts and by the acts of their agents, have taken a fraudulent advantage, and the event brought about by their own agency is not the event which was contemplated in the contract of hazard entered into by the parties. It would be manifestly a fraud in one of the contracting parties against the other, himself, by his own act, to win the wager (128-9.) (Mr. Baron Parke.) DOOLUBDASS PETTAMBERDASS v. RAMLOLL THACKOORSEYDASS.

(1850) 5 M. I. A. 109 = 7 Moo. P. C. 239 = Perry O. C. 232 = 1 Sar. 403.

Opium at next Government sale at Calcutta—Wager

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on price of—Legality of—English Common law.

The question was whether by the common law of England the contract in question in the case was illegal, and could not be enforced in a Court of Justice. The contract amounted to a wager upon the average price which opium should fetch at the next Government sale at Calcutta, the plaintiffs having to pay the defendants the difference between that price, and a sum named, per chest, if that price should be below that sum; and the defendants having to pay the plaintiffs the difference between that price and that sum, if that price should be above the sum. It was contended that the wager was illegal, on the ground of public policy, as it gave the defendants an interest unduly to lower the price, whereby individuals dealing in opium, and the East India Company, might be injured.

Held, reversing the Court below, that by the Common law of England, the wager in question was not illegal, and might be enforced in a Court of Justice. (352).

The great question here is, whether the wager gave either party an interest, which is to be considered injurious to individuals or to the Government. We are of opinion, that, although to a certain degree, it might create a temptation to do what was wrong we are not to presume that the parties would commit a crime; and as it did not interfere with the performance of any duty, and as if the parties were not induced by it to commit a crime, neither the interests of individuals or of the Government could be affected by it we cannot say that it is contrary to public policy (349-50.) (*Lord Campbell.*) RAMLOLL THACKOORSEYDASS *v.* SOOJUMNULL DHONDMULL.

(1848) 4 M. I. A. 339 = 6 Moo. P. C. 300 = Perry O. C. 193 = 1 Sar. 361.

———*Pakka Adatia contracts—Wagers if and when.*

The plaintiffs were a firm carrying on a large mercantile business at Bombay and, as a branch of it, they were in the habit of acting as pakka adatias. The defendant was a young man without any regular business, who engaged in speculative transactions on the Bombay market. He instructed the plaintiffs to sell for him three several lots of linseed amounting in all to 4000 tons for future delivery. On the strength of this order the plaintiffs sold linseed to this amount by separate contracts to several buyers. Though the transactions took the form of sales by the defendant to the plaintiffs, followed by re-sales by the plaintiffs to the several buyers, the plaintiffs acted throughout as pakka adatias, and to secure them against loss, sums amounting to Rs. 61,000 were deposited with them by the defendant as margin money.

The market went against the defendant, and he therefore neither gave delivery of the linseed nor authorised the plaintiffs to purchase linseed on his behalf. The plaintiffs accordingly discharged their obligation to the several buyers by delivering 300 tons, and by making cross-contracts and paying differences as to the balance of the linseed.

In a suit by the plaintiffs to recover from the defendants the loss incurred by them upon the contracts of re-sale, less the amount deposited by him as security against loss, *held* that the transaction was not a wagering contract, and that the plaintiffs were entitled to recover.

The acts of a pakka adatia are not as such unlawful; on the contrary, pakka adatia dealings are well established as a legitimate mode of conducting commercial business in the Bombay market. The contract of a pakka adatia as that of any one else, may be by way of wager; but the employment of the plaintiffs by the defendant was not of this description. It has not been shown that there was any bargain or understanding between the parties either express or implied that linseed was not to be delivered, nor was it, a term of the employment that the plaintiffs should protect the defendant from liability to make delivery. The mere

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fact that as to the greater part of the linseed there was no delivery, but an adjustment of claims, cannot alone vitiate the transactions (33). (*Sir Lawrence Jenkins.*) BHAGWANDAS PARASRAM *v.* BURJORJI RUTTONJI.

(1917) 45 I. A. 29 = 42 B. 373 = 23 M. L. T. 203 = (1918) M. W. N. 315 = 16 A. L. J. 241 = 4 Pat. L. W. 229 = 20 Bom. L. R. 561 = 22 C.W.N. 625 = 27 C. L. J. 358 = 7 L. W. 577 = 44 I. C. 284 = 34 M. L. J. 305.

———*Public revenue—Wager with reference to—Legality of—English Common Law.*

Under the Common Law of England the mere circumstance that a wager refers to the public revenue does not establish its illegality. A wager on the amount received for a tax, as it shall appear, in a return published by the authority of the House of Commons, would have been free from legal objection (349.) (*Lord Campbell.*) RAMLOLL THACKOORSEYDASS *v.* SOOJUMNULL DHONDMULL.

(1848) 4 M. I. A. 339 = 6 Moo. P. C. 300 = Perry, O. C. 193 = 1 Sar. 361.

———*Sale of goods—Contract for—Wager if—Intention not to deliver by itself not conclusive of its being a.*

The mere fact that one party to a contract for sale of goods did not intend to deliver, even if known to the other party, does not vitiate the contract, unless there is a bargain or understanding between the parties that delivery is not to be called for (33). (*Sir Lawrence Jenkins.*) BHAGWANDAS PARASRAM *v.* BURJORJI RUTTONJI.

(1917) 45 I. A. 29 = 42 B. 373 (378) = 23 M. L. T. 203 = (1918) M. W. N. 315 = 16 A. L. J. 241 = 4 P. L. W. 229 = 20 Bom. L. R. 561 = 22 C.W.N. 625 = 27 C. L. J. 358 = 7 L. W. 577 = 44 I. C. 284 = 34 M. L. J. 305.

———*Statute 8 & 9 Vict., c. 109—Extension to India—Desirability of.*

The Statute 8 & 9 Vict., c. 109, does not extend to India (349). It is for the Legislative Council at Calcutta, to consider how far it may be conducive to the benefit of our Indian Empire, to introduce into it the provisions of the Statute, 8 & 9 Vict., c. 109 (353). (*Lord Campbell.*) RAMLOLL THACKOORSEYDASS *v.* SOOJUMNULL DHONDMULL.

(1848) 4 M. I. A. 339 = 6 Moo. P. C. 300 = Perry, O. C. 193 = 1 Sar. 361.

———*Tej Mundi transactions in Bombay—Wagers if—Presumption.*

There is no presumption that *Tej Mundi* transactions are wagers, and, in the absence of evidence to the contrary, they should be treated as genuine transactions (244). (*Lord Justice Warrington.*) SOBHAGMAL GIANMAL *v.* MUKUNDCHAND BALIA.

(1926) 53 I. A. 241 = 51 B. 1 = (1926) M. W. N. 830 = 28 Bom. L. R. 1376 = 98 I. C. 338 = A. I. R. 1926 P. C. 119 = 44 C. L. J. 509 = 38 M. L. T. 16 (P. C.) = 51 M. L. J. 809.

———*Wager—Action on—Maintainability—English Common Law as to—Evasions of, by Judges—Abolition of such law by 8 & 9 Vict., c. 109.*

By the Common Law of England an action may be maintained on a wager, although the parties had no previous interest in the question on which it is laid, if it be not against the interests or feelings of third persons, and does not lead to indecent evidence, and is not contrary to public policy (348-9.)

I look with concern and almost with shame, on the subterfuges, and contrivances, and evasions, to which Judges in England long resorted, in struggling against this rule, and I rejoice that it is at last constitutionally abrogated by the Legislature (349). (*Lord Campbell.*) RAMLOLL THACKOORSEYDASS *v.* SOOJUMNULL DHONDMULL.

(1848) 4 M. I. A. 339 = 6 Moo. P. C. 300 = Perry, O. C. 193 = 1 Sar. 361.

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——Wager—Legality of—Temptation to commit wrong—Absence of—Necessity.

It is not necessary for the legality of a wager, that there should be no temptation to commit a wrong (343). (*Lord Campbell.*) **RAMLOLL THACKOORSEYDASS v. SOOJUM-NULL DHONDMULL.**

(1848) 4 M. I. A. 339 = 6 Moo. P.C. 300 = Perry, O. C. 193 = 1 Sar. 361.

——Wagering contract within meaning of—What amounts to.

Two parties may enter into a formal contract for the sale and purchase of goods at a given price, and for their delivery at a given time. But if the circumstances are such as to warrant the legal inference that they never intended any actual transfer of goods at all, but only to pay or receive money between one another according as the market price of the goods should vary from the contract price at the given time, that is not a commercial transaction, but a wager on the rise or fall of the market (p. 244).

Held, on the evidence in the case, that the transactions in question were wagering contracts within the meaning of the Indian Contract Act. (*Lord Hobhouse.*) **KONG YEE LONE AND CO., v. LOWJEE NANJEE.**

(1901) 28 I. A. 239 = 29 C. 461 (466-7) = 5 C.W.N. 714 = 3 Bom. L. R. 476 = 8 Sar. 101.

——Wagering contract—Date of sale referred to in—Essence of contract or mere description—Change in date and conditions of sale—Effect of, on contract.

The plaintiff and defendants, by contracts in writing, wagered as to the average price to be obtained for opium "of the 30th of November," "of the first lelaum, or public Government sale of opium." At the time when those contracts were entered into, the first Government sale had been advertised for the "30th of November, 1846." The sale on that day was prevented by a combination of opium speculators interested in similar contracts. The Government sale was again advertised, and took place on the 7th December following, when opium of the quantity and description advertised for sale on the "30th November" was sold.

Held, looking at the words of the contracts, and at the surrounding circumstances of the case, that the contracting parties intended to make a wager as to the average price of opium at the first Government sale, without any provision that such sale should necessarily take place on "the 30th of November," and no other day; and that upon a certain average being realised thereon, the event on which the plaintiff had wagered was determined in his favour, and he was entitled to recover the differences under the averages (263-4).

The 30th of November had been advertised in the Gazette of the 29th of August, 1846, as the intended day of the first sale; and it appears that it really happened that no alteration was made in the day so advertised. The parties, therefore, would naturally in their contracts refer to the advertisement in the Gazette by way of description. If they had intended to confine their contracts to what should happen on the 30th of November, and no other day, they certainly would have used some words of limitation so confining it, but no such words are to be found. The words are, "the first public sale," the addition of "the 30th of November," being introduced only as a description, as if it had been, which sale is advertised now on the 30th of November (264).

The alteration made in the conditions of sale, after the attempted sale of the 30th of November proved abortive, did not do away with the contracts. There is nothing in the present case leading to the conclusion that the parties contracted with express reference to the conditions which are published in the Gazette of the 29th of August (264-5). (*Sir John Patteson.*) **CHOTAYLOLL v. MANICKCHAND.**

(1856) 6 M. I. A. 251 = 10 Moo. P.C. 124 = 1 Sar. 538.

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——Wagering Contract—Essentials of—Speculative nature of contract by itself not enough.

Speculation does not necessarily involve a contract by way of wager, and to constitute such a contract a common intention to wager is essential (33). (*Sir Lawrence Jenkins.*) **BHAGWANDAS PARASRAM v. BURJORJI RUTTONJI.**

(1917) 45 I. A. 29 = 42 B. 373 (378) = 23 M. L. T. 203 = (1918) M. W. N. 315 = 16 A.L.J. 241 = 4 P.L.W. 229 = 20 Bom. L.R. 561 = 22 C. W. N. 625 = 27 C. L. J. 358 = 7 L. W. 577 = 44 I. C. 284 = 34 M. L. J. 305.

——These contracts were, no doubt, in character highly speculative; but that is insufficient in itself to render them void as wagering contracts. To produce that result there must be proof that the contracts were entered into upon the terms that performance of the contracts should not be demanded, but that differences only should become payable. (*Lord Darling.*) **SUKDEVDOSS RAMPRASAD v. GOKULDOSS CHATURBHUJA DOSS & CO.**

(1927) 55 I.A. 32 = 51 M. 96 = 5 O.W.N. 195 = 107 I.C. 29 = 30 Bom. L.R. 238 = 27 L. W. 453 = I. L. T. 40 M. 138 = 26 A. L. J. 484 = 47 C. L. J. 144 = A. I. R. 1928 P. C. 30 = 54 M. L. J. 130 (133).

——Wagering contract—Fraud of winner on loser—Avoidance of contract on ground of—Market price—Wager on—Elevation of price by acts of winner or his agents—Effect.

Wager contracts between the plaintiffs and defendants upon the price that Patna opium would fetch at the next Government sale at Calcutta, the understanding between the parties being that they might use means to enhance or depress such price.

Held, that the efforts made to raise the market by the plaintiffs, by bidding by themselves and agents, were no fraud on the defendants, as such course was, according to the understanding of both parties, to be pursued, and consequently, that the intention to use those efforts was not a fraud which rendered the contract voidable by the defendants (131). (*Mr. Baron Parke.*) **DOOLUBDASS PETTAMBERDASS v. RAMLOLL THACKOORSEYDASS.**

(1850) 5 M. I. A. 109 = 7 Moo. P. C. 239 = Perry, O. C. 232 = 1 Sar. 403.

——Wagering contract—Fraud of winner on public—Avoidance of contract by loser on ground of—Market price—Wager on—Bidding by winner himself merely to enhance price—Effect.

Wager contracts between the plaintiffs and defendants upon the price that Patna opium would fetch at the next Government sale at Calcutta, each party knowing that the other might use means to enhance or depress such price.

Held, that the bidding at the sale by one of the plaintiffs, though done colourably, and as it appeared only to enhance the price was no fraud upon the public, entitling the defendants to avoid the contract on the ground of that intended fraud (131-2.)

There is no law which prevents any person buying any quantity of a commodity at any price that he likes, whether to use himself, or to sell again in gross or by retail, or to give away, or to prevent another having it, provided always, that he does not commit the common law offence of forestalling and regrating, of ingrossing; provided, also, that he makes no false representation in order to effect the purchase (132).

In all these cases, the buying of any commodity when the purchaser does not want it, necessarily raises the price, and so causes a damage to all others who do, and who buy for the purpose of using it; but the purchase is not on that account a fraud on them. The market is open to all who buy, whatever their object may be; whether the plaintiffs meant to buy to sell again at a profit, or to make their

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profits by the collateral contracts that they had entered into with others appears to their Lordships to make no difference (132-3.) (*Mr. Baron Parke.*) DOOLUBDOSS PETTAMBERDOSS v. RAMLOLL THACKOORSEYDASS.

(1850) 5 M. I. A. 109 = 7 Moo. P. C. 239 = Perry, O. C. 232 = 1 Sar. 403.

———*Wagering contract—Legality of—Law applicable to question of—Hindus—Contract between—English common law—Applicability of.*

On a question arising between Hindus as to whether or not a contract amounting to a wager was legal and could be enforced in a Court of Justice, *held* that, inasmuch as the Statute 8 & 9 Vict., c. 109, did not extend to India, and no peculiar Hindu law was alleged to exist upon the subject, the case must be decided by the common law of England (349). (*Lord Campbell.*) RAMLOLL THACKOORSEYDASS v. SOOJUMNULL DHONDMULL. (1848) 4 M.I.A. 339 = 6 Moo. P. C. 300 = Perry, O. C. 193 = 1 Sar. 361.

———*Wagering contract—Sale of goods—Contract for—Patta Patti—Making of, in contract—Effect.*

In a suit for the price of goods, the defendants pleaded that the suit contracts were void as being wagering contracts for the payment of differences only.

It was proved or conceded that as regards the goods in question no delivery took place, but that documents purporting to be delivery orders were made which passed through several hands, and that within one week all the goods—so far as any ever existed—were in the hands of the plaintiffs-appellants, which, indeed, they had never left. That resulted from the fact that in respect to each re-sale what was described as *patta patti* was made—a process which resulted in differences merely, according to the fluctuations of the market, being recoverable, instead of the goods or their price. No definite agreement or understanding was, however, proved to the effect that performance of the contract should not be demanded, but that differences only should become payable. In some instances of other sales between the parties there was no *patta patti* and delivery was given and taken, so that unless *patta patti* had been made, delivery might always have been insisted upon, though to have made such a demand would, amongst those merchants, have been considered bad form.

The trial Judge held that, notwithstanding the fact that *patta patti* had been made or agreed in the contracts relating to the suit goods, the contracts were not mere wagering contracts, and that the appellants were entitled to recover the price of them, since the documents which passed between the parties were valid delivery orders on presentation of which the goods might have been demanded. The appellate Court held *contra*.

Held, agreeing with the trial Judge, that the contracts were not bad on the ground of wagering, (*Lord Darling.*) SUKDEVDOSS RAMPERSAD v. GOKULDOSS CHATHURBHUJADOSS & CO. (1927) 55 I. A. 32 = 51 M. 96 =

5 O. W. N. 195 = 107 I. C. 29 = 30 Bom. L. R. 238 = 27 L. W. 453 = I. L. T. 40 M. 138 = 26 A. L. J. 484 = 47 C. L. J. 144 = A. I. R. 1928 P. C. 30 = 54 M. L. J. 130.

———*Wagering contract—Sum recoverable under—Interest on—Right to—Act XXI of 1848—Contract before. See INTEREST—RIGHT TO.* (1862) 9 M. I. A. 260.

———*Wagering contract—Test of—Validity of. See UNDER THIS SECTION—SCOPE AND EFFECT OF.*

(1901) 28 I. A. 239 (244) = 29 C. 461 (466-7).

———*Wagering contract—Validity of, prior to Act XXI of 1848.*

A wagering contract in India (before the passing of the Legislative Act No. XXI of 1848) upon the average price of opium would fetch at a future Government sale, held

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legal, and an action thereon maintained. (*Sir John Patten.*) CHOTAYLOLL v. MANICKCHAND.

(1856) 6 M. I. A. 251 = 10 Moo. P. C. 124 = 1 Sar. 538.

———*Wagering contract—Validity of, under Hindu Law.*

Their lordships are not satisfied that by the Hindu law wagering contracts are void (127). (*Mr. Baron Parke.*) DOOLUBDOSS PETTAMBERDOSS v. RAMLOLL THACKOORSEYDASS. (1850) 5 M. I. A. 109 = 7 Moo. P. C. 239 =

Perry, O. C. 232 = 1 Sar. 403.

———S. 38—Tender, *See* TENDER.

———S. 41—Applicability—Conditions. *See* MORTGAGE—EXTINGUISHMENT—ACCEPTANCE OF FRESH MORTGAGE (1916) 44 I. A. 60 = 39 A. 178 (185).

———S. 48—Joint promisors—Minority of one of—Effect of, on liability of the other.

One of two promisors cannot plead the minority and consequent immunity of the other as a bar to the promisee's claim against him (103).

Held, therefore, in a suit upon a bond executed by an adult person and by a minor "represented by his grandmother and guardian," that the fact that the bond was unenforceable against the minor on the ground of non-compliance with the provisions of S. 462 of C. P. C. of 1882 was no answer to the plaintiff's claim against the other executant and that the plaintiff was entitled to recover the full amount of the bond from the latter (103). (*Sir Lawrence Jenkins.*) JAMNA BAI v. VASANTA RAO.

(1916) 43 I. A. 99 = 39 M. 409 (414) = 34 I. C. 213 =

14 A. L. J. 534 = 18 Bom. L. R. 432 = 3 L. W. 540 =

24 C. L. J. 74 = 20 M. L. T. 31 =

(1916) 1 M. W. N. 452 = 31 M. L. J. 18.

———S. 49—Applicability—Place of performance fixed by contract by manifest implication or necessary import.

S. 49 of the Contract Act has no application to a case where, by manifest implication or necessary import, a place is fixed by the contract for the performance of the obligation. The rule in S. 49 accordingly does not apply when there is an obligation to pay the creditor, and an inference can legitimately be drawn, either from the terms of the contract itself or from the necessities of the case, that there is a further obligation on the debtor of finding the creditor so as to pay him. (*Viscount Sumner.*) SONIRAM JEETMULL v. TATA & CO. LTD. (1927) 54 I. A. 265 = 5 R. 451 =

20 Bom. L. R. 1027 = 45 C. L. J. 633 =

4 O. W. N. 676 = 25 A. L. J. 690 = 31 C. W. N. 998 =

39 M. L. T. 72 = (1927) M. W. N. 520 = 102 I. C. 610 =

26 L. W. 720 = A. I. R. 1927 P. C. 156 =

53 M. L. J. 25 =

———S. 49—Debtor—Duty to find out creditor and to make payment where he is—English and Indian laws as to.

Even by British law the duty of a debtor to find and pay his creditor is only imposed upon him when the creditor is within the realm. If there be any such duty at all imposed by Indian law upon a debtor it does not extend in this respect further than in England (63). (*Lord Blanesburgh.*) BANSILAL ABIRCHAND v. GULAM MAHBUB KHAN.

(1925) 53 I. A. 58 = 53 C. 88 = 23 L. W. 3 =

A. I. R. 1925 P. C. 290 = 24 A. L. J. 48 = 43 C. L. J. 1 =

(1926) M. W. N. 108 = 27 Punj. L. R. 1 (P. C.) =

28 Bom. L. R. 211 = 92 I. C. 760 = 49 M. L. J. 806 =

———*Debtor—Duty to find out creditor and to make payment where he is—English common law rule as to—Effect of section upon.*

Quaere: whether the English common law rule that if no place is named, it is the duty of the debtor to make the payment where the creditor is, has been superseded by S. 49 of the Contract Act. (*Viscount Sumner.*) SONIRAM JEETMULL v. TATA & CO., LTD. (1927) 54 I. A. 265 =

5 R. 451 = 20 Bom. L. R. 1027 = 45 C. L. J. 633 =

CONTRACT ACT (IX OF 1872), S. 49—(Contd.)

4 O. W. N. 676 = 25 A. L. J. 690 = 31 C. W. N. 998 =
 39 M. L. T. 72 = (1927) M. W. N. 520 = 102 I. C. 610 =
 26 L. W. 720 = A. I. R. 1927 P. C. 156 = 53 M. L. J. 25.

—Place of performance—Alteration of—Agreement for
 —Consideration for—Necessity.

In a case in which a debt was under the contract repayable at one place, *held* that a subsequent arrangement changing the place at which repayment ought to be made was not binding unless there was any consideration present for the alteration of the obligations as they then existed (63). (*Lord Blanesburgh.*) **BANSILAL ABIRCHAND v. GHULAM MAHBUB KHAN.** (1925) 53 I. A. 58 = 53 C. 88 =

23 L. W. 3 = A. I. R. 1925 P. C. 290 =
 24 A. L. J. 48 = 43 C. L. J. 1 = (1926) M. W. N. 108 =
 27 Punj. L. R. 1 (P. C.) = 28 Bom. L. R. 211 =
 92 I. C. 760 = 49 M. L. J. 806.

—Place of performance—Provision in contract by
 implication for—What amounts to.

The appellants were a firm carrying on business in Calcutta. The respondents were a limited company whose registered office was in Bombay, but who had a branch business at Rangoon. The appellants agreed to assist the respondents in securing constituents to purchase and/or sell grain in Rangoon, on constituents' accounts, as common agents only, in consideration of which the respondents agreed to pay the appellants a certain commission. The contract between them provided that the appellants were to make good any undisputed claims that the respondents might lose owing to the failure or suspension of payment of constituents. In a suit brought by the respondents against the appellants in the High Court at Rangoon by leave of that court for payment of sums of money, due upon the failure of constituents to satisfy debts due to the respondents, *held* that an intention was shown in the contract that payment should be made in Rangoon, that, accordingly, part of the contract was performable in Rangoon so as to satisfy S. 49 of the Contract Act; and that, therefore, the Rangoon court had jurisdiction to entertain the suit.

Upon the face of this contract, not indeed in express terms, but by the clearest implication, payment is to be made in Rangoon. It is not possible to accede to the contention that S. 49 of the Contract Act gets rid of inferences that should justly be drawn from the terms of the contract itself or from the necessities of the case, involving in the obligation to pay the creditor the further obligation of finding the creditor so as to pay him. The rule in S. 49 is one which it was intended should apply both to the delivery of goods and to the payment of money, to which obviously different considerations apply from those applying in a case like the present, where the question is one of jurisdiction. (*Viscount Sumner.*) **SONIRAM JEETMULL v. R. D. TATA & COMPANY.** (1927) 54 I. A. 265 = 5 R. 451 =

29 Bom. L. R. 1027 = 45 C. L. J. 633 = 4 O. W. N. 676 =
 25 A. L. J. 690 = 31 C. W. N. 998 = 39 M. L. T. 72 =
 (1927) M. W. N. 520 = 102 I. C. 610 = 26 L. W. 720 =
 A. I. R. (1927) P. C. 156 = 53 M. L. J. 25.

—Ss. 49 and 94—Place of performance—"At any place in Bengal"—Earlier clause fixing—"To be mentioned hereafter"—Later clause stating—Place of delivery in case of—Purchaser's right to fix.

A contract in the usual form of bought and sold notes provided in the earlier part of it that the goods were to be delivered "at any place in Bengal," and lower down it contained the provision that the place of delivery was "to be mentioned hereafter."

Held that, on the right construction of the contract, the buyer was entitled to ask the sellers for its performance at the place selected by him, *viz.*, Howrah station.

The first sentence relating to delivery gives the choice of place to the buyer, subject only to the expressed condition

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that it must be in Bengal, and to the implied one that it must be reasonable. The choice given by the words "to be at any place" is not taken away, or converted into a deferred agreement, by the statement that the place is "to be mentioned hereafter". That is a very unsuitable expression by which to reserve a point for subsequent agreement. It would be quite simple to say "to be agreed on hereafter" if that were meant. But it is only "to be mentioned" and the obvious meaning of that term is that the place is to be mentioned by the party who, according to the former part of the agreement, had the right of mentioning it. It is true that with such a meaning the sentence in question adds nothing of value to the document; it merely takes notice that some place of delivery is to be mentioned more definite than the very wide area of Bengal. The addition is natural enough, and though it may be legally superfluous, such superfluities are not unknown in agreements. So far from falling within S. 94, the contract seems rather to resemble the contracts contemplated in S. 49 of the Contract Act, where the promisee has not to make any application for performance, but no place is fixed. In those cases not only has the promisee the right of naming the place, but there is thrown on the promisor the duty of applying to the promisee to appoint a reasonable place. (*Lord Hobhouse.*) **GRENON v. LUCHMEE-NARAIN AUGURWALLAH.** (1896) 23 I. A. 119 = 24 C. 8 = 7 Sar. 66.

—S. 55—Land—Contract to sell—Instalments payments provided for by—Payments of, on days fixed, if of essence of contract.

To prevent the property of K, an under-lessee, from being sold in execution of decrees for arrears of rent obtained against him by the appellant, the lessee, the respondent, who had purchased the property of K, executed an *ikrarnamah* in favour of the appellant. The *ikrarnamah* recited that the amount due to the appellant from K was Rs. 33,589—15—3, and that it had been amicably settled that the appellant was to receive from the respondent Rs. 25,000 and was to make a remission of the balance of Rs. 8,000 and odd. The agreement then stated that certain sums had already been received by the appellant in part of the Rs. 25,000; that at the time of the execution of the instrument Rs. 10,000 more had been paid to the appellant, leaving Rs. 12,713; and that the respondent agreed to pay that sum, with interest from 16—8—1850 by two instalments, one of Rs. 6,000 for principal, on 22—1—1851, and the other of Rs. 6,719 for principal, on 22—3—1851. The agreement provided that whatever sum of money the respondent might at any time pay, the appellant would first deduct the interest money out of that, and credit the balance for principal. The properties purchased by the respondent were then pledged for the payment of that money as well as the personal liability of the respondent. Then followed the words:—"If I fail to pay the whole of the money due to you, together with interest, after deduction of the remitted money agreeably to the condition written, then the remission of the money that you have now made under the amicable settlement is not to hold good, and the said remitted money will be justly due by me, and you will realise it by the sale of the hypothecated property, and from me, my heirs, representatives, and executors, and in the event of any other person purchasing the said property from the said purchaser." Provision was then made for putting an end to the several suits subsisting between the different parties, which was accordingly done.

Held that there was nothing in the agreement which made the payment of the instalments on the days fixed of the essence of the contract.

The only words in the agreement from which, if at all, such a stipulation could be inferred are "If I fail to pay agreeably to the condition written." Instead of there being in any other part of the agreement an thing to favour this

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construction, the nature of the engagements on each side, and the clause as to any payments on account being applied first to payment of interest, appear to furnish an implication to the contrary (257). (*Lord Kingsdown.*) **RAM GOPAL MOOKERJEE v. MASSEYK.** (1860) 8 M. I. A. 239 =

2 W. R. P. C. 43 = 1 Suth. 409 = 1 Sar. 760.

—Land—Contract to sell—Time if of essence of—English Law—Rule under section.

S. 55 does not lay down any principle which differs from those which obtain under the law of England as regards contracts to sell land (31). (*Viscount Haldane.*) **JAMSHED KHODARAM IRANI v. BURJORJI DHUNJI BHAI.**

(1915) 43 I. A. 26 = 40 B. 289 =

(1916) 1 M. W. N. 229 = 23 C. L. J. 358 =

20 C. W. N. 744 = 19 M. L. T. 184 = 3 L. W. 239 =

32 I. C. 246 = 14 A. L. J. 225 = 18 Bom. L. R. 163 =

30 M. L. J. 186.

—Land—Contract to sell—Time made of essence of—Specific performance of—Party in default—Right of—Waiver of right to treat time as of essence—Effect.

Courts of Equity, which look at the substance as distinguished from the letter of agreements, no doubt exercise an extensive jurisdiction which enables them to decree specific performance in cases where justice requires it, even though literal terms of stipulation as to time have not been observed. But they never exercise this jurisdiction where the parties have expressly intimated in their agreement that it is not to apply, by providing that time is to be of the essence of their bargain. If, indeed, the parties, having originally so provided, have expressly or by implication waived the provision made, the jurisdiction will again attach. The case of *Kilmer v. British Columbia Orchard Lands, Ltd.*, [(1913) A. C. 319] in which specific performance was decreed notwithstanding a stipulation in the agreement that time was to be of the essence of the agreement, really proceeded on the view that there had been a waiver of that provision. In the present case there has been no such agreement to extend time (as in the case above referred to), nor anything that amounts to waiver of the right to treat time as of the essence. (*Viscount Haldane.*) **STEEDMAN v. DRINKLE.** (1915) 33 I. C. 323 = 85 L. J. P. C. 79.

—Where a contract for the sale of land expressly makes time of the essence of the contract in all respects, specific performance of the contract cannot be decreed in favour of the party in default, and the default, though trivial, will entitle the other party to stand upon "the letter of his bond." The case would be different where there has been a waiver of the provision as to time (126). (*Lord Atkinson.*) **BRICKLES v. SNALL.** (1916) 38 I. C. 123 =

86 L. J. P. C. 22 = (1916) 2 A. C. 599.

—Land—Contract to sell. Time of essence of—Stipulation making—What amounts to.

Under the law of England equity which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. In the language of Lord Cairns: "The construction is and must be in equity the same as in a court of law. A court of equity will indeed relieve against and enforce specific performance, notwithstanding a failure to keep the date assigned by the contract, either for completion or for the step towards completion, if it can do justice between the parties, and if there is nothing in the 'express stipulations between the parties, the nature of the property, or the surrounding circumstances,' which would make it inequitable to interfere with and modify the legal right.

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That is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract. Of the three grounds, 'express stipulations' require no comment. The 'nature of the property' is illustrated by the case of reversions, trusts, or trades. The 'surrounding circumstances' must depend on the facts of each particular case" (31-2).

The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation. But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the notion that these time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay at its foundation. *Prima facie*, equity treats the importance of such time limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a Court of Law the contract has not been literally performed by the plaintiff as regards the time limits specified. This is merely an illustration of the general principle of disregarding the letter for the substance which courts of equity apply, when, for instance, they decree specific performance with compensation for a non-essential deficiency in subject-matter (32-3).

But equity will not assist when there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time. Nor will it exercise its jurisdiction when the character of the property or other circumstances would render such exercise likely to result in injustice. In such cases the circumstances themselves, apart from any question of expressed intention, exclude the jurisdiction (33). (*Viscount Haldane.*) **JAMSHED KHODARAM IRANI v. BURJORJI DHUNJI BHAI.** (1915) 43 I. A. 26 =

40 B. 289 (298-9) = (1916) 1 M. W. N. 229 =

22 C. L. J. 358 = 20 C. W. N. 744 = 19 M. L. T. 184 =

3 L. W. 239 = 32 I. C. 246 = 14 A. L. J. 225 =

18 Bom. L. R. 163 = 30 M. L. J. 186.

—Lease—Contract to grant, in consideration of loan to be advanced within time fixed—Time within which loan to be advanced if of essence of contract.

The Respondent, being in urgent need of money, entered into an agreement in writing with *N* acting as the agent of the appellant for an advance of a certain sum of money. The agreement recited that *N* had undertaken to procure this amount from the appellant on his return, he being then absent from the place where the agreement was executed, and the Respondent promised, in consideration of the loan, to grant *N* a lease of his Zemindary and it was provided that the Respondent should, on the arrival of the appellant, execute a regular deed. *N* could only accommodate the Respondent with a part of the proposed loan and as the matter was urgent, and the appellant's return was expected to be within a few days, it was verbally agreed, that the remaining portion of the loan should be advanced within 8 days. The appellant did not return till 19 days after when he was willing to make the advance required; but in the interim, and after 15 days from the date of the agreement, the Respondent, from pressure of money had been obliged to get the advance from another party, and had thereupon, granted him a lease of his Zemindary. In a suit by the appellant against the respondent for breach of contract, held, that as the agreement to grant the lease was incomplete in itself and conditional upon the advance by the appellant within 8 days, a delay of 19 days, in the circum-

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stances of the want of money by the respondent to meet his pressing demands, was an unreasonable delay, which defeated the object of the loan, and avoided the agreement to grant the lease. (189-90). (*Sir John Coleridge*.)
FISCHER v. KAMALA NAICKER. (1860) 8 M.I.A. 170 =
 3 W.R. 33 = 1 Suth. 395 = 1 Sar. 733.

———*Lease of godown to be erected on premises then in occupation of tenants—Contract to take—Eviction of tenants and erection of godown by lessor—Time fixed for, if of essence of contract.*

The defendants agreed to take a lease of certain premises from the plaintiff at a certain rent, upon the plaintiffs' undertaking to erect a godown in the premises, in accordance with a plan approved by the defendants. The premises were, to the knowledge of both parties, in the occupation of tenants who could not be ejected at a moment's notice. The plaintiff promised to clear the ground and erect the proposed buildings as soon as practicable and he also said that when the land was ready the buildings might be finished in the course of three or four months. *Held*, on a construction of the correspondence between the parties constituting the contract, that the plaintiff did not undertake to finish the buildings within three months irrespective of the time when existing tenants vacated the land. (*Lord Macnaghten*.)
IKRAMULL HUQ v. WILKIE. (1907) 11 C.W.N. 946 =
 4 A.L.J. 740 = 2 M.L.T. 448 = 6 C.L.J. 682 =
 17 M.L.J. 454.

———*Leasehold interest—Contract for sale of—Time if of essence of—Presumption—Evidence to rebut.*

In 1898 *M* obtained a reclamation lease from the Government of Bombay for a term of 999 years. Under the lease, the lessee was to reclaim the land and bring it under cultivation within a period which was ultimately extended to 1910; he was not to assign or underlet until the reclamation was complete, without the consent in writing of the collector; and, in case of breach of any of the covenant contained in the lease, the lessor was to have the right to re-enter and determine the lease. In 1908, the respondent obtained a transfer of the lease; and in July, 1911, he agreed in writing to sell the leasehold interest to the appellant for Rs. 85,000 and the appellant paid Rs. 4,000 as a deposit or earnest. The agreement provided that the title was to be made marketable; that the conveyance was to be prepared and received within two months from the date of the agreement, that on signing the document of sale Rs. 85,000 were to be paid, and after its Registration the remaining Rs. 500. Clause 5 provided that on payment of the Rs. 81,000, as provided by cl. 2, the document of sale or conveyance was to be executed, but should the purchaser not pay the amount within the period fixed, he was to have no right to the deposit or earnest money of Rs. 4,000 paid on account, and any claim of his was to be void, and the vendor was, after that date, to be at liberty to resell.

Held, on a construction of the agreement, reversing the court below, that time was not of the essence of the contract (33).

There is nothing in the language of the agreement or in the subject-matter to displace the presumption that for the purposes of specific performance time was not of the essence of the bargain. Their Lordships do not think that the subject-matter or the character of the lease sold were such as to take the case out of the class to which the principle of equity applies (33). (*Viscount Haldane*.) **JAMSHED KHODARAM IRANI v. BURJOJI DHUNJI BHAI.**

(1915) 43 I.A. 26 = 40 B. 289 = 14 A.L.J. 225 =
 (1916) 1 M.W.N. 229 = 23 C.L.J. 358 = 20 C.W.N. 744 =
 19 M.L.T. 184 = 3 L.W. 239 = 32 I.C. 246 =
 18 Bom. L. R. 163 = 30 M.L.J. 186.

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———*Railway wagons—Contract for supply of—Instalment payments fixed by—Payments of, on dates fixed, if of essence of contract.*

The defendant company agreed by a contract to manufacture and to deliver to the Morvi State Railway 25 covered and 25 open goods wagons at the price of Rs. 1,825 for each covered wagon and at the price of Rs. 1,875 for each open wagon, the wagons to be in accordance with certain specifications and drawings, and the 50 wagons to be delivered in six months from the date of the receipt by the defendant company of an order for the wagons. The terms of payment were that the Thakur should pay to the defendant company one-third of the contract price on the order for the wagons being given, and one-third of the contract price when the underframes of the wagons should be wheeled, and the remaining one-third when the wagons should be delivered. One-third of the total contract price amounted to Rs. 30,833. The contract contained no provision that the contract time for the delivery of the wagons should be extended in case the defendant company should be delayed in completing the wagons owing to the war or any other cause beyond the company's control.

Held that, having regard to the times when the three instalments of the contract price were according to the contract to become payable, and to the fact that the manufacture of the 50 wagons would involve considerable expenditure by the defendant company in providing materials for their construction, and in the payment of men who would necessarily be employed in constructing them, and to the fact that it might be difficult to enforce in a British Court or in a Court of the State of Morvi payment by the Thakur of the contract price, it must have been the intention of the parties when the contract was made that time should be of the essence of the contract as to the times when the three instalments of the contract price should be paid.

Held, further, that when the Thakur had, after he had notice that the underframes of the wagons had been wheeled, made default in payment of the second instalment of the contract, which was, in effect, a refusal by him to perform the contract in its entirety, the defendant company was entitled to treat the contract as void and to rescind it; but that as the defendant company did not rescind it, but, on the contrary, by delivering 8 of the wagons in February, 1917, to the Morvi State Railway, treated the contract as a subsisting contract, the defendant company was not on that delivery of the 8 wagons entitled to insist on a then payment for them; and that the contract price was not payable until the 50 wagons had been delivered. (*Sir John Edge*.)
BURN & CO., LTD. v. HIS HIGHNESS THAKUR SAHIB SREE LUKHDIRJI OF MORVI STATE.

(1925) 30 C. W. N. 145 = A. I. R. 1925 P. C. 188 =
 90 I. C. 52 = 23 A. L. J. 806 = 6 L. R. (P.C.) 147.

———*Time of essence of contract—Intention of parties as to—Evidence of—Correspondence prior and subsequent to contract—Admissibility of.*

The intention that time should be of the essence of a contract must appear from what has passed between the parties prior to the signing of the contract, and its construction cannot be affected in the contemplation of equity by what takes place after it has once been entered into (33). (*Viscount Haldane*.) **JAMSHED KHODARAM IRANI v. BURJOJI DHUNJI BHAI.**

(1915) 43 I. A. 26 =
 40 B. 289 (299) = (1916) 1 M.W.N. 229 =
 23 C. L. J. 358 = 20 C. W. N. 744 = 19 M. L. T. 184 =
 3 L. W. 239 = 32 I. C. 246 = 14 A. L. J. 225 =
 18 Bom. L. R. 163 = 30 M. L. J. 186.

———*Time originally not of essence of contract—Notice subsequent making time of, essence of contract—Reasonableness of—Sale—Contract for.*

CONTRACT ACT (IX OF 1872), S. 55—(Contd.)

In the case of a contract of sale of February, 1919, in which time was made of the essence of the contract, the time allowed for completion was far exceeded and the condition as to time being of the essence of the contract was, by the conduct of the parties, obliterated therefrom. Prior to 23rd August, 1919, all that remained to be done under the contract was the payment of the price and the engrossing of the draft conveyance for signature. On 23rd August, 1919, the vendor wrote to the purchaser a letter insisting upon the completion of the sale within 4 days from the receipt thereof. On 25th August, 1919, the purchaser replied stating that the engrossment had been taken in hand, and that he would let the vendor have it as soon as it was ready. The purchaser protested against the vendor's suggestion that he had not the purchase-money ready with him and stated that it had been lying idle with him for 2 months. Thereupon the vendor wrote a letter on the 27th August giving 5 days' notice for completing the sale. That letter was received by the purchaser the very next day so that 4 days remained for the purchaser within which to complete the sale.

Held, in the circumstances of the case, that the vendor's notice of 27th August was not unreasonable, and that the purchaser was estopped from contending that it was.

The question before their Lordships is not any serious or complicated question as to what would be a demand of equity in the completion of a transaction of sale recently made, with reference to which many practical things had to be done by way of clearing the title, and reasonable time for needful business arrangements had to be taken into account. In the circumstances of this case it is simply the ordinary commonplace question: Was it reasonable, with the assurance given by a purchaser that he had the money in the bank and the title in his hand, to say, "Well, the contract having been made months ago, do this little matter within 4 days or the contract is off"? (*Lord Shaw*.) **MOTILAL ITCHHALAL GANDHI v. HAJI MOOSA HAJI MAHOMED.** (1925) M. W. N. 314 = 26 P. L. R. 209 = 41 C. L. J. 334 = 3 Pat. L. R. 152 = 27 Bom. L. R. 814 = A. I. R. 1925 P. C. 124 = 88 I. C. 440 (2) = 48 M. L. J. 484.

—Time originally not of essence of contract—Right of either party to subsequently make it of essence—Procedure.

Though time is not originally made the essence of a contract, yet, in case of undue delay on the part of one of the contracting parties, the other party to the contract may make time the essence of the contract by giving notice that he will not hold himself bound to complete unless the contract is performed within a specified time, assuming the time specified to be such as the court will hold to be reasonable under the circumstances (464). (*Lord Macnaghten*.) **IKRAMULL HUQ v. WILKIE.** (1907) 11 C. W. N. 946 = 4 A. L. J. 740 = 2 M. L. T. 448 = 6 C. L. J. 682 = 17 M. L. J. 454.

—S. 55, Para. 3—Promise referred to in—Extension of time for performance—Case of—Applicability to.

The promise for the non-performance of which the third paragraph of S. 55 provides that compensation cannot be claimed is the promise to deliver at the time originally agreed, not the promise to deliver at the extended time (179). (*Lord Dunedin*.) **MUHAMMAD HABID ULLAH v. BIRD & CO.** (1921) 48 I. A. 175 = 43 A. 257 (261-2) = 14 L. W. 350 = 63 I. C. 589 = 24 Bom. L. R. 687 = A. I. R. 1922 P. C. 178.

—Ss. 55 and 63—Time for performance—Extension by agreement of—Effect of—Rights of parties on—Agreement after original date. See CONTRACT ACT, SS. 63 AND 55. (1921) 48 I. A. 175 (179-80) = 43 A. 257 (261-2).

CONTRACT ACT (IX OF 1872)—(Contd.)**Ss. 59-61—Appropriation of payments.**

—Creditor—Principal—Appropriation towards—What amounts to—Simple interest—Creditor really entitled only to—Erroneous impression on his part that compound interest with annual rests was chargeable—Statement of accounts prepared by him under—If can be relied on for the purpose.

A creditor, under the belief that compound interest was payable with yearly rests, prepared a statement in which payments by the debtor were carried forward with interest to the end of the year, and the sums so found were then credited against the total sum due. Upon the account being taken with simple interest, *held*, that the creditor had not thereby appropriated the payments to principal so as to be precluded from applying the rule above stated. (*Lord Buckmaster*.) **VENKATADRI APPA ROW v. PARTHASARATHY APPA RAO.** (1921) 48 I. A. 150 = 44 M. 570 (573-4) = 19 A. L. J. 465 = 33 C. L. J. 447 = (1921) M. W. N. 347 = 14 L. W. 25 = 23 Bom. L. R. 644 = 61 I. C. 31 = 30 M. L. T. (P. C.) 36 = A. I. R. 1922 P. C. 233 = 40 M. L. J. 549.

—Debt bond—Payments made from time to time towards—Appropriation of—Mode proper of.

In a suit on a bond for a debt, the defendant alleged that a number of sums were received by the plaintiff from time to time on behalf of the defendant but they were not carried into account on those dates as against the principal or the current interest, as it might be, of the bond, so as to discharge the defendant from interest *pro tanto* from those dates.

Held, that the principle that they should be so carried into account was a sound one (147). (*Lord Hobhouse*.) **MUSSAMAT RAJESWARI KUAR v. RAI BAL KRISHAN.** (1887) 14 I. A. 142 = 9 A. 713 (719) = 5 Sar. 80.

—Debt carrying interest—Payment towards, without definite appropriation—Rule of appropriation in case of.

Where there is a debt due that carries interest, and moneys are received without a definite appropriation on the one side or on the other, the rule which is well established in ordinary cases is that in those circumstances the money is first applied in payment of interest and then when that is satisfied in payment of the capital (153). (*Lord Buckmaster*.) **VENKATADRI APPA ROW v. PARTHASARATHY APPA RAO.** (1921) 48 I. A. 150 = 44 M. 570 (573-4) = 19 A. L. J. 465 = 33 C. L. J. 447 = (1921) M. W. N. 347 = 14 L. W. 25 = 23 Bom. L. R. 644 = 61 I. C. 31 = 30 M. L. T. (P. C.) 36 = A. I. R. 1922 P. C. 233 = 40 M. L. J. 549.

—Debts several—Rule of appropriation in case of.

On ordinary principles a creditor is entitled, in the absence of any direction from the debtor paying, to apply the monies he receives to whichever of several debts arising he pleases (40-1). (*Dr. Lushington*.) **BANK OF BENGAL v. RADAKISSEN MITTER.** (1842) 3 M. I. A. 19 = 1 Sar. 231.

—The Contract Act of 1872 follows the ordinary rules of law in providing that when the debtor has omitted to intimate, and when there are no circumstances indicating, to which of several debts a payment is to be applied, the creditor may apply it at his discretion to any debt actually due and payable to him from the debtor (180-1). (*Lord Hobhouse*.) **RAMESWAR KOER v. SYED NAWAB MEHDI HOSSEIN KHAN.** (1898) 25 I. A. 179 = 26 C. 39 (44) = 2 C. W. N. 633 = 7 Sar. 413.

—Debtor—Appropriation by—Agreement to—Evidence of—Entries in creditor's books if.

Entries in the books of the creditor may be taken as indicative of agreement to a proposed appropriation by the

CONTRACT ACT (IX OF 1872), Ss. 59-61—(Contd.)

debtor (842). (*Lord Dunedin.*) NEMI CHAND v. RADHA KISHEN. (1921) 48 C. 839 = 14 L. W. 391 =

(1921) M.W. N. 411 = 26 C. W. N. 153 =

30 M. L. T. 39 = 63 I. C. 904 = A. I. R. 1922 P. C. 26.

—Debtor—Bonds by, one carrying simple interest, and another carrying compound interest—Intention to appropriate towards former—Evidence of—Reluctance original to pay compound interest at all if.

Defendant in the suit was the mortgagor. The mortgage bond provided for interest on interest. There was also another bond executed by the defendant in favour of the mortgagee which carried only simple interest. Certain payments made by the mortgagor without intimating to which of the debts those payments were to be appropriated were appropriated by the mortgagee to the bond which carried only simple interest. The mortgagor contended that the payments should have been appropriated to the mortgage bond, and the only circumstance he could point to as indicating to which debt he intended the payments to be appropriated was his original reluctance to pay any compound interest at all.

Held, that that reluctance had nothing whatever to do with the appropriation of payments, and that the mortgagee had a right, in the silence of the debtor, to appropriate it to the other bond (180-1). (*Lord Hobhouse.*) RAMESWAR KOER v. SYED NAWAB MEHDI HOSSEIN KHAN.

(1898) 25 I.A. 179 = 26 C. 39 (44) = 2 C.W.N. 633 = 7 Sar. 413.

—Debtor—Collateral security deposited by—Proceeds of—Appropriation of—Creditor's right of—Direction by debtor—Absence of—Effect.

A person who was indebted to the appellant Bank under different accounts, deposited collateral security with the Bank by an instrument which, while empowering the Bank to sell the security and reimburse itself in default of payment, contained no direction that the proceeds of the sale should be applied preferentially in payment of any debt, nor *pari passu* in payment of all debts.

Held that, in the absence of such a direction, the Bank had a perfect right to apply the proceeds towards the payment of any loan it chose (40-1). (*Dr. Lushington.*) BANK OF BENGAL v. RADAKISSEN MITTER.

(1842) 3 M. I. A. 19 = 1 Sar. 231.

—Debtor—Mode of appropriation alleged by—Proof of—Onus of, on debtor. (*Lord Phillimore.*) RADHA KISHUN v. HIRA LAL SAH. (1926) 31 C.W.N. 566 =

(1927) M. W. N. 73 = 4 O. W.N. 344 = 100 I. C. 668 =

45 C. L. J. 318 = 38 M. L. T. (P. C.) 97 =

29 Bom. L.R. 791 = A. I. R. 1927 P. C. 50 = 52 M. L. J. 715.

—Interest or principal—Appropriation towards—Creditor's right of—Condition.

B executed a mortgage on 20th Bysack 1237, B.E., for Rs. 30,000, with interest at 1 per cent. per mensem, in favour of the appellants. B died, leaving the respondents, his sons and heirs. The amount due for principal and interest under the bond up to 30th Assar 1240, B.E. (July 1833), was calculated by agreement between the appellants and the respondents, and the 1st respondent, for himself and as manager of the joint family, and guardian of his brothers, executed an agreement for the total sum of Rs. 34,628, being Rs. 30,000, principal under the mortgage bond, and Rs. 4,628, arrears of interest due thereunder. The agreement provided that, out of the said sum of Rs. 34,628, the sum of Rs. 4,628, due as interest, was to be paid in 1240 F. and the principal sum of Rs. 30,000 from 1241 to 1250, at Rs. 3,000 per annum. The agreement also provided for interest on whatever amount of principal remained unpaid each year at 9 per cent. per annum.

CONTRACT ACT (IX OF 1872), Ss. 59-61—(Contd.)

The question arose on the construction of the agreement as to the mode in which payments, made by the respondents at irregular intervals, without any directions as to the application thereof respectively, were to be appropriated.

Held, that the creditors were entitled to appropriate the payments in the first instance to interest, and to principal only so far as those payments exceeded the interest due (306). (*Sir William H. Maule.*) BAMUNDOSS MOOKERJEE v. OMEISH CHUNDER RAE.

(1856) 6 M. I. A. 289 = 1 Sar. 542.

—A creditor to whom principal and interest are owed is entitled to appropriate any indefinite payment which he gets from a debtor to the payment of interest. A debtor might in making a payment stipulate that it was to be applied only to principal. If he did so, the creditor need not accept the payment on these terms, but then he must give back the money or the cheque by which the money is proffered. If he accepts it, he would then be bound by the appropriation proposed by the debtor (841-2). (*Lord Dunedin.*) NEMI CHAND v. RADHAKISHEN. (1921) 48 C. 839 =

14 L. W. 391 = (1921) M.W.N. 411 = 26 C. W. N. 153 = 30 M. L. T. 39 = 63 I. C. 904 = A. I. R. 1922 P. C. 26.

—Interest then due in excess of amount paid—Rule in case of—Regulation XV of 1793, S. 6.

Where a payment was made on account of a bond-debt (the amount paid being less than the interest due), *held*, that the payment ought to be deducted from the interest; S. 6, Reg. XV of 1793, being construed to apply to cases where the interest at the time of the suit had accumulated so as to exceed the principal. LUCHMESWAR SINGH BAHADUR v. SYAD LATF ALI KHAN.

(1871) 8 B. L. R. 110 = 2 Suth. 461 = 2 Sar. 700.

—Money expressly paid to satisfy one demand and received and acknowledged on that account—Alteration of appropriation subsequently—Power of, of either party without consent of other.

Kists of revenue became payable in respect of the suit property in September, 1901, and in January, 1902. Plaintiff-appellant, who had purchased the property, paid into the Treasury a certain sum of money, appropriating that payment in the document which accompanied the payment to the Government to the January kist, and the payment was received and accepted on that account. Subsequently, however, the officers of the Treasury appropriated the sum paid, in the first place to the satisfaction of the September, 1901, kist, and then, as far as the money would go, towards the January, 1902, kist. The result was that a balance was found to be due in respect of the January kist, and for that balance the property was put up for sale.

Held, that the money paid by the appellant having been expressly paid to satisfy the January kist, and having been received and acknowledged on that account, the amount of the January kist in respect of which the sale was made was really not due at the time of the sale, and that the sale was therefore without jurisdiction.

It requires no statutory provision to show that, when money is expressly paid to satisfy a particular claim and is received and acknowledged on that account, it is not in the power of one of the parties, to the transaction, without the assent of the other, to vary the effect of the transaction by altering the appropriation in which both originally concurred. (*Sir Arthur Wilson.*) MAHOMED JAN v. GANGA BISHUN SINGH. (1911) 38 I. A. 80 = 38 C. 537 =

15 C. W. N. 443 = 9 M. L. T. 446 = 8 A. L. J. 480 =

13 C. L. J. 525 = 13 Bom. L. R. 413 =

(1911) 2 M. W. N. 277 = 10 I.C. 272 = 21 M. L. J. 1148.

—S. 63—Applicability—Agreement or contract supported by consideration—Necessity.

CONTRACT ACT (IX OF 1872), S. 63—(Contd.)

It was contended that S. 63 applied only when there was an agreement to dispense or a contract, supported by consideration, to do so, and, in support of that contention, reliance was placed upon the judgment of Jenkins, C. J., in *I. L. R. 28 B. 66 (72)*, where he held that the promisee mentioned in S. 63 can only do the acts he is by that section empowered to do, if there be an agreement [as defined by S. 2 (c) of the Contract Act] amongst the parties to that effect. With that view their Lordships are unable to agree. The language of S. 63 does not refer to any such agreement and ought not to be enlarged by any implication of English doctrines. (*Lord Atkinson.*) **FIRM OF CHHUNNA MAL—RAM NATH v. FIRM OF MOOL CHAND—RAM BHAGAT.**

(1928) 55 I.A. 154 = 9 Lah. 510 =

5 O.W.N. 466 = 26 A. L. J. 603 = 32 C. W. N. 738 =

47 C. L. J. 503 = 9 Lah. W.N. 24 = 29 Punj. L.R. 353 =

108 I.C. 678 = 30 Bom. L. R. 837 = 28 L.W. 251 =

A.I.R. 1928 P. C. 99 = 55 M.L.J. 1.

———*Debt—Acceptance of a sum in full satisfaction of—Claim subsequent inconsistent with—Maintainability.*

The suit was brought against the minor son and heir of a deceased Raja, the plaint expressly stating that the claim was founded or based upon the bond which was therein mentioned. There was no evidence of the particular debt mentioned in the bond, which was a debt mentioned as being owing from the widows of the deceased. The only debt which was proved to have existed was that which was the subject of an adjustment before the Collector, who, in the exercise of a public duty, was *de facto* in possession of the Raja's property for the benefit of his creditors. The evidence showed that by virtue of that adjustment, the plaintiff obtained and received payment of a sum of money from the Collector, upon the faith of the representation made by him to the Collector, that his debt was satisfied, or that he would accept the sum that was then paid in satisfaction of the debt owing to him.

Held, that the plaintiff could not be heard in a Court of Justice to contradict that representation, or to sue upon a debt or contract having such an origin (100). (*Sir Lawrence Peel.*) **MAHANT JAYRAM GIR v. RANI SHIVRAJ KOER.**

(1869) 2 B. L. R. 98 (P. C.) = 11 W. R. 41 (P. C.) =

2 Suth. 216 = 4 M. J. 207.

———*Debt—Remission of portion of, on condition of balance paid in stated instalments on specified dates—Compliance with agreement as to—What amounts to—English technical rules—Inapplicability—Obligee preventing compliance with agreement—Effect of.*

To prevent the sale of K's property in execution of decrees obtained against him by the appellant, the respondent, who had purchased K's attached property, executed an *ikrar-namah* in favour of the appellant by which the latter agreed to remit a sum of Rs. 8,000 and odd and to accept the balance in full satisfaction. Prior to the date of the *ikrar* the respondent had made payments towards the balance so agreed to be received, another portion was paid on the date of the *ikrar*, and the balance the respondent undertook to pay in two instalments on specified dates. The agreement provided for payment of interest, for payments on account being appropriated first towards interest, and charged the property of the respondent for the payment of the balance due. The agreement also provided that the remission of the money made by the appellant under the amicable settlement was not to hold good, in the event of default on the part of the respondent to pay the balance as per the conditions of the agreement.

In a suit brought by the appellant to recover the amount remitted, alleging breach by the respondent of the conditions as to payment by instalments, *held*, that courts ought not to apply to such a case the nice technicalities of English law, that they must look at the agreement with a view to see

CONTRACT ACT (IX OF 1872), S. 63—(Contd.)

what the real intention of the parties was, and must inquire whether it appeared upon the evidence that there had been any failure by the respondent in the substantial performance of the contract, and if there had been any default, to whom such default was attributable (258).

Held, further, that, as there was a *bona fide* endeavour on the part of the respondent fairly to perform his engagement, and there was reason to believe that there was a desire on the part of the appellant to throw obstacles in the way of the performance, in order to obtain payment of the penalty which he expected would be the consequence of non-performance, the appellant was not entitled to the delay, if any, on the part of the respondent in paying the instalments (261). (*Lord Kingsdown.*) **RAM GOPAL MOOKERJEA v. MASSEYK.**

(1860) 8 M. I. A. 239 = 2 W. R. 43 =

1 Suth. 409 = 1 Sar. 760.

———*Performance of contract—Party wholly dispensing with—Right of, to subsequently sue for damages for breach of contract. See CONTRACT—BREACH OF—DAMAGES FOR—SUIT FOR—MAINTAINABILITY.*

(1928) 55 I. A. 154 = 9 Lah. 510.

———**Ss. 63 and 55—Time for performance—Extension by agreement of—Effect—Rights of parties thereafter—Agreement after original date.**

Where, in the case of a contract for the sale of goods to be delivered on a particular date, the vendor applies to the vendee for an extension of the time fixed for delivery and the latter agrees, the contract subsists, and the contract is liable to be performed by either party within the extended time, in default of which he will be liable for damages calculable in the ordinary way. The same principle applies to cases in which an extension of time is asked for by the vendee and is agreed to by the vendor. The effect of S. 55 of the Contract Act is, when the party having the option elects not to avoid, to put agreement after the original date on the same footing as an agreement just before the original date. In the case of an extension of the time for performance, if a specific time is stated, then that substituted date must hold; but if there is a simple waiver of the right to extension of the original time, then, a reasonable time would be the proper time for delivery (179-80). (*Lord Dunedin.*) **MUHAMMAD HABID ULLAH v. BIRD & COMPANY.**

(1921) 48 I. A. 175 = 43 A. 257 (261-2) = 14 L. W. 350 =

24 Bom. L. R. 687 = A. I. R. 1922 P. C. 178 =

63 I. C. 589.

———**S. 64—Hypothecation bond—Cancellation of—Sums advanced to borrower's agent under bond—Refund of—Liability of borrower for.**

In a suit to recover the amount due under a hypothecation bond, it was found that the bond was brought about by the fraud of the lender and the manager of the borrower, that it was executed by the borrower under fraud and undue influence, and that the bond was therefore invalid and unenforceable as such. Various sums in cash had, however, been advanced by the lender, and the question arose as to what amounts the borrower was to be held liable for as a condition of the cancellation of the bond.

Held, that the borrower was liable for sums which had been advanced to and received by him personally, and that, with regard to the amounts which had been advanced to his manager, he was liable only for such sums as the manager would have been justified in borrowing in the course of a prudent management of the borrower's estate (217).

Considering the relations that had existed between the lender and the borrower's manager, their Lordships are of opinion that the lender cannot recover merely by showing that he paid money to the manager. He must show further that his advances were really applied to the benefit of the borrower, or were properly borrowed on his behalf (217).

CONTRACT ACT (IX OF 1872), S. 64—(Contd.)

(*Sir Robert P. Collier.*) **AJIT SINGH v. BIJAI BAHADUR SINGH.** (1884) 11 I. A. 211 = 11 C. 61 (67-8) = 4 Sar. 560 = R. & J's No. 84 (Oudh).

—Ss. 64 and 65—*Void contract—Applicability to case of.*

S. 65, like S. 64, of the Contract Act starts from the basis of there being an agreement or contract between competent parties; and has no application to a case in which there never was, and never could have been, any contract (124). (*Sir Ford North.*) **MOHORI BIBEE v. DHURMODAS GHOSE.** (1903) 30 I. A. 114 = 30 C. 539 (548) = 7 C. W. N. 441 = 5 Bom. L. R. 421 = 8 Sar. 374.

—S. 65—*Agreement discovered to be void—Meaning of—Agreement discovered to be not enforceable by law from its inception if included—Contract that becomes void—Distinction.*

S. 65 of the Contract Act deals with (a) agreements and (b) contracts. The distinction between them is apparent from S. 2; by clause (e) every promise and every set of promises forming the consideration for each other is an agreement, and by clause (h) an agreement enforceable by law is a contract. S. 65, therefore, deals with (a) agreements enforceable by law and (b) with agreements not so enforceable. By clause (g) an agreement not enforceable by law is said to be void. An agreement, therefore, discovered to be void is one discovered to be not enforceable by law, and on the language of the section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void. (*Sir Lawrence Jenkins.*) **HARNATH KUAR v. INDAR BAHADUR SINGH.**

(1922) 50 I. A. 69 (75-6) = 45 A. 179 (184) = 9 O. L. J. 652 = 37 C. L. J. 346 = A. I. R. 1922 P. C. 403 = 9 O. & A. L. R. 270 = 27 C. W. N. 949 = 5 Pat. L. T. 281 = 2 Pat. L. R. 237 = 33 M. L. T. 216 = 18 L. W. 383 = 26 O. C. 223 = 71 I. C. 629 = 44 M. L. J. 489.

—*Expectancy—Transfer of—Agreement when discovered to be void in case of.*

In a suit to recover money advanced under a contract void on the ground that it relates to a transfer of an expectancy, the time at which the agreement is "discovered to be void" within the meaning of S. 65 of the Contract Act is, in the absence of special circumstances, the date of the agreement. (*Lord Sumner.*) **ANANDA MOHAN ROY v. GOUR MOHAN MULLICK.** (1923) 50 I. A. 239 (243-4) = 50 C. 929 (935) = 21 A. L. J. 718 = A. I. R. 1923 P. C. 189 = 4 Pat. L. T. 609 = (1923) M. W. N. 803 = 25 Bom. L. R. 1269 = 33 M. L. T. 365 = 28 C. W. N. 713 = 40 C. L. J. 10 = 74 I. C. 499 = 45 M. L. J. 617.

—*Litigation—Sale of subject-matter of, in consideration of advances made for—Sale invalid—Compensation in case of—Measure of.* See **LITIGATION—SALE OF SUBJECT-MATTER OF.** (1922) 50 I. A. 69 (76) = 45 A. 179 (185).

—*Minor—Mortgage deed by—Setting aside at instance of minor—Money received by him under mortgage—Restoration of—Discretion of Court as to.* See **CONTRACT—MINOR—MORTGAGE EXECUTED BY—CANCELLATION OF, ETC.** (1903) 30 I. A. 114 (125) = 30 C. 539 (549).

—*Sale—Setting aside of, at instance of vendor—Money received under—Restoration of—Necessity.*

The suit was brought by *N* to recover possession of certain lands with mesne profits, and to set aside a deed of sale purporting to have been executed by him to one *I*, in consideration of Rs. 4,000. The plaintiff alleged that he agreed to sign, and that he executed the deed of sale for the said consideration, in consequence of pressure and duress put upon him, and in order to get back certain papers, etc., of

CONTRACT ACT (IX OF 1872), S. 65—(Contd.)

his, which had been abstracted by the defendant and his servants.

Their Lordships held on the evidence that the plaintiff had failed to establish the case set up by him, nor even that the deed was forcibly taken from him. They, however, assumed that *I* entered into the alleged plot to bring *N* to Cuttack; that they caused his goods to be abstracted and made the execution of the deed of sale the condition of their restoration; and that, on his side, *N* agreed to sell, and executed the conveyance in order to get back his goods, but with a mental reservation that he would take the earliest opportunity of impeaching the transaction, and proceeded to consider what, on such a case, would be the plaintiff's rights. They observed as follows:—The contract was complete, and the plaintiff could only be relieved from it in a suit properly framed for that purpose upon proof of facts entitling him to that relief, and upon the terms of accounting for the Rs. 4,000 with interest. Whatever be the law applied to such a transaction, whether it be the law of England, or the Mahomedan law, or the general rule of equity and good conscience, these consequences would equally follow. The plaintiff could not insist that he was subjected to such personal duress as destroyed his free agency, and entitled him to treat his deed as a mere nullity. He could not both avoid the contract and retain the money (64-5). (*Sir James Colville.*) **GUTHRIE v. ABOOL MOZUFFER.**

(1871) 14 M. I. A. 53 = 15 W. R. (P. C.) 50 = 7 B. L. R. 630 = 2 Suth. 429 = 2 Sar. 660.

—*Void contract—Applicability to case of.* See Under this Act, Ss. 64, 65—**VOID CONTRACT.**

—S. 68—*Minor—Cases relating to.* See **CONTRACT—MINOR.**

—Ss. 69 and 70—*Bengal Putni Taluks Reg. VIII of 1819, S. 14—Sale illegal under—Money paid to avert—Recovery of—Suit for—Maintainability.* See **BENGAL REGULATIONS—PUTNI TALUQS REGULATIONS VIII OF 1819, S. 14—SALE ILLEGAL UNDER.**

(1918) 45 I. A. 103 (107) = 46 C. 1 (8).

—*Co-heirs—Litigation for preservation of inheritance—Costs incurred by one of heirs in connection with—Contribution to, by other heir—Liability for.* See **CO-HEIRS—LITIGATION FOR PRESERVATION OF INHERITANCE.**

(1893) 21 I. A. 26 (34) = 21 C. 496 (503-4).
—*Decree reversed on appeal—Person in possession under—Revenue paid by—Recovery from opponent of—Right of.*

In March 1882, the appellant obtained a decree from the High Court establishing his title as against the respondents to a revenue-paying estate. In 1885 the appellant obtained possession of the estate in execution of the decree.

The decree of the High Court was reversed by the judgment of the Privy Council in April, 1886, and in the latter part of the same year the respondents were replaced in possession of the estate in dispute.

In the interval, while the appellant was in possession, the respondents actively interfered with the tenant upon the estate, and in consequence of their obstruction the appellant received only a trifling sum on account of rents and profits. During the same period the appellant was called upon to pay, and did in fact pay, large sums for Government revenue and other charges, assessed upon the estate and recoverable in the same manner as Government revenue.

The Sub-Judge held that as the estate was preserved for the benefit of the respondents by the payments which the appellant had made he was entitled to recover from the respondents the difference between the amount so paid and the net amount of the rents and profits which he actually received, and for which alone, owing to the conduct of the

CONTRACT ACT (IX OF 1872), Ss. 69 and 70
—(Contd.)

respondents, he was held accountable. That decision was on appeal reversed by the High Court.

Held, that the decree of the High Court ought to be reversed and that of the Sub-Judge restored (164).

It seems to their Lordships to be common justice that when a proprietor in good faith pending litigation makes the necessary payments for the preservation of the estate in dispute, and the estate is afterwards adjudged to his opponent, he should be recouped what he has so paid by the person who ultimately benefits by the payment, if he has failed through no fault of his own to reimburse himself out of the rents. Of course, he is bound to account for mesne profits, for all rents and profits which he has received, or which without wilful default he might have received. But if owing to circumstances beyond his control, and still more, if in consequence of some wrongful conduct on the part of his opponent, he has received less than what he has had to pay for the preservation of the estate, it would seem to be in accordance with justice, equity and good conscience—there being no specific rule to the contrary—that he should recover the difference on the final adjustment of accounts. The claim is in the nature of salvage; and it is to be observed that the law relating to sales for arrears of Government revenue recognises an equity to repayment in the case of a person who not being proprietor pays the Government-revenue in good faith to protect a claim which afterwards turns out to be unfounded (163-4). (*Lord Macnaghten*.) **DAKSHINA MOHUN ROY CHOWDHRY v. SARODA MOHUN ROY CHOWDHRY.** (1893) 20 I.A. 160 = 21 C. 142 = 6 Sar. 366.

—Execution of decree—Attachment and sale wrongful in—Money paid to avert—Recovery of—Right of.

In this country, if the goods of a third person are seized by the sheriff and are about to be sold as the goods of the defendant, and the true owner pays money to protect his goods and prevent the sale, he may bring an action to recover back the money he has so paid; it is the compulsion under which they are about to be sold that makes the payment involuntary.

Where property of the respondents was wrongfully attached and put up for sale in execution of a decree obtained by the appellant against a third party, and, to prevent the sale which would otherwise inevitably have taken place of the property, the respondents paid the amount required to satisfy the appellants' decree, *held*, that there was no pretence for saying that the payment made by the respondents was voluntary.

The payment was made under compulsion of law,—that is, under force of the execution proceedings. (*Sir Montague E. Smith*.) **DOOLI CHAND v. RAM KISHEN SINGH.**

(1881) 8 I.A. 93 (97-8) = 7 C. 648 (653) = 4 Sar. 245 = Bald. 357 = 3 Suth. 734.

—See also CASES UNDER S. 72.

—Execution purchaser—Purchase-money of, applied in satisfaction of decree debts of judgment-debtor—Recovery from latter of, on sale becoming infructuous—Right of.

It is not in every case in which a man has benefited by the money of another, that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or implied, to repay. It is well settled that there is no such obligation in the case of a voluntary payment by A of B's debt. Still less will the action lie when the money has been paid against the will of the party for whose use it is supposed to have been paid. Nor can the case of A be better because he made the payment not *ex mero motu*, but in the course of a transaction which in one even! would have turned out highly profitable to him-

CONTRACT ACT (IX OF 1872), Ss. 69 and 70
(Contd.)

self, and extremely detrimental to the person whose debts the money went to pay (143).

The respondents purchased in execution of a money decree obtained against A by B the surplus proceeds in the hands of the Collector of a sale of A's estate for arrears of revenue under Bengal Act XI of 1859. The respondents had, at least before the confirmation of their sale, notice of a suit which had been instituted by A for setting aside the revenue sale. The purchase-money paid by the respondents was applied in satisfaction of the decree of B and of other decrees obtained by other persons against A. The revenue sale was, however, subsequently set aside in A's suit brought for the purpose, and, in consequence, the Collector declined to pay the respondents the surplus proceeds purchased by them.

In a suit subsequently brought by the respondents for the recovery from A of the purchase-money paid by them and applied in satisfaction of the decree debts of A, *held*, that the respondents had no cause of action for the recovery of the amount sued for against A (139, 143). (*Sir James W. Colville*.) **RAM TUHUL SINGH v. BISESWAR LALL SAHOO.** (1875) 2 I. A. 131 = 15 B. L. R. 208 = 23 W. R. 305 = 3 Sar. 477 = 3 Suth. 136.

—Legal proceedings—Claim in—Money paid on, without setting up defence—Recovery of—Right of.

A person who pays a claim brought against him in an ordinary suit in which he could have set up a full defence but has failed to do so is prevented from recovering back the money which he has so paid. In such a case he who pays loses his right to resist however good, because, having had the full opportunity of doing so which the law allows him once for all, he has not availed himself of the opportunity so given (107). (*Viscount Haldane*.) **RAJA OF PACHETE v. KUMUD NATH CHATTERJEE.**

(1918) 45 I. A. 103 (106) = 46 C. 1 (8) = 24 M. L. T. 66 = (1918) M. W. N. 441 = 8 L. W. 186 = 22 C. W. N. 1009 = 28 C. L. J. 165 = 20 Bom. L. R. 856 = 16 A. L. J. 569 = 5 Pat. L. W. 64 = 45 I. C. 827 = 35 M. L. J. 347.

—Putnee talukdar—Rent arrears due to Zemindar by—Sale of putnee talook for—Money paid by durputneedar to avert—Recovery of, from putneedar—Right of.

Suit to recover a sum of money lodged by the plaintiffs, the assignees of a durputni talook, in court, in order to stay the sale of a putnee talook for an arrear of rent due to the Zemindar from the defendants, who were the putnee talookdars, and thereby to save a durputnee talook of the second degree, which had been created by the defendants out of their said putnee talook. The plaintiffs did not register the transfer in the sherista of the defendants, and the defendants never recognised the plaintiffs as their tenants. The money deposited by the plaintiffs was applied in discharge of the rent due from the defendants as putneedars, and the sale of the putnee was stopped.

Held, that the money deposited by the plaintiffs was not a voluntary payment, and that they were entitled to recover the amount from the defendants (904).

The plaintiffs were assignees of the durputnee talook, and, though the transfer was not registered, they had the right and were compelled to deposit the amount of rent due to the Zemindar in order to protect their own interest. They made the deposit, and the defendants had the benefit of it. The plaintiffs are consequently entitled to recover the amount from the defendants (904). **LUCKHINARAIN MITTER v. KHETTRO PAL SINGH ROY.** (1873) 2 Suth. 903 = 20 W. R. 380 = 13 B. L. R. 146 = 3 Sar. 273.

—Revenue—Payment in good faith of, by person who is not proprietor—Recovery of amount paid from *de jure* proprietor—Right of. See UNDER Ss. 69, 70—DECREE REVERSED ON APPEAL.

CONTRACT ACT (IX OF 1872), Ss. 69 and 70 —(Contd.)

—Vendee—Mortgages on property purchased which vendor was bound to discharge—Money paid to discharge—Recovery from vendor of—Right of.

A payment made by a vendee to satisfy a decree obtained on foot of a mortgage not mentioned in the sale-deed is a payment made under compulsion, and the vendee is, under S. 69 of the Contract Act, entitled to recover the amount paid from the vendor. (*Lord Shaw.*) **MUSST. BHAGWATI v. BANARSI DAS.** (1928) 55 I. A. 135 =

50 A. 371 = 26 A. L. J. 550 = 32 C. W. N. 705 =

47 C. L. J. 539 = 108 I. C. 687 = 30 Bom. L. R. 834 =

28 L. W. 150 = A. I. R. 1928 P. C. 98 = 54 M. L. J. 689.

—S. 72—Coercion—Meaning of.

The word "coercion" in S. 72 is used in its general or ordinary sense as an English word and not in the special sense in which it is used in S. 15 of the Act. The definition in S. 15 is expressly inserted for the special object of applying to S. 14, i.e., to define what is the criterion whether an agreement was made by means of a consent extorted by coercion and does not control the interpretation of "coercion" when the word is used in other surroundings (65-6), (*Lord Moulton.*) **SETH KANHAYA LAL v. NATIONAL BANK OF INDIA, LTD.** (1913) 40 I. A. 56 =

40 C. 598 (611-2) = 17 C. W. N. 541 =

(1913) M. W. N. 406 = 13 M. L. T. 406 = 11 A. L. J. 413 =

17 C. L. J. 478 = 15 Bom. L. R. 472 =

184 P. L. R. 1913 = 18 I. C. 949 = 25 M. L. J. 104.

—Execution of decree—Attachment and sale wrongful in—Money paid to avert—Suit to recover—Decree in—Form of.

In a suit to recover money paid by the plaintiff to avert the wrongful attachment and sale of his property in execution of a decree obtained by the defendant against a third party, the decree to be passed in favour of the plaintiff is simple money decree (98). (*Sir Montague E. Smith.*) **DOOLI CHAND v. RAMKISHEN SINGH.** (1881) 8 I. A. 93 =

7 C. 648 (655) = 4 Sar. 245 = Bald. 357 = 3 Suth. 734.

—Execution of decree—Attachment and sale wrongful in—Money paid to avert—Suit to recover—Dismissal of, on considerations of equities of case.

A suit to recover money paid under protest to release the plaintiff's property from an illegal attachment was held by their Lordships to be one to recover a payment made under coercion within the meaning of S. 72 of the Contract Act, and the case was remitted that the defences, other than that rested on the words of that statute, might be disposed of. The appellate court, the Chief Court of the Punjab, dismissed the suit, proceeding on one ground alone, namely, that on consideration of the whole circumstances it was not equitable that the money should be paid back.

Held, reversing the Chief Court, that the claim ought not to have been rejected on the ground assigned.

The right here sought to be enforced is a statutory right expressed in terms of S. 72 of the Contract Act, and this Board has already held that the circumstances gave rise to that statutory right. To append a consideration (as the appellate court has done) of the relation of parties *inter se*—apart from the actual circumstances which enforced the payment—is simply to allow counterclaim under another name, and a counterclaim in the Punjab is not admissible. (*Lord Dunedin.*) **KANHAYA LAL v. NATIONAL BANK OF INDIA, LTD.** (1923) 50 I. A. 162 (170) =

4 Lah. 284 = 33 M. L. T. 349 = 25 Bom. L. R. 1248 =

A. I. R. 1923 P. C. 114 = 28 C. W. N. 689 =

40 C. L. J. 1 = 75 I. C. 7 = 45 M. L. J. 497.

—Execution of decree—Attachment and sale wrongful in—Money paid to avert—Suit to recover—Maintainability.

A suit lies to recover money paid by the plaintiff to prevent the wrongful attachment and sale of his property in

CONTRACT ACT (IX OF 1872), S. 72—(Contd.)

execution of a decree obtained by the defendant against a third party (98). (*Sir Montague E. Smith.*) **DOOLI CHAND v. RAM KISHEN SINGH.** (1881) 8 I. A. 93 =

7 C. 648 (653-4) 4 Sar. 245 = Bald. 357 = 3 Suth. 734.

—When property belonging to A is wrongfully attached in execution of a decree obtained against B, and, in order to release the property from the attachment, A pays the decree-holder, he is, under the English law, unquestionably entitled to demand the repayment of that sum as being an involuntary payment produced by coercion, and he is equally entitled under S. 72 of the Contract Act. (*Lord Moulton.*) **SETH KANHAYA LAL v. NATIONAL BANK OF INDIA, LTD.** (1913) 40 I. A. 56 = 40 C. 598 =

17 C. W. N. 541 (1913) M. W. N. 406 = 13 M. L. T. 406 =

11 A. L. J. 413 = 17 C. L. J. 478 = 15 Bom. L. R. 472 =

184 P. L. R. 1913 = 18 I. C. 949 = 25 M. L. J. 104.

—Execution of decree—Attachment and sale wrongful in—Money paid to avert—Suit to recover—Maintainability Amount paid over to decree-holder with consent of person paying.

The appellants, two sisters, became entitled to dower in the form of a charge on an estate or property which had belonged to one N. He having died in debt, his heirs or representatives were sued by, amongst others, the respondents, to recover considerable debts alleged to have been due by him. They obtained judgment in that suit, and, in execution of the decree obtained by them, they obtained an order for the sale of the estate upon which the dower of the appellants, was charged though their decree had been satisfied otherwise and they were therefore disentitled to institute or to continue any further proceedings against the properties in question. In order to prevent that sale, the appellants, upon a proceeding which they instituted, and under the authority of the court, not voluntarily, but under protest, and because they were compelled to take that step in order to prevent the sale of the estate, paid a certain sum into Court. The deposit was expressly stated to be without prejudice to the rights of all parties, and, among others, of the appellants. The question then arose whether the money so deposited should remain in Court or whether it might not be paid over to the respondents. The appellants' pleader consented that the money, instead of remaining in Court should in the meantime, and until the rights of the parties could be settled by the final decree of the Court, be paid over to the respondents.

In a suit brought by the appellants to recover back from the respondents the amount so paid by them, the High Court held that by law the payment to the respondents of the money of the appellants, under the circumstances in which it was made, constituted a voluntary payment with the full knowledge of the facts, and, therefore, that the money could not be recovered back.

Held, reversing the High Court, that, in view of the circumstances of the petition of the appellants, when the money was paid into Court, it was not a payment at all, but was originally a mere deposit in Court of the full amount recoverable by the decree-holder, and that the money having been deposited, under protest, for the purpose of preventing an injurious sale of the whole property, the payment was not a voluntary payment, and the appellants were entitled to recover back the amount paid by them. (*Lord Romilly.*) **FATIMA KHATOON CHOWDHRAIN v. MAHOMED JAN CHOWDHRY.** (1868) 12 M. I. A. 65 = 10 W. R. (P. C.) 29 =

1 B. L. R. (P. C.) 1 = 2 Suth. 145 = 2 Sar. 380.

—Mistake of fact—Money paid under—Recovery of—Right of.

Money paid under a mistake of fact common to the payee and the person paying can be recovered as money had and received to the use of the person paying. (*Lord Buckmaster.*) **TOM BOEVEY BARRETT v. AFRICAN PRODUCTS, LTD.** (1928) 110 I. C. 299 = A. I. R. 1928 P. C. 261.

CONTRACT ACT (IX OF 1872)—(Contd.)

—S. 73—Damages for breach of contract. See CONTRACT—BREACH OF—DAMAGES FOR.

—S. 74—Crops on tea estates—Option of purchase of—Agreement to offer—Default in regard to—Payment of stated sum on, as liquidated damages and not as penalty—Stipulation for—Sum stated liquidated damages.

Plaintiff and defendant entered into partnership for the purpose of exporting and selling Ceylon tea, and particularly tea grown upon two estates in the island belonging to the defendant. The part of the plaintiff in connection with the enterprise was to travel for the purpose of pushing the sale of the tea. In 1895 the partnership was dissolved, the plaintiff buying the defendant's interest in the goodwill for a certain sum, and taking over the assets at a valuation. The dissolution was effected by a deed, which contained among other things a provision that the defendant should for a period of ten years after 30th July, 1896, sell the whole or any part of the two tea estates to the plaintiff at a valuation so long as the plaintiff should pay to the defendant yearly a certain sum for the use of the names of the two estates, and should express his intention of purchasing the whole or any part of the said crops. The deed then provided as follows:—

"And the said Bosanquet (defendant) shall not be at liberty to sell during the period aforesaid the whole or any part of the tea crops of the said estates to any person other than the said Webster (plaintiff) without first offering to the said Webster the option of buying the same, so long as Webster shall pay to Bosanquet the yearly payment fixed, and, if the said Bosanquet shall fail, neglect, or refuse to sell the whole or any part of the crop of the said estates, as hereinbefore provided, to the said Webster, he shall pay to Webster the sum of £500, as liquidated damages and not as a penalty."

The plaintiff duly performed his part of the agreement, but in the first half of 1906, the defendant, in breach of the agreement, sold to persons other than the plaintiff five different parcels of tea of one of the said estates without offering to the plaintiff the option of buying the same. In a suit by plaintiff in 1908 claiming the sum of £500 as liquidated damages in respect of the said breach, *held*, that the contract stipulated for what in words it said, namely, for a payment of money by way of liquidated damages and not by way of penalty.

The sum of £500 stipulated for was not claimable in respect of every pound of tea sold in breach of the stipulation. The breach consists of the selling to third parties. It matters not whether the sale is of the whole or part of a crop, nor whether it is made in one lot or in many. The agreement neither says nor means that, if successive parcels forming parts of the same crop be sold a right to claim £500 in respect of each sale shall accrue; all such parts put together cannot amount to more than the whole crop, and the penalty for the sale of the whole is limited to the £500 (180). (*Lord Mersey*). WEBSTER v. BOSANQUET. (1912) 16 C.W.N. 697 = 16 I.C. 147 = 23 M.L.J. 177.

—Interest—Compound interest on default—Stipulation for—Penalty if and when—Compensation in case of—Measure of.

Compound interest is in itself perfectly legal, but compound interest at a rate exceeding the rate of interest on the principal moneys, being in excess of and outside the ordinary and usual stipulation, may well be regarded as in the nature of a penalty.

Held, that, in the circumstances of the case, the High Court took a reasonable course in allowing compound interest on a mortgage bond at the same rate only as that at which simple interest was stipulated for in the bond. (*Lord Davey*). SUNDAR KOER v. SHAM KRISHEN. (1906) 34 I.A. 9 (18-9) = 34 C. 150 (158) =

CONTRACT ACT (IX OF 1872), S. 74—(Contd.)

2 M. L. T. 75 = 5 C.L.J. 106 = 11 C.W.N. 249 = 9 Bom. L. R. 304 = 4 A. L. J. 109 = 17 M.L.J. 43.

—Interest—Enhancement of, on default—Stipulation for—Penalty if a—Enhancement from date of default—Enhancement from date of bond—Distinction.

The "explanation" to S. 74 of the Contract Act as amended says that "a stipulation for increased interest from the date of default may be a stipulation by way of penalty."

Their Lordships accept the view of the Indian Courts that where the stipulation is retrospective, and the increased interest runs from the date of the bond and not merely from the date of default, it is always to be considered a penalty, because an additional money payment in that case becomes immediately payable by the mortgagor.

Quare, under what circumstances increased interest running only from default should or should not be considered a stipulation by way of penalty. (*Lord Davey*). SUNDAR KOER v. SHAM KRISHEN. (1906) 34 I.A. 9 (17-8) =

34 C. 150 (157) = 2 M.L.T. 75 = 5 C.L.J. 106 = 11 C.W.N. 249 = 9 Bom. L.R. 304 = 4 A.L.J. 109 = 17 M.L.J. 43.

—Interest—Enhancement of—Stipulation for—Penalty when not a—Compromise instalment money decree—Interest at 6 per cent. per annum fixed by—Enhancement of, to 12 per cent. in certain contingencies.

A decree for payment of money by instalments with interest at 6 per cent. passed in pursuance of solehnamah or compromise between the parties to the suit provided also for three contingencies, *viz.*, non-payment at due date, (a) of the first instalment, two consecutive instalments being in arrear at the same time; (b) of instalments, other than the first; and (c) of the first instalment simply. Upon the occurrence of (a), or, of (b), execution might issue for the whole decretal money with interest thereon at 12 per cent. Upon the occurrence of (c) execution might issue for that instalment, with interest at 12 per cent. from the date of the decree.

Held, that the provisions in the decree for the payment of a double rate of interest were not in the nature of a penalty, and could not be relieved against (165, 170).

The solehnamah was an agreement fixing the rate of interest, which was to be at the rate of 6 per cent. under certain circumstances, and 12 per cent. under others (165).

The stipulation for payment of interest at 12 per cent. per annum upon the whole decretal money was not a penalty, and even if it were so, the stipulation is not unreasonable, inasmuch as it was a mere substitution of interest at 12 instead of 6 per cent. per annum in a given state of circumstances (170). (*Sir Barnes Peacock*). RAI BALKISHEN DASS v. RAJA RUN BAHADUR SINGH. (1883) 10 I. A. 162 = 10 C. 305 (310, 314) =

13 C.L.R. 392 = 4 Sar. 465.

—Interest—Enhancement of, on default—Stipulation for, in nature of penalty—Compensation in case of—Right to—Measure of.

A mortgage bond of the year 1888 provided for interest at the rate of 14 annas per cent. per mensem, and by the first condition of the bond it was agreed that the interest should be paid every six months, and in case of default the mortgagor should pay interest on interest at the rate of Rs. 1-8 per cent. per mensem; and if the amount of interest be not paid within the year, interest on the amount of the loan should run at the rate of R. 1 per cent. per mensem, from the date of the execution of the bond till the day of payment.

Another mortgage bond between the parties of the year 1891 contained similar stipulations as to the interest and compound interest as those in the bond of 1888, except that the rate of interest on the principal money was 12

CONTRACT ACT (IX OF 1872), S. 74—(Contd.)

annas per cent. per mensem instead of 14 annas. The principal sum secured by the bond of 1891 included the amount due for interest under the earlier bond.

In a suit to enforce the two bonds, the High Court held the stipulations as to increased interest to be in the nature of a penalty, and (agreeing so far with the Sub-Judge) gave compensation at the same rate as the mortgagor agreed to pay as increased interest, but (differing in that respect from that Sub-Judge) did not allow such interest to run from the respective dates of the bonds. The High Court observed that at the date of the execution of the second bond there was a settlement of accounts as regards the interest due on the first bond, and simple interest only was then calculated, and the amount was included in the principal of the second bond. They treated that as a waiver of the compound interest, and any claim for increased interest to that date, and they therefore held that the increased interest by way of compensation on the first bond should run only from the date of execution of the second bond, and that on the second bond should run only from the date of default of that bond.

Their Lordships accepted the concurrent judgment of the courts below, so far as concerned the rate of the increased interest payable by way of compensation, and held that the High Court came to a right conclusion as to the dates from which such increased interest should run. (*Lord Davey*). **SUNDAR KOER v. SHAM KRISHEN.**

(1906) 34 I.A. 9 (17-8) = 34 C. 150 (157-8) =
2 M.L.T. 75 = 5 C.L.J. 106 = 11 C.W.N. 249 =
9 Bom. L.R. 304 = 4 A.L.J. 109 = 17 M.L.J. 43.

—Interest—Enhancement of, on default—Stipulation for, in nature of penalty—Creditor's rights in case of—Compensation—Right to—Measure of.

Where a stipulation for increased interest on default is in the nature of a penalty, the increased interest ought not to be disallowed altogether. S. 74 of the Contract Act, on the other hand, directs that the party complaining of the breach shall receive from the party who has broken the contract reasonable compensation, not exceeding the amount of the penalty stipulated for. (*Lord Davey*). **SUNDAR KOER v. SHAM KRISHEN.**

(1906) 34 I.A. 9 (18) =
34 C. 150 (157-8) = 2 M. L. T. 75 = 5 C.L.J. 106 =
11 C.W.N. 249 = 9 Bom. L. R. 304 =
4 A. L. J. 109 = 17 M. L. J. 43.

—Interest—Rate of, originally fixed—Reduction of, on punctual payments—Provision for—Original rate—Stipulation for, not a penalty.

A mortgage bond provided that interest was to be paid at nine and a half per cent. by equal half-yearly payments but that if the interest at the rate of seven and a half per cent. was paid before the half-yearly day appointed for payments of interest the mortgagees should accept the same in lieu of and in satisfaction for interest at nine and a half per cent.

Held, that the stipulation for payment of interest at the rate of nine and a half per cent. was not penal (271). (*Sir John Edge*). **MATI LAL DAS v. EASTERN MORTGAGE AND AGENCY CO., LTD.**

(1920) M.W.N. 631 = 61 I.C. 486 = 28 M.L.T. 351.

—Interest—Stipulation for—Penalty or not. See also under INTEREST.

—Mortgage—Interest—Penal rate of—Provision as to—Relief against—Puisne mortgagee's right to.

In a suit by a puisne mortgagee for redemption of a prior mortgage, which had ripened into a decree and an execution purchase by the prior mortgagee himself in proceedings to which the puisne mortgagee was not a party, it appeared that there was a penal rate of interest (120 per cent.) imposed by the prior mortgage, and that that rate was not claimed in the suit upon the prior mortgage. Their Lordships observed:

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"Nor do they conceive that it (the penal rate) can now be claimed." (214). (*Lord Hobhouse*). **UMES CHUNDER SIRCAR v. MUSSUMAT ZAHOR FATIMA.**

(1890) 17 I.A. 201 = 18 C. 164 (180-1) = 5 Sar. 507.

—Mortgage—Interest due up to date of payment—Default in payment of—Principal also to become due in event of—Stipulation for—Not a penalty.

A mortgage deed dated 22nd October 1898, provided for redemption by payment on 22nd October, 1899, of the principal sum with interest at 10 per cent. per annum computed from the date of the deed. It also provided that, in the event of default in making the said payment, the mortgagor should pay to the mortgagee interest on the principal sum at the said rate until the same should be fully paid and satisfied and that he would pay all such interest month by month on the 22nd day of each month succeeding that for which it should become due. The deed further provided that, if before 22nd October, 1899, the mortgagor should make default in payment of the interest due under the deed for one calendar month after becoming due, the principal and interest should thereupon become due and payable. Held, on a construction of the deed, that there was a covenant to pay interest before 22nd October, 1899, that the provision entitling the mortgagee to demand principal and interest in the event of default in payment of the interest before 22nd December, 1899, as provided for in the deed was not in the nature of a penalty and that a suit for sale instituted prior to 22nd October, 1899, on the ground of such default was maintainable. (*Sir Richard Couch*). **YEO HTEAN SEW v. ABU ZAFFER KOREESHEE.** (1900) 27 I. A. 98 = 27 C. 938 = 4 C.W.N. 552 = 7 Sar. 706.

—Mortgage—Sale absolute—Provision for mortgage becoming, on breach of certain conditions by mortgagor—Penalty if a—Strict construction of provision—Necessity—Onus on mortgagee seeking to avail himself of provision.

In a suit for redemption, the mortgagee pleaded that, under a special agreement in the mortgage-deed, the mortgagor was to lose his right of redemption and the mortgage was to be turned into an absolute sale, in the event of breach by the mortgagor of certain stipulations in that special agreement; and that, as, when at annexation the first summary settlement was made, the mortgagors, though unsuccessfully, repudiated the mortgage deed and asked for a settlement, they lost their right of redemption and the mortgage became an absolute sale under the terms of the special agreement.

Held, that the terms of the agreement were meant to apply to some breach thereof in a matter connected with the mortgaged taluka itself, such as cutting the wood, taking the crops, or interfering with the ryots, and that the claims put forward at the settlement, though they might be a breach of the former part of the agreement, did not fall within the scope of the condition which turned the mortgage into a sale.

In construing clauses which are in their nature penal, the party seeking to take advantage of the penalty must bring his case very clearly within the scope of the clause. **SAIYAD MUHAMMAD HUSAIN KHAN v. BHABOOTEE SINGH.**

9 M. J. 341 = R. & J's No. 31.

—Mortgage for term—Interest payable in instalments—Default in payment of—Sale of mortgaged property and realization of principal and interest due up to end of term—Stipulation for, a penalty—Relief against.

A mortgage bond dated 28-12-1867, executed by the defendant in favour of the plaintiff, provided that the defendant was to pay interest on the principal sum of Rs. 60,000 at three-fourths per cent. per mensem, and to repay the said principal sum in twelve years from the date of the bond, but that the plaintiff was not bound to accept payment even though the defendant tendered it, and that the plaintiff

CONTRACT ACT (IX OF 1872), S. 74—(Contd.)

could not demand it, before that time. Then there was a provision for the payment of the interest which amounted to 9 per cent. in three instalments annually. Then at the end there came this clause:—"If any obstruction be caused either by me or my men in respect of any of the conditions aforesaid, you are competent to give me two months' notice, and if I do not within that term fulfil the conditions entered into with you, to sell by auction yourself the mortgaged property or portions thereof, according to your pleasure, to pay yourself at once the principal due to you, and the interest payable on the full amount of principal for the unexpired portion of the twelve years, and to deliver to me the remainder, if any."

It appeared that a portion of the interest became in arrear, and that the plaintiff gave notice in October, 1869, of his intention to sell under that power, the plaintiff supposing that he had the power to sell for the purpose of realizing the principal and the interest up to the end of the twelve years. The defendant disputed that right of the plaintiff to sell for that amount on the mere ground of non-payment of interest which he alleged not to be an obstruction within the meaning of the bond. The parties not being able to come to a final agreement as to the conditions of sale, the plaintiff brought the suit out of which the appeal arose claiming the full amount of the mortgage money with interest for twelve years.

Held, that the clause in the mortgage bond relating to sale was in the nature of a penalty, and that the plaintiff was not entitled to put up the property for sale, and to realise the full amount which he claimed, namely, interest due up to the expiration of the twelve years, upon such default only as had been made, namely, default in the payment of interest on the mortgage-money (60). *VENKATAVARADA IYENGAR v. VENKATA LUCHMAMMAL*.

(1874) 3 *Suth.* 58 = 23 *W. R.* 91.

——Mortgage with possession—Delivery of possession—Sale in default of—Stipulation for—Enforceability of. See **MORTGAGE—USUFRUCTUARY MORTGAGE—DELIVERY OF POSSESSION.**

(1922) 50 *I. A.* 41 (46) = 46 *M.* 108 (112-3).

——Penalty—Liquidated damages—Distinction—Test.

Whether a stipulated payment in respect of the breach of a contract should be regarded as liquidated damages fixing once for all the sum to be paid or merely as a penalty covering the damages, though not assessing them, does not depend upon the expression used in the contract in describing the payment. The question must always be whether the construction contended for renders the agreement unconscionable and extravagant and one which no Court ought to allow to be enforced. It is impossible to lay down any abstract rule as to what may or may not be extravagant or unconscionable to insist upon, without reference to the particular facts and circumstances which are established in the individual case. The Court is to consider whether it is extravagant, exorbitant, or unconscionable at the time when the stipulation is made—that is to say, in regard to any possible amount of damages which may be conceived to have been within the contemplation of the parties when they made the contract (179). (*Lord Mersey*.) *WEBSTER v. BOSANQUET*.

(1912) 16 *C. W. N.* 697 = 16 *I. C.* 147 = 23 *M. L. J.* 177.

——Sale—Contract for—Earnest money—Forfeiture of, on breach by vendee.

Earnest money is part of the purchase price when the transaction goes forward; it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee.

Where, in a contract for the purchase of an estate, it appeared that the vendee paid a sum *in cumulo* for the earnest money and a portion of the price, *held*, that on a breach by

CONTRACT ACT (IX OF 1872), S. 74—(Contd.)

the vendee he was entitled to recover the latter portion of the amount but not that which represented the earnest money. (*Lord Shaw*.) *KUNWAR CHIRANJIT SINGH v. RAI BAHADUR HAR SWARUP*. (1925) 23 *L. W.* 172 = 3 *O. W. N.* 168 = (1926) *M. W. N.* 145 = 24 *A. L. J.* 248 = 94 *I. C.* 782 = *A. I. R.* 1926 *P. C.* 1 = 50 *M. L. J.* 629.

——Sale—Contract for—Earnest money—Forfeiture of, on breach by vendee—Agreement by vendor to forego—What amounts to.

One of the terms of a contract entered into by the plaintiff for the purchase of an estate from the defendant for the sum of 4 lakhs and 76,000 rupees was that Rs. 20,000 was to be paid as earnest money, that the balance of the price was to be paid in two moieties, the first being payable on the execution of the conveyance, and the last within 6 months. The plaintiff did not pay the earnest money *eo nomine*, but subsequently sent two cheques, amounting *in cumulo* to Rs. 1,65,000. The defendant accepted the sum and granted a receipt which stated that it was towards the sale price out of the consideration of Rs. 4,76,000. The plaintiff subsequently intimated his inability to purchase, and claimed the recovery of Rs. 1,65,000 paid by him.

Held, that the original contract was not superseded by the acceptance of the said sum of Rs. 1,65,000, by the defendant and the granting of the receipt by him to the effect stated, that in particular he did not agree to sacrifice the stipulated earnest, and that therefore the plaintiff was entitled to recover Rs. 1,45,000, but not the Rs. 20,000, the earnest money. (*Lord Shaw*.) *KUNWAR CHIRANJIT SINGH v. RAI BAHADUR HAR SWARUP*.

(1925) 23 *L. W.* 172 = 3 *O. W. N.* 168 = (1926) *M. W. N.* 145 = 24 *A. L. J.* 248 = 94 *I. C.* 782 = *A. I. R.* 1926 *P. C.* 1 = 50 *M. L. J.* 629.

——Sale—Contract for—Time fixed for completion of—Purchaser's default to complete within—Provisions in event of, in nature of penalty—What amount to—Vendor's right to enforce—Loss to him—Proof of—Necessity.

A suit brought by *G*, a mortgagee of properties appertaining to the estate of a deceased person, against, *inter alia*, the trustee for the liquidation of the debts of the deceased, to enforce the mortgage, was compromised on the terms, amongst others, that *G* should, at the request and by the direction of *B*, pay off certain other mortgages up to a particular amount, that the amount, so paid by *G* should be added to his mortgage claim and carry interest at 7 per cent. with quarterly rests, that upon *B* making a marketable title to the property, the title should be accepted by *G*, and the purchase should be completed within one month from the date of the compromise, and that, if such purchase was not completed within the aforesaid period, then the interest on the part of the principal moneys secured by the said mortgage and further charges, namely, Rs. 2,90,000, should cease to run and *G* should be deemed to be the owner of the property subject to the mortgage and charge aforementioned as well as all existing incumbrances on the property, and the whole of the said consideration money of Rs. 2,90,000 should *ipso facto* be set off against his claims under his mortgage and further charges.

Held, that the last provision was one in the nature of a penalty, and that *B* was not, in the absence of proof on his part of any loss to him as the result of the delay on the part of *G* in completing the purchase till after the expiry of the month fixed, entitled to refuse the conveyance tendered by *G*. (*Mr. Ameer Ali*.) *BANKU BEHARI DHUR v. GALSTAUN*.

(1922) 27 *C. W. N.* 77 = 31 *M. L. T.* 159 (*P. C.*) = (1922) *P. C.* 339 = 21 *A. L. J.* 9 = 9 *O. & A. L. R.* 237 = 69 *I. C.* 163 = 47 *M. L. J.* 145.

——Sale of land—Contract for, in consideration of sum then paid and of sums to be paid in instalments at stated periods—Default of purchaser in regard to any of

CONTRACT ACT (IX OF 1872), S. 74—(Contd.)

payments to be made—Forfeiture on, of amounts already paid by him—Provision for—Penalty—Relief from.

The predecessor in title of the appellants agreed by writing dated 9th December, 1909, to sell land to the predecessor in title of the respondents for a certain sum of money, of which a portion was paid on signing the agreement, and the balance was payable in annual instalments on December 1st in each year. The agreement further provided that on payment of the sums of money mentioned with interest, the vendor was to convey to the purchaser, who was to have possession on the execution of the agreement, the purchaser holding the premises as tenant to the vendor at a yearly rent equivalent to and applicable in satisfaction of the instalments. It was also provided that in case the purchaser should make default in any of the payments to be made the vendor should be at liberty, without notice, to cancel the agreement and declare it void, and to retain any payments made on account of it as and by way of liquidated damages, and to retain all improvements made on the premises, or else to proceed to another sale, any deficiency in price, with costs, charges and expenses to be borne by the purchaser. It was also provided that time was to be considered as of the essence of the agreement. The first deferred instalment, falling due on 1st December, 1910, was not paid. The appellant, thereupon, gave notice cancelling the agreement. The respondents, thereupon, on 21st December 1910, tendered the amount due, but the appellant declined to receive it.

In a suit brought by the respondents, claiming specific performance, and, in the alternative, relief from forfeiture under the terms of the agreement, *held*, that the stipulation that payments already made of instalments might, on forfeiture, be retained, was really a stipulation for a penalty, and that the respondents should be relieved from forfeiture of the sums paid by them under the agreement. (*Viscount Haldane.*) **STEEDMAN v. DRINKLE.**

(1915) 33 I. C. 323 = 85 L. J. (P. C.) 79.

—*Sale—Contract for, fixing amount to be paid by either party as damages in case of breach by him—Breach by purchaser and re-sale by vendor—Suit by vendor for damages in case of—Measure of damages—Right to recover amount fixed as penalty or liquidated damages—Right to recover only actual loss proved.*

A contract for the sale of immoveable property for the sum of Rs. 1,05,000, provided, *inter alia*, that the cost of stamp paper and registration was to be borne equally, that the purchasers were to pay Rs. 500 earnest money, and that "the party retracting from the contract shall pay Rs. 10,000 as pashemana (damages)."

The purchasers having broken the contract, the vendors re-sold the property to another person for Rs. 1,04,000, and instituted a suit against the purchasers, claiming the Rs. 10,000 and further damages. The only evidence of loss sustained by the plaintiffs was that of the loss on re-sale by Rs. 1,000. They remained in possession of the rents and profits of the property until re-sale, amounting, according to the evidence, to 450 to 500 rupees per mensem. They had received earnest money Rs. 500. They had also received for the value of the stamp paper realised after deducting commission charged in respect of the purchaser's contribution, Rs. 689-10.

With regard to the amount of the damages to which the plaintiffs were entitled, *held*, that the effect of S. 74 of the Contract Act was to disentitle the plaintiffs to recover simpliciter the sum of Rs. 10,000, whether penalty or liquidated damages, and that their actual damage on the evidence being Rs. 500 they were entitled only to that sum.

The vendors having remained in possession of the rents and profits of the property until re-sale, there was no ground for awarding them interest. The sum of Rs. 689 (the value

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of the stamp paper realised by the vendors after deducting commission charged in respect of the purchasers' contribution) the vendors held when the contract went off to the use of the purchasers, and the purchasers were in their cross-suit entitled to a decree for the said sum. (*Lord Atkin.*) **BHAI PANNA SINGH v. FIRM BHAI ARJAN SINGH, ETC.** (1929) 27 A. L. J. 791 = 33 C. W. N. 949 = 31 Bom. L. R. 909 = A. I. R. (1929) P. C. 179 = 57 M. L. J. 323.

—**S. 76—Company—Shares in—Sale of—Contract for—Certificates and blank transfers signed by registered holders of shares—Delivery of—Sufficiency of—Certificates and blank transfers so signed if "goods."** See COMPANY—SHARES IN—SALE OF—CONTRACT FOR.

(1926) 53 I. A. 92 (98) = 50 B. 360.

—**Chap. VII—Sale of goods.** See CONTRACT—GOODS—CONTRACT FOR SALE OF.

—**S. 83—Company—Shares in—Sale of unascertained—Certificates and blank transfers signed by registered holders obtained by vendor and delivered to and accepted by purchaser—Effect—Unpaid purchase-money—Vendor's remedy in respect of—Return of certificates and blank transfers—Suit for—Maintainability against transferee thereof from buyer.** See COMPANY—SHARES IN—SALE OF UN-ASCERTAINED. (1926) 53 I. A. 92 (98) = 50 B. 360.

—**Ss 94 and 49—Place of performance—"At any place in Bengal"—Earlier clause fixing—"To be mentioned hereafter"—Later clause stating—Place of delivery in case of—Purchaser's right to fix.** See CONTRACT ACT, SS. 49, 94.

(1896) 23 I. A. 119 = 24 C. 8.

—**S. 95—Seller's lien under—Possession condition precedent to—Company—Shares in—Sale of, by broker not himself a registered shareholder—Certificates and blank transfers signed by registered holder—Delivery to purchaser of—Unpaid purchase-money—Vendor's lien for, under S. 95 of the Contract Act, in such case.** See COMPANY—SHARES IN—SALE OF, BY BROKER NOT HIMSELF A REGISTERED HOLDER OF SHARES.

(1923) 53 I. A. 92 (97) = 50 B. 360.

—**Ss. 99 and 100—Sale of goods F.O.B. (Free on Board)—Stoppage in transitu—Seller's right of—Mate's receipt—Non-delivery by seller of—Effect—Delivery on board vessel chosen by purchaser—Acceptance by seller of bills drawn by buyer for price of goods—Effect.**

B. & Co. bought of T. & Co. in the City of London 100 tons of British pig lead "free on board" to be paid for by acceptances, at six months, upon delivery on board, or in cash at 2 per cent. discount, at the option of the sellers. The lead was delivered on board, and receipts taken by the lighterman, from the mate of the vessel, which vessel was chosen by B. & Co. The sellers elected to be paid by acceptances at six months, which they immediately received from the purchasers, and the latter having failed soon after, both after they accepted the bill and after the master of the vessel had signed bills of lading, the question arose whether those goods were *in transitu*, so as to give T. & Co. a right of stoppage, or were completely vested in the purchasers, B. & Co., and their assignees under the bill of lading.

It was proved that when goods were sold in London, "free on board," the cost of shipping them fell on the seller, but the buyer was considered the shipper. T. & Co. contended that the mate's receipt not having been given up by them to B. & Co., the delivery was not completed and was imperfect, the transaction was not finished, and the transitus not determined.

Held that, on the delivery of the goods on board the vessel, they were no longer *in transitu*, so as to be stopped by the sellers.

T. & Co. ought to have delivered the mate's receipt, they were in the wrong in not doing so, and they could not avail

CONTRACT ACT (IX OF 1872), Ss. 99 and 100—
(Contd.)

themselves of their own wrong against the other party, whom they had injured; and could not be heard to set up the possession of the receipts against the purchaser of the goods.

Further, the taking a receipt is a mere accident, not essential to the transaction between the buyer and seller, however good for binding a third party, the ship owner or his captain and mate. The taking an acceptance equivalent to the stipulated price according to the contract, which was by the contract only to be given by the purchaser on the delivery of the goods, and to be given for each parcel as delivered, at once shows that the delivery was completed, that nothing remained to be done, that the goods had reached their journey's end, and that they were no longer *in transitu* to be stopped. The question in all the cases between the buyer and seller is whether, or not, anything remained to be done as between these two parties, and in this case nothing whatever remained to be done. (*Lord Brougham.*) *COWASJEE v. THOMPSON.*

(1845) 3 M. I. A. 422 =

5 Moo. P.C. 165 = 1 Sar. 298.

S. 102—Effect of.

The effect of S. 102 of the Contract Act may be stated as follows:—First, so far as bills of lading are concerned, it enacts the rule of the common law by which a second buyer who obtained an assignment of the bill of lading obtained constructive delivery of the goods represented by the bill, so that the vendor's right of stoppage ceased. Secondly, so far as other documents of or showing title to the goods are concerned, it makes their assignment to a second buyer have the same effect as the assignment of a bill of lading (169-70). (*Lord Parker.*) *RAMDAS VITHALDAS DURBAR v. S. AMEERCHAND & CO.*

(1916) 43 I. A. 164 =

40 B. 630 (635) = 18 Bom. L.R. 670 =

20 C.W.N. 1182 = 24 C.L.J. 820 = 14 A.L.J. 1045 =

(1916) 2 M.W.N. 110 = 20 M.L.T. 194 =

4 L.W. 342 = 35 I.C. 954 = 31 M.L.J. 541.

Ss. 102, 103, 108 and 178—Document of title.

Bill of lading—Other documents of title—Distinction between—Assignment—Effect—Distinction as regards.

The only point in which a bill of lading differs from other "documents of title" is that its assignment, whether upon a re-sale or by way of pledge, operates as a constructive delivery of the goods to which it refers. There is no other document with this peculiarity (171). (*Lord Parker.*) *RAMDAS VITHALDAS DURBAR v. S. AMEERCHAND & CO.*

(1916) 43 I. A. 164 = 40 B. 630 =

18 Bom. L.R. 670 = 20 C.W.N. 1182 = 24 C.L.J. 820 =

35 I.C. 954 = 14 A.L.J. 1045 =

(1916) 2 M.W.N. 110 = 20 M.L.T. 194 = 4 L.W. 342 =

31 M.L.J. 541.

Document showing title—Text to find out whether a document is a.

Whenever any doubt arises as to whether a particular document is a "document showing title" or a "document of title" to goods for the purposes of the Indian Contract Act, the test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or delivery, the possessor of the document to transfer or receive the goods thereby represented (169). (*Lord Parker.*) *RAMDAS VITHALDAS DURBAR v. S. AMEERCHAND & CO.*

(1916) 43 I.A. 164 =

40 B. 630 (634) = 18 Bom. L.R. 670 =

20 C.W.N. 1182 = 24 C.L.J. 820 = 14 A.L.J. 1045 =

(1916) 2 M.W.N. 110 = 20 M.L.T. 194 = 4 L.W. 342 =

35 I.C. 954 = 31 M.L.J. 541.

Document showing title—Instrument of title—Meaning of.

CONTRACT ACT (IX OF 1872), Ss. 102 103, 108, 178—Document of title—(Contd.)

Little importance can be attached to the fact that one section of the Contract Act employs the word "document" and the other the word "instrument," more especially as the use of the two expressions "document showing title" and "document of title" in the same sense shows that the draftsman was not very careful in his use of language (171-2). (*Lord Parker.*) *RAMDAS VITHALDAS DURBAR v. S. AMEERCHAND & CO.*

(1916) 43 I.A. 164 =

40 B. 630 (638) = 18 Bom. L.R. 670 =

20 C.W.N. 1182 = 24 C.L.J. 820 = 14 A.L.J. 1045 =

(1916) 2 M.W.N. 110 = 20 M.L.T. 194 = 4 L.W. 342 =

35 I.C. 954 = 31 M.L.J. 541.

Ss. 103 and 178—Instrument of title—Document of title—Title in both expressions relates to what.

The word "title" in both the expressions "document of title" and "instrument of title" can relate only to the right to receive delivery of the goods to which the instrument or document relates. It can have nothing to do with ownership (171). (*Lord Parker.*) *RAMDAS VITHALDAS DURBAR v. S. AMEERCHAND & CO.*

(1916) 43 I.A. 164 =

40 B. 630 = 18 Bom. L.R. 670 = 20 C.W.N. 1182 =

24 C.L.J. 820 = 14 A.L.J. 1045 = (1916) 2 M.W.N. 110 =

20 M.L.T. 194 = 4 L.W. 342 = 35 I.C. 954 =

31 M.L.J. 541.

Ss. 108 and 178—Scope of.

Ss. 108 and 178 of the Contract Act, though they very possibly extend, at least cover the same ground as the provisions of the Indian Act XX of 1844, which, with certain modifications not material for the purposes of this appeal, made the provisions of the English Factors Act, 1842, applicable to British India (168-9). (*Lord Parker.*) *RAMDAS VITHALDAS DURBAR v. S. AMEERCHAND & CO.*

(1916) 43 I. A. 164 = 40 B. 630 = 18 Bom. L.R. 670 =

20 C.W.N. 1182 = 24 C.L.J. 820 = 14 A.L.J. 1045 =

(1916) 2 M.W.N. 110 = 20 M.L.T. 194 = 4 L.W. 342 =

35 I.C. 954 = 31 M.L.J. 541.

S. 121—Company—Shares in—Sale of—Passing of property on—Bombay Stock Exchange Rules—Rule (c) of—Scope and effect of. See COMPANY—SHARES IN—SALE OF—PASSING OF PROPERTY ON.

(1926) 53 I.A. 92 (99) = 50 B. 360.

Stipulation referred to in—Must be express—Contract for sale of shares—Nature of—Nothing proved to contrary.

The stipulation referred to in S. 121 of the Contract Act must be an express stipulation (97).

Where, therefore, in a contract for the sale of shares, nothing was proved to the contrary, *held*, that it must be presumed that the contract was an ordinary contract for the sale of shares effected by bought and sold notes (96-7). (*Viscount Dunedin.*) *MANECKJI PESTONJI BHARUCHA v. WADILAL SARABHAI & CO.*

(1926) 53 I.A. 92 =

50 B. 360 = 24 A.L.J. 657 = 28 Bom. L.R. 777 =

43 C.L.J. 508 = (1926) M.W.N. 499 = 30 C.W.N. 890 =

A.I.R. 1926 P.C. 38 = 94 I.C. 824 = 51 M.L.J. 1.

Ss. 124 to 126—Guarantee. See CONTRACT—GUARANTEE.

Ss. 126 to 147—Surety. See SURETY.

Chap. IX—Applicability—Common carriers. See COMMON CARRIERS—LAW APPLICABLE TO.

S. 151—Sudden emergency—Duty required of a man in a—Standard of—Negligence on his part—What amounts to.

Good sense and the policy of the law impose some limit upon the amount of care, skill and nerve which are required of a person in a position of duty, who has to encounter a sudden emergency. What is to be required of a man who

CONTRACT ACT (IX OF 1872), S. 151—(Contd.)

finds himself in a sudden emergency, however that emergency has been brought about? In a moment of extreme peril and difficulty you are not to expect perfect presence of mind, accurate judgment, and promptitude. If a man is suddenly put in an extremely difficult position and a wrong order is given by him, it ought not in the circumstances to be attributed to him as a thing done with such want of nerve and skill as to amount to negligence. If in a sudden emergency a man does something which he might, as he knew the circumstances, reasonably think proper, he is not to be held guilty of negligence, because, upon review of the facts, it can be seen that the course he had adopted was not in fact the best (8-9). (*Sir Walter Phillimore.*) **DWARKANATH RAIMOHAN CHAUDHURI v. RIVERS STEAM NAVIGATION CO.** (1917) 8 L. W. 4 = 20 Bom. L. R. 735 = 23 M. L. T. 376 = (1918) M. W. N. 435 = 27 C. L. J. 615 = 46 I. C. 319.

—**Ss. 151, 152—Shipowner—Liability of, on consignee's neglect to take delivery in due course—Nature of.**

When the consignee of goods neglects to take delivery in due course, the liability of the Shipping Company under the bills of lading ceases, and its responsibility thereafter is that of an ordinary bailee, the limits of whose responsibility are defined in Ss. 151 and 152 of the Contract Act (6). (*Sir Walter Phillimore.*) **DWARKANATH RAIMOHAN CHAUDHURI v. RIVERS STEAM NAVIGATION CO.**

46 I. C. 319 = (1917) 8 L. W. 4 = 20 Bom. L. R. 735 = (1918) M. W. N. 435 = 27 C. L. J. 615 = 23 M. L. T. 376.

—**Shipowner—Lighter manned by labourers—Letting of, to another shipowner—Negligence of labourers during period of letting—Loss of lighter due to—Liability for.**

Appellants and respondents were shipowners, and one was in the habit of letting lighters to the other. The appellants let on hire to the respondents a lighter. Part of the agreement was that the lighter should be manned by two lighter-boys, that is, coloured labourers. The coloured labourers were, from the moment of the transfer, out of the control of the appellants, and subject to the orders and under the control of the respondents. While the lighter was in the harbour for a night during the period of letting, both of the labourers decamped, forsaking the duties which they were bound to perform, *viz.*, taking charge of the barge. The consequence was that the barge, having parted her moorings, drifted with the current out of the harbour, and subsequently ran ashore and broke up before she could be solved. In a suit brought by the appellants for the value of the lighter which became a total loss, *held*, that the respondents were liable for the loss.

From the moment of the letting, the lighter and the labourers went out of the appellants, and it is unreasonable to suggest that this control only lasted while the active work of lighterage was being carried on; and the suggestion that the lighter-boys passed into the control of the respondents during that active lighterage, but out of the control and back into the service of the appellants when the ship was tied up for the night, seems to have nothing to commend it. The sense, as well as the law, of the position is that during the entire period of hiring the barge had to be watched over by the bailee, and it was the bailee's duties to keep an eye upon the labourers, or to furnish others so that the chattel might not be lost. (*Lord Shaw.*) **BULL & CO. v. WEST AFRICAN SHIPPING & CO.** (1927) 47 C. L. J. 258 =

A. I. R. 1927 P. C. 173 = 4 O. W. N. 737 = 104 I. C. 113 = 96 L. J. P. C. 127.

—**Ss. 172 to 179—Pledge. See PLEDGE.**

—**Chap. X—Agency. See PRINCIPAL AND AGENT.**

—**Ss. 190 to 195—Sub-Agent. See BROKER—UNDER-BROKER AND ALSO PRINCIPAL AND AGENT—AGENT—SUB-AGENT.**

CONTRACT ACT (IX OF 1872),—(Contd.)

—**Ss. 196 to 200—Ratification. See RATIFICATION.**

—**Chap. XI—Partnership. See PARTNERSHIP.**

—**Chap. XI—Not exhaustive of law as to partnership.**

Fasciculus of sections in Chapter XI is not exhaustive of all questions which can be raised in connection with partnership. (*Viscount Dunedin.*) **JWALA DUTT v. BANSILAL MOTILAL.** (1929) 27 A. L. J. 579 = 49 C. L. J. 485 =

31 Bom. L. R. 687 = 115 I. C. 707 =

A. I. R. (1929) P. C. 132 = 56 M. L. J. 739 (749-50).

—**S. 247—Share of minor—Meaning of.**

The share of the minor of which S. 247 of the Contract Act speaks is no more than a right to participate in the property of the firm after its obligations have been satisfied (116). (*Sir Lawrence Jenkins.*) **SANYASI CHARAN MANDAL v. KRISHNADHAN BANERJI.**

16 L. W. 536 = (1922) 49 I. A. 108 = 49 C. 560 (570) =

30 M. L. T. 228 = 20 A. L. J. 409 =

24 Bom. L. R. 700 = 35 C. L. J. 498 =

67 I. C. 124 = (1922) M. W. N. 364 = 26 C. W. N. 954 =

A. I. R. (1922) P. C. 237 = 43 M. L. J. 41.

CONTRACTOR.

—**Dangerous articles—Installation of—Duty in case of—Negligence—Accident due to—Liability for. See DANGEROUS ARTICLES.** (1909) 14 C. W. N. 158 (163-4).

CONTRIBUTION.

—**Co-owners—Contribution between. See CO-SHARERS—CONTRIBUTION BETWEEN.**

—**Co-Sharers—Contribution between. See CO-SHARERS—CONTRIBUTION BETWEEN.**

—**Debt—Recovery of entire—Suit for, on foot of plaintiff being only a surety—Contribution on foot of plaintiff being really a co-debtor—Relief for—Grant of. See MORTGAGE—MORTGAGOR—CO-MORTGAGORS.**

(1906) 33 I. A. 81 = 28 A. 482 (487).

—**Hindu Law—Joint family—Debt joint due by—Partition agreement apportioning—Member paying more than his share of debt—Contribution against others. See HINDU LAW—JOINT FAMILY—DEBT JOINT DUE BY.**

(1837) 1 M. I. A. 366.

—**Money decree—Parties liable inter se in stated shares for—Payments by, in various amounts at different dates extending over a series of years, to discharge decree—Contribution among persons paying—Interest—Calculation of—Principle.**

Where in a suit for contribution between parties who were liable *inter se* in stated shares to satisfy a decree for money, and who had satisfied it by contributory payments in various amounts at different dates extending over a series of years, the final inequality which it was sought to remedy arose by reason of the fact that the payments which stopped *pro tanto* the running of interest on the decretal amount operated for the benefit of those who had not made them as well as those who had:—

Held that this inequality had been satisfactorily adjusted by crediting each party with his separate payments and with interest thereon to the date of final satisfaction of the decree, and then comparing the total with his stated share of the aggregate amount so credited. That aggregate amount represented for purposes of contribution the total aggregate cost at which *inter se* the common debt had been liquidated. (*Lord Collins.*) **GURU PRASANNA LAHIRI v. JOTINDRA MOHUN LAHIRI.** (1907) 35 I. A. 32 =

35 C. 303 = 4 M. L. T. 135 = 7 C. L. J. 454.

CONVERSION.

—**Deceased—Conversion of goods of—Suit for—Legacies bequeathed by her—Suit subsequent for payment of—Maintainability—Subject-matter of two suits—Same.**

CONVERSION—(Contd.)

A prior suit for the wrongful conversion of goods appertaining to the estate of a deceased person is no bar to a subsequent suit brought to obtain payment of legacies bequeathed by her, there being no claim in respect of any of the goods to which the prior suit related. The causes of action in the two suits are not the same (224). (*Sir John Edge.*) VENKATADRI APPA RAO v. PARTHASARATHY APPA RAO. (1925) 52 I. A. 214=48 M. 312=23 A. L. J. 261=6 L. R. P. C. 82=27 Bom. L. R. 823=(1925) M. W. N. 441=3 Pat. L. R. 208=29 C. W. N. 989=A. I. R. 1925 P. C. 105=87 I. C. 324=48 M. L. J. 627.

——Meaning of. See LIMITATION ACT OF 1908—ART. 48—APPLICABILITY. (1928) 56 I. A. 93 (100-1)=56 M. L. J. 517.

——Pledgee of goods—Liability of, for conversion. See UNDER—PLEDGE.

——Several things—Conversion of—Suit to recover one thing—Subsequent suit to recover another—If barred.

In the case of one conversion of several things, the act of conversion of the several things is one cause of action, and you cannot bring an action for the conversion of one of the things, and a separate action for the conversion of another. The conversion of the whole is one claim and one cause of action (119). (*Sir Barnes Peacock.*) RAJAH OF PITTAPUR v. VENKATA MAHIPATI SURYA.

(1885) 12 I. A. 116=8 M. 520=4 Sar. 638.

CONVERTS.

——Christianity—Converts to—Class of—Change of—Permissibility.

The law does not prohibit a Christian convert from changing his class (244).

If a family of converts retain the customs in part of their unconverted predecessors, is that election of theirs invariable and inflexible? Can neither they nor their descendants change things in their very nature variable, as dependent on the changeable inclinations, feelings, and obligations of successive generations of men? If the spirit of an adopted religion improves those who become converts to it, and they reject, from conscience, customs to which their first converted ancestors adhered, must the abandoned usages be treated by a sort of *fictio juris* as still the enduring customs of the family? If it be not so as to things which belong to the jurisdiction of conscience, is it so as to things of convenience or interest? Surely, in things indifferent in themselves, the Tribunals which have a discretion and have no positive *lex fori* imposed on them should rather proceed on what actually exists than on what has existed, and informing their own presumptions have regard rather to a man's own way of life than to that of his predecessors. Though race and blood are independent of volition, usage is not (243-4). (*Lord Kingsdown.*) ABRAHAM v. ABRAHAM.

(1863) 9 M. I. A. 195=1 W. R. 1 P. C.=1 Suth. 501=2 Sar. 10.

——Christianity—Converts to—Class of—Change of, from Native Christian to East Indian—Permissibility—Proof.

Held that it was competent to the deceased Mathew Abraham, though himself both by origin and actually in his youth a "Native Christian," following the Hindoo laws and customs on matters relating to property, to change his class of Christian, and become of the Christian class to which his wife belonged, viz., the class of East Indians. Held further, on the evidence, that he did so become a Christian of the East Indian class (244). (*Lord Kingsdown.*) ABRAHAM v. ABRAHAM. (1863) 9 M. I. A. 195=

1 W. R. 1 P. C.=1 Suth. 501=2 Sar. 10.

——Christianity—Converts to—Classes of—Native Christians—East Indians—Customs and usages of—Distinction,

CONVERTS—(Contd.)

The class known in India as "Native Christians", using that term in its wide and extended sense as embracing all natives converted to Christianity, has subordinate divisions forming again distinct classes, of which some adhere to the Hindu customs and usages as to property; others retain those customs and usages in a modified form; and others again have wholly abandoned those customs and usages, and adopted different rules and laws as to their property. Of this latter class are the "East Indians," a class well-defined in India, the members of which follow in all things the usages and customs of the English resident there, and though they cannot claim the exemption from jurisdiction, nor the privilege of a personal law, which the British subjects, in the limited sense of the term of the jurisdiction of the Charters of the Supreme courts, enjoy, in other respects, in the common bond of union in religion, customs, and manners, approach the class of British subjects (240-1). (*Lord Kingsdown.*) ABRAHAM v. ABRAHAM.

(1863) 9 M. I. A. 195=1 W. R. 1 P. C.=1 Suth. 501=2 Sar. 10

——Christianity—Converts to—East Indians—Joint Family of Hindu Law unknown to.

In an East Indian family the undivided family union in the Hindoo law sense of the term is unknown (244). (*Lord Kingsdown.*) ABRAHAM v. ABRAHAM.

(1863) 9 M. I. A. 195=1 W. R. P. C. 1=1 Suth. 501=2 Sar. 10.

——Christianity—Converts to—East Indians—Self-acquisition of one of—Share in—Claim by his brother to—Agreement or consent amounting to agreement to give such share—Proof by claimant of—Necessity.

Where among the East Indian class of Christian converts, the defendant, a brother of the deceased, claimed a share in property acquired by the deceased, with the aid of a nucleus which was his separate, unaided acquisition, unaided either by funds or labour of the defendant, held that the *onus* was on the defendant to prove an agreement, or consent amounting to an agreement, between him and the deceased, to give the former the share claimed (246). (*Lord Kingsdown.*) ABRAHAM v. ABRAHAM.

(1863) 9 M. I. A. 195=1 W. R. 1 P. C.=1 Suth. 501=2 Sar. 10.

——Christianity—Hindu Convert to. See HINDU—CONVERSION TO CHRISTIANITY.

——Mahomedanism—Hindu Convert to. See HINDU—CONVERSION TO MAHOMEDANISM.

——Mahomedanism—Hindu family converted to. See HINDU FAMILY—CONVERSION TO MAHOMEDANISM.

CONVEYANCE.

——Law of, in England.

The Law of Conveyance in England depends on special and complicated considerations (254). (*Lord Buckmaster.*) TILAKDHARI LAL v. KHEDAN LAL.

(1920) 47 I. A. 239=48 C. 1 (21)=25 C. W. N. 49=32 C. L. J. 479=13 L. W. 161=(1920) M. W. N. 591=28 M. L. T. 224=18 A. L. J. 1074=2 P. L. T. 101=22 Bom. L. R. 1319=57 I. C. 465=39 M. L. J. 243.

——Style—Common words of—Meaning to be attached to, when not mere words of surplusage.

Common words of style used in conveyances of any sort may be, and often are, words of surplusage, but when they are not words of surplusage they must be given the proper effect of their own meaning (114-5). (*Lord Dunedin.*) SATYA NIRANJAN CHAKRAVARTI v. RAM LAL KAVIRAJ.

(1924) 52 I. A. 109=4 P. 244=6 P. L. T. 42=21 L. W. 289=29 C. W. N. 725=27 Bom. L. R. 753=23 A. L. J. 712=A. I. R. 1925 P. C. 42=86 I. C. 289=48 M. L. J. 328.

CONVEYANCE—(Contd.)

—*Art of, of very simple character in India.*

In India the art of conveyancing has been and is of a very simple character (133). (*Sir Richard Couch.*) GOKULDOSS GOPALDOSS *v.* RAMBUX SEOCHAND.

(1884) 11 I. A. 126 = 10 C. 1035 (1045-6) = 5 Sar. 543.

—In Rambux *v.* Seochand (11 I. A. 126) this Board observed that "In India the art of conveyancing has been and is of a very simple character." What this Board said in 1884 as to the art of conveyancing in India, and the practice in such cases, is true as to the art of conveyancing and the practice in such cases at the present day. (*Sir John Edge.*) MAHOMED IBRAHIM HOSSEIN KHAN *v.* AMBIKA PRASAD SINGH. (1912) 39 I. A. 68(81) =

39 C. 527 (555) = (1912) 1 M.W.N. 367 =

11 M.L.T. 265 = 9 A.L.J. 332 = 14 Bom. L.R. 280 =

16 C.W.N. 505 = 15 C.L.J. 411 = 14 I.C. 496 =

22 M.L.J. 468.

—*Art of, very little known or understood in country parts of India.*

The art of conveyancing is but little understood in the country parts of India. (*Sir John Edge.*) GULABSINGH *v.* SETH GOKULDAS. (1913) 40 I.A. 117 (125) =

40 C. 784 (797) = 17 C.L.J. 619 = 15 Bom. L. R. 613 =

17 C.W.N. 918 = (1913) M.W.N. 542 = 14 M.L.T. 55 =

19 I. C. 521 = 9 N.L.R. 117 = 25 M.L.J. 179.

—At least outside the Presidency towns of Calcutta, Madras and Bombay, the art of conveyancing is but little understood in India, and the drafting of documents, including wills, is generally of a very simple and inartificial character. (*Sir John Edge.*) SASIMAN CHOWDHURAIN *v.* SHIB NARAYAN CHOWDHURY.

(1921) 49 I.A. 25 (35-6) = 1 P. 305 (316) =

15 L. W. 434 = 26 C.W.N. 425 = 20 A.L.J. 362 =

35 C.L.J. 427 = 24 Bom. L.R. 576 = (1922) M.W.N. 368 =

A.I.R. 1922 P. C. 63 = 3 Pat. L.R. 133 =

30 M.L.T. 242 = 66 I. C. 193 = 42 M.L.J. 492.

—*Mortgages—Art in regard to—Little known in India before T. P. Act.*

The art of conveyancing was in 1869 and in 1878 little, if at all, understood in India, except possibly by some English solicitors practising in the Presidency towns and the mortgages in question were made before the Transfer of Property Act of 1882 came into force, and afforded some information as to how mortgages of immovable property should be framed (162.) (*Sir John Edge.*) ABID HUSAIN KHAN *v.* KANIZ FATIMA. (1924) 51 I. A. 157 =

46 A. 269 = A.I.R. 1924 P.C. 102 =

10 O. & A.L.R. 281 = 22 A. L. J. 284 = 34 M.L.T. 78 =

19 L.W. 703 = 27 O.C. 72 = 11 O. L. J. 427 =

29 C.W.N. 214 = (1924) M.W.N. 657 = 80 I.C. 1019.

—*System of, in India—Not uniform or accurate or artificial.*

In India there is no uniform or accurate system of conveyancing, and deeds and wills are as a rule most inartificially drawn up, frequently by persons not possessed of legal knowledge. (*Sir John Edge.*) MOHAMMAD ABDUL GHANI *v.* FAKHR JAHAN BEGAM.

(1922) 49 I.A. 195 (207-8) = 44 A. 301 (313-4) =

25 O. C. 95 = 31 M.L.T. 21 = 9 O.L.J. 369 =

27 C.W.N. 53 = 24 Bom. L.R. 1268 = 20 A.L.J. 994 =

A.I.R. 1922 P.C. 281 = 37 C.L.J. 1 = 68 I.C. 254 =

43 M.L.J. 453.

CO-OWNERS.

—See CO SHARERS.

COPYRIGHT.

—See ALSO COPYRIGHT ACT.

COPYRIGHT—(Contd.)

—*Author—Abridgment of work of—What amounts to.*

An abridgment of an author's work means a statement designed to be complete and accurate of the thoughts, opinions and ideas by him expressed therein, but set forth much more concisely in the compressed language of the abridger. A publication the text of which consists of a number of detached passages selected from an author's work, often not contiguous, but separated from those which precede and follow them by considerable bodies of print knit together by a few words so as to give these passages, when reprinted, the appearance as far as possible of a continuous narrative, is not an abridgment at all. The learning, judgment, literary taste and skill requisite to compile properly and effectively an abridgment deserving that name would not be at all needed merely to select such scraps as these taken from an author and to print them in a narrative form. (*Lord Atkinson.*) MACMILLAN & CO., LTD. *v.* COOPER.

(1923) 51 I.A. 109 (116) = 48 B. 308 =

A. I.R. 1924 P.C. 75 = 19 L.W. 299 =

26 Bom. L. R. 292 = (1924) M.W.N. 308 =

28 C.W.N. 613 = 22 A.L.J. 471 = 2 Pat. L.R. 137 =

83 I.C. 101 = 46 M.L.J. 637.

—*Author—Select passages from work of—Reprint of—Copyright in regard to—Right of.*

The conclusion is not correct that a publication the text of which consists merely of a reprint of passages selected from the work of an author can never be entitled to copyright. For instance, it may very well be that in selecting and combining for the use of schools or Universities passages of a scientific work in which the lines of reasoning are so closely knit and proceed with such unbroken continuity that each later proposition depends in a great degree for its proof or possible appreciation upon what has been laid down or established much earlier in the book, labour, accurate scientific knowledge, sound judgment touching the purpose for which the selection is made, and literary skill would all be needed to effect the object in view. In such a case copyright might well be acquired for the print of the selected passages. (*Lord Atkinson.*) MACMILLAN & CO. LTD., *v.* COOPER.

(1923) 51 I.A. 109 (118) = 48 B. 308 =

A.I.R. 1924 P. C. 75 = 19 L.W. 299 =

26 Bom. L.R. 292 = (1924) M.W.N. 308 =

28 C.W.N. 613 = 22 A.L.J. 471 = 2 Pat. L.R. 137 =

83 I.C. 101 = 46 M.L.J. 637.

—*Book—Notes to—Copyright in.*

To be entitled to copyright in the notes added to a compilation, the notes must exhibit an addition to the work which is not superficial or colorable, but imparts to the book a true and real value over and above that belonging to the text. This value may perhaps be rightly expressed by saying that the book will procure purchasers in the market on special account of these notes. (*Lord Atkinson.*) MACMILLAN & CO., LTD., *v.* COOPER.

(1923) 51 I. A. 109 (126) = 48 B. 308 =

A. I. R. 1924 P. C. 75 = 19 L. W. 299 =

26 Bom. L. R. 292 = (1924) M. W. N. 308 =

28 C. W. N 613 = 22 A. L. J. 471 = 2 Pat. L R. 137 =

83 I. C. 101 = 46 M. L. J. 637.

—*Nature of—Statutory right.*

S. 31 of the Copyright Act, 1911, provides that no person shall be entitled to copyright or any similar right in any literary, dramatic, musical or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of this statute or any other statutory enactment for the time being in force. Copyright is therefore a statutory right. (*Lord Atkinson.*) MACMILLAN & CO., LTD., *v.* COOPER. (1923) 51 I. A. 109 (118) =

48 B. 308 = A. I. R. 1924 P. C. 75 = 19 L. W. 299 =

COPYRIGHT—(Contd.)

26 Bom. L. R. 292 = (1924) M. W. N. 308 =
28 C. W. N. 613 = 22 A. L. J. 471 = 2 Pat. L. R. 137 =
83 I. C. 101 = 46 M. L. J. 637.

—Product from raw material—Copyright in—Condition—Quality or character differentiating product from raw material—Necessity.

It is product of the labour, skill and capital of one which must not be appropriated by another, not the elements, the raw material, if one may use the expression, upon which the labour and skill and capital of the first have been expended. To secure copyright for this product it is necessary that the labour, skill and capital expended should be sufficient to impart to the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material. (*Lord Atkinson.*) *MACMILLAN & CO., LTD. v. COOPER.*

(1923) 51 I. A. 109 (119) = 48 B. 308 =
A. I. R. 1924 P. C. 75 = 19 L. W. 299 =
26 Bom. L. R. 292 = (1924) M. W. N. 308 =
28 C. W. N. 613 = 22 A. L. J. 471 = 2 Pat. L. R. 137 =
83 I. C. 101 = 46 M. L. J. 637.

—Selections from translation of *Plutarch's Life of Alexander*—Notes to—Copyright in text of the book and in the notes appended to it—Conditions.

The appellants claimed to be entitled to the copyright of a certain book entitled "*Plutarch's Life of Alexander—Sir Thomas North's Translation, edited for Schools by H. W. M. Parr, M.A.*" The text of the book consisted of a number of detached passages, selected from Sir Thomas North's Translation, words being in some instances introduced to knit the passages together so that the text should, as far as possible, present the form of an unbroken narrative. The passages so selected were, in the original translation, by no means contiguous. Considerable printed matter in many instances separated the one from the other. Notes bearing upon the text were appended to the book. The question for decision was whether the appellants were entitled to a copyright in the text of their book and in those notes attached to it.

It was found that it did not require great knowledge, sound judgment, literary skill or taste to be brought to bear upon the translation, as the passages of the translation which had been selected were reprinted in their original form, not condensed, expanded, modified or re-shaped to any extent whatever. With respect to the notes, on the other hand, it was found that they were neither trifling in their nature nor useless; that they made the book more attractive, the study of it more interesting and informing, enhanced its efficiency and consequently increased its value as an educational manual; and that the notes must have required for the framing of their classical knowledge, literary skill and taste, labour and sound judgment as to what was fitting and useful to be brought to the notice of school-boys and students about to enter the University.

Held, that the appellants were not entitled to a copyright in the text of their book, but that they were entitled to a copyright in the notes. (*Lord Atkinson.*) *MACMILLAN & CO., LTD. v. COOPER.*

(1923) 51 I. A. 109 =
48 B. 308 = A. I. R. 1924 P. C. 75 = 19 L. W. 299 =
26 Bom. L. R. 292 = (1924) M. W. N. 308 =
28 C. W. N. 613 = 22 A. L. J. 471 = 2 Pat. L. R. 137 =
83 I. C. 101 = 46 M. L. J. 637.

COPYRIGHT ACT (III OF 1911).

(See also COPYRIGHT.)

—Book or other compilation—Copyright in—Knowledge, labour, etc., to be bestowed upon composition—Nature of, necessary.

What is the precise amount of the knowledge, labour, judgment or literary skill or taste which the author of any book or other compilation must bestow upon its composition

COPYRIGHT ACT (III OF 1911)—(Contd.)

in order to acquire copyright in it within the meaning of the Copyright Act of 1911 cannot be defined in precise terms. In every case it must depend largely on the special facts of that case, and must in each case be very much a question of degree. (*Lord Atkinson.*) *MACMILLAN & CO., LTD. v. COOPER.*

(1923) 51 I. A. 109 (125) = 48 B. 308 =
A. I. R. 1924 P. C. 75 = 19 L. W. 299 =
26 Bom. L. R. 292 = (1924) M. W. N. 308 =
28 C. W. N. 613 = 22 A. L. J. 471 = 2 Pat. L. R. 137 =
83 I. C. 101 = 46 M. L. J. 637.

—S. 1 (1)—Original literary work—Meaning of.

The word 'original' in S. 1, sub-s. (1) of the Copyright Act of 1911 does not, in the expression "original literary work" in that sub-section, mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought; and, in the case of 'literary work,' with the expression of thought in print or writing. The originality which is required relates to the expression of thought; but the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—that it should originate from the author. (*Lord Atkinson.*) *MACMILLAN & CO., LTD. v. COOPER.*

(1923) 51 I. A. 109 (125) =
48 B. 308 = A. I. R. 1924 P. C. 75 = 19 L. W. 299 =
26 Bom. L. R. 292 = (1924) M. W. N. 308 =
28 C. W. N. 613 = 22 A. L. J. 471 = 2 Pat. L. R. 137 =
83 I. C. 101 = 46 M. L. J. 637.

CORPORATION.

(See also COMPANY.)

—Inspection of books of—Member's right of—Nature of—Common Law.

On the application of a member of a corporation, the King's Bench Division will, in general, grant a rule for a limited inspection of the documents of the corporation, if it be shewn that such inspection is requisite with reference either to an action then instituted or at least to some specific dispute or question pending in which the applicant is interested; but, even in this case, the inspection will be granted to such an extent only as may be necessary for the particular occasion. The rule was formerly sometimes laid down more broadly, and the language ascribed to the court in one or two cases might almost lead to the inference that members of a corporation have an absolute right, whenever they think fit, to inspect all papers belonging to the aggregate body. But any such doctrine is now exploded; and the privilege of inspection is now confined to cases where the member of the corporation has in view some definite right or object of his own, and to those documents which would tend to illustrate such right or object. (*Lord Atkinson.*) *BANK OF BOMBAY v. SULEMAN SOMJI.*

(1908) 35 I. A. 130 (136) =
32 B. 466 (476-7) = 4 M. L. T. 16 = 8 C. L. J. 103 =
12 C. W. N. 825 = 10 Bom. L. R. 636 = 5 A. L. J. 463 =
18 M. L. J. 355.

—Principal officer of. See C.P.C. OF 1908, O. 29.

—Vis major—Rain unusual—Damage caused by—Liability for—Negligence of Corporation—Lower Canada—Law in. See NEGLIGENCE—VIS MAJOR.

(1922) 32 M. L. T. 36 (P.C.).

CORRODY.

—Meaning of.

"Corrody" is not a very happy translation of the Sanskrit word "Nibandha". Corrody is a word of mediæval origin, properly signifying a peculiar right, viz., the grant by the royal or other founder of an abbey of certain allowances out of the revenues of the abbey in favour of a defendant or servant (51). (*Sir James Colville.*) *MAHARANA FATTEHSANGJI JASWATSANGJI v. DESSAI KALLIANRAJI HEKOO-MUTSANGJI.*

(1873) 1 I. A. 34 = 21 W. R. 175 =
10 B. H. C. R. 281 = 13 B. L. R. 254 = 3 Sar. 306.

CO-SHARERS.

—Adverse possession—Title by—Acquisition by one co-owner of—Proof of—Quantum. See CO-SHARERS—JOINT ESTATE—FERRY ON—SETTING UP OF, ETC.

(1891) 19 I.A. 48 (56-7) = 19 C. 253 (263-4).

—Adverse possession against one of—Devolution by inheritance of right of that owner on adverse possessor before statutory period—Effect of, on nature of his possession against other owner.

Where a person has had such possession of land as to amount to an ouster of the two owners, each being owner of a moiety, and before the expiration of the statutory period of limitation succeeds to one moiety upon the death of its owner, his possession continues to be adverse to the owner of the other moiety, although he has become jointly interested with that other. (*Viscount Cave.*) VARATHA PILLAI v. JEEVARATHNAMMAL. (1919) 46 I.A. 285 (292-3) =

43 M. 244 (252) = 24 C.W.N. 346 = 27 M.L.T. 6 = 22 Bom. L.R. 444 = (1919) M.W.N. 724 = 10 L.W. 679 = 18 A.L.J. 274 = 53 I.C. 901 = 38 M.L.J. 313.

—Adverse possession by one of—What amounts to.—See POSSESSION—EXCLUSIVE POSSESSION—MEANING OF. (1918) 9 L.W. 123 (123-4).

—Contribution between—Mesne profits—Decree against co-sharers for—Payments by different sharers at different times to discharge—Contribution in case of—Basis proper of.

Where the payments by which a decree for mesne profits (obtained against co-sharers) was satisfied were made at various times, between 1883 and 1889, by the several persons liable, and in different proportions, while all the time interest was running on the balance unpaid under the decree, held, in a suit for contribution by the co-sharer, who contributed relatively more largely to the later payments, against the defendants-co-sharers, who contributed relatively more largely to the earlier payments, that in assessing the contribution due allowance ought to be made for the distinction.

Each payment on account, so far as it went stopped the running of interest on the decretal amount; and the benefit of that cessation of interest ought to have gone in relief of those, who made the payments, not of those, who continued in default.

Their Lordships therefore directed the account between the parties to be taken on the principle of compounding interest on the total principal of the judgment debt to the date of the final extinguishment without regard to the sums from time to time paid on account, and then crediting interest at the same rate on each amount paid in favour of the party on whose behalf it was paid, from the date of payment, until the final satisfaction of the decree in 1889. (*Sir Arthur Wilson.*) JOTINDRA MOHUN LAHIRI v. GURU PROSUNNO LAHIRI. (1904) 31 I.A. 94 =

31 C. 597 (612) = 8 C.W.N. 625 = 8 Sar. 645.

—Contribution between—Mesne profits—Decree against co-sharers for—Shares at date of decree—Shares during period of wrongful possession—Variance between—Contribution in case of—Assessment of—Basis proper of.

R, the 12 annas shareholder of an estate and, after his death, his successors in interest remained in wrongful possession of the remaining 4 annas share from 1826 to 1854 when the true owners recovered possession. In 1862, they instituted a suit for mesne profits from 1826 to 1854 against "the co-sharers zemindars of the 12 annas share" and got a decree in the first Court in 1875 against persons who were co-partners in the estate at the date of the decree. On appeal, the High Court merely reduced the amount decreed, by its decree dated 1882. Between 1854 and 1882 several changes had taken place in the distribution of interest amongst the different branches of R's family. On a question subsequently arising as to what each co-partner was liable to con-

CO-SHARERS—(Contd.)

tribute in paying off the decretal amount, the High Court held that this was to be determined according to the share which each of them had in possession from 1826 to 1854. Held by their Lordships that the principle adopted by the High Court was wrong and that the proper basis for assessing contribution was according to the shares held by the co-partners respectively at the date of the decree.

The cause of action in the suit for mesne profits was the wrongful enjoyment by the 12 annas shareholders collectively, as a part of their family estate, of property that did not belong to them. The suit was brought against those who were co-partners at the time of its institution, and both in form and in substance it sought to charge them as such. The decree which followed was against those who were co-partners when it was passed; it was in effect a decree against the estate. The execution proceedings were directed against the estate. If those proceedings had gone to their legal conclusion the estate would have been sold and the loss would have fallen on the co-partners according to their shares. That is the danger which hung over them if the decree were not satisfied otherwise, and which was averted by the payments made. It follows that the same shares form the proper basis for assessing contribution. (*Sir Arthur Wilson.*) JOTINDRA MOHUN LAHIRI v. GURU PROSUNNO LAHIRI

(1904) 31 I.A. 94 (104-5) = 31 C. 597 (611) = 8 C.W.N. 625 = 8 Sar. 645.

—Contribution between—Money decree—Parties liable *inter se* in stated shares for—Payments by, in various amounts at different dates extending over a series of years, to discharge—Contribution among persons paying—Interest—Calculation of—Principle. See CONTRIBUTION—MONEY DECREE. (1907) 35 I.A. 32 = 35 C. 303.

—Decree in favour of one of—Partition between him and his opponent on basis of—Effect of decree as against another sharer—Res judicata—Admissibility in evidence.

The suit was brought by the appellant, a Zemindar, against the Government and related to chur lands formed in the Padma river. The appellant's case was that the lands were re-formations on the site of his permanently settled estate, and that consequently he was entitled to hold them independently of certain settlements entered into with the Government by his adoptive mother and himself; the appellant also claimed the return of land revenue paid by him under those settlements. The Secretary of State pleaded, *inter alia*, that the lands were not re-formed *in situ* and that they had not been settled with the plaintiff's ancestor.

It appeared that, in a suit previously instituted against the Government by a co-sharer with the appellant, a judgment of the Privy Council was obtained in 1906 to the effect that land which included the land sued for by the appellant was a part of the permanently settled estate. The appellant was not a party to that suit, but in consequence of that judgment the land had been partitioned between that co-sharer, the appellant, and the Government.

Held that, having regard to the partition, the judgment in the prior suit was admissible in evidence, and that the Commissioner's report in the case then before their Lordships, coupled with the decree in the prior suit, was sufficient to turn the scale in favour of the plaintiff. (*Lord Phillimore.*) NARESH NARAYAN ROY v. SECRETARY OF STATE FOR INDIA. (1923) 50 I. A. 121 (132, 133-4) =

50 C. 446 (459-60) = A. I. R. 1923 P.C. 1 =

(1923) M.W. N. 511 = 32 M. L. T. 162 =

28 C. W. N. 453 = 77 I. C. 1048 = 45 M.L.J. 444.

—Joint estate—Easement in—Acquisition by one co-owner of—Proof of—Quantum. See CO-SHARERS—JOINT ESTATE—FERRY ON—SETTING UP OF, ETC.

(1891) 19 I. A. 48 (56-7) = 19 C. 253 (263-4).

CO-SHARERS—(Contd.)

———*Joint estate—Enjoyment of—Dispute as to—Remedy in case of.*

When co-sharers cannot agree as to how any lands held by them in common may be used, the remedy of any co-sharer who objects to the exclusive use by another co-sharer of lands held in common is to obtain a partition of the lands. (*Sir John Edge.*) MIDNAPORE ZEMINDARY CO., LTD. v. NARESH NARAYAN ROY.

(1924) 51 I. A. 293 (296-8) = 51 C. 631 =
26 Bom. L. R. 651 = A. I. R. 1924 P. C. 144 =
35 M. L. T. 169 = 20 L. W. 770 = 23 A. L. J. 76 =
(1924) M. W. N. 723 = 80 I.C. 827 = 29 C.W.N. 34 =
47 M.L.J. 23.

———*Joint estate—Enjoyment by shares of—Interference with—Caution in regard to.*

The Courts should be very cautious of interfering with the enjoyment of joint estates as between their co-owners, though they will do so in proper cases (59). (*Lord Hobhouse.*) MAHARAJAH SIR LUCHMESWAR SINGH BAHADOOR v. SHEIK MANOWAR HOSSEIN.

(1891) 19 I. A. 48 =
19 C. 253 (265) = 6 Sar. 133.

———*Joint estate—Exclusive enjoyment by one of sharers—Right of others in case of—Ouster—What amounts to.*

Where lands in India are held in common by co-sharers, each co-sharer is entitled to cultivate in his own interests in a proper and husband-like manner any part of the lands which is not being cultivated by another of his co-sharers, but he is liable to pay to his co-sharers compensation in respect of such exclusive use of the lands. Such an exclusive use of lands held in common by a co-sharer is not an ouster of his co-sharers from their proprietary rights as co-sharers in the lands. (*Sir John Edge.*) MIDNAPORE ZEMINDARY CO., LTD. v. NARESH NARAYAN ROY.

(1924) 51 I. A. 293 (296-7) = 51 C. 631 =
26 Bom. L. R. 651 = A. I. R. 1924 P. C. 144 =
35 M. L. T. 169 = 20 L. W. 770 = 23 A. L. J. 76 =
(1924) M. W. N. 723 = 80 I.C. 827 = 29 C. W. N. 34 =
47 M. L. J. 23.

———*Joint estate—Exclusive possession of, by one of sharers—What amounts to. See POSSESSION—EXCLUSIVE POSSESSION—MEANING OF. (1918) 9 L. W. 123 (123-4).*

———*Joint estate—Ferry on—Exclusive right of one sharer to set up—Conditions.*

Where the defendant sets up a ferry on property of which he is co-owner with the plaintiffs, and no grant was ever made to him of the right to do so, he can only set up exclusive right against the plaintiffs by showing either that he has dispossessed them for twelve years, or that he has held possession adversely to them for twelve years, or that he has enjoyed what he claims, for twenty years, as an easement and as of right (55-6). (*Lord Hobhouse.*) MAHARAJAH SIR LUCHMESWAR SINGH BAHADOOR v. SHEIK MANOWAR HOSSEIN.

(1891) 19 I. A. 48 = 19 C. 253 (262) =
6 Sar. 133.

———*Joint estate—Ferry on—Setting up of, by one co-owner—Effect of, on rights of others—Easement or title by adverse possession—Acquisition by one co-owner of—Proof of—Quantum.*

The respondents instituted the suit against the appellant in respect of a ferry worked by him across a river, at a point where it flowed through mauza B. The plaintiffs were proprietors of fourteen annas of that mauza, and the other two annas were vested in the defendant, who was also the proprietor of a factory and land in the adjoining mauza of K. The lands were held in several pattis, but the river-bed and the landings of the ferry had never been divided, and were on the date of the suit ijmal land of the mauza. The defence of the appellant was that he had an exclusive right to the ferry by prescription.

CO-SHARERS—(Contd.)

The defendant had not excluded any co-sharer. It was not alleged that he had used the river for passage in any such way as to interfere with the passage of other people. It was not alleged that there ever had been any obstruction at the landing places. It was not alleged that the defendant's proceedings had prevented any one else from setting up a boat for himself or his men, or even from carrying strangers for payment. So far from inflicting any damage upon the joint owners, the defendant had, it appeared, supplied them gratuitously with accommodation for passage. All that was complained of was that the defendant had expended money in a certain use of the joint property, and had thereby reaped a profit for himself.

Held, agreeing with the High Court, that the defendant had not acquired any easement or any title by adverse possession (56-57).

Whether the facts found would, as between strangers, raise the inference of adverse possession or of enjoyment of the ferry as an easement and as of right, is a question which need not be discussed. For the parties are co-owners, and the defendant has made use of the joint property in a way quite consistent with the continuance of the joint ownership and possession (56-7). (*Lord Hobhouse.*) MAHARAJAH SIR LUCHMESWAR SINGH v. MANOWAR HOSSEIN.

(1891) 19 I. A. 48 = 19 C. 253 (263-4) = 6 Sar. 133.

———*Joint estate—Joint possession of—Declaration of right of one co-owner to—Propriety—Title of plaintiff not denied by defendant co-owner—Possession of all owners joint all along.*

The respondents instituted the suit against the appellant in respect of a ferry worked by him across a river, at a place where it flowed through mauzah B. The plaintiffs were proprietors of 14 annas of that mauzah, and the other 2 annas were vested in the defendant, who was also the proprietor of a factory and land in the adjoining mauzah of K. The lands were held in several pattis, but the river-bed and the landings of the ferry had never been divided, and were even at the date of the suit ijmal land of the mauzah. The plaintiffs prayed for a declaration that the river and the ferry were within mauzah B, for an injunction restraining the defendants from offering opposition to their possession, and for a declaration that they were entitled to get the profits of the ferry in proportion to the extent of their own share.

The High Court found that the defendant had made use of the joint property in a way quite consistent with the continuance of the joint ownership and possession, and that he had not acquired any easement or any title by adverse possession. Nevertheless the High Court made a decree declaring that the river and the ferry were within mauzah B.

The defendant had not denied the title of the plaintiffs. Nor did the plaintiffs, before suit, ask for anything but a share in the profits. Only in the suit did the plaintiffs ask for removal of opposition to their possession; and only in the suit did the defendant, when asked to account for the profits of the ferry, which their Lordships found the plaintiffs were not entitled to, seek to protect himself by setting up a title in himself to the profits of the ferry and to the landing places.

Held, reversing the High Court, that a declaration with respect to the possession of the ferry was, in the circumstances of the case, not needed (59). (*Lord Hobhouse.*) MAHARAJAH SIR LUCHMESWAR SINGH BAHADOOR v. SHEIK MANOWAR HOSSEIN.

(1891) 19 I. A. 48 =
19 C. 253 (266) = 6 Sar. 133.

———*Joint estate—Jote right in—Acquisition by one sharer of—Creation by one sharer of—Power of.*

No co-sharer can, as against his co-sharers, obtain any jote right, rights of permanent occupancy, in the lands held in common, nor can he create by letting the lands to cultiva-

CO-SHARERS—(Contd.)

iors as his tenants any right of occupancy of the lands in them. (Sir John Edge.) MIDNAPORE ZEMINDARY CO., LTD. v. NARESH NARAYAN ROY.

(1924) 51 I.A. 293 (296-8) = 51 C. 631 =
26 Bom. L.R. 651 = A.I.R. 1924 P.C. 144 =
35 M.L.T. 169 = 20 L.W. 770 = 23 A.L.J. 76 =
(1924) M.W.N. 723 = 80 I.C. 827 = 29 C.W.N. 34 =
47 M.L.J. 23.

———Joint estate—Jote right in—Purchase by one sharer of—Effect of—Extinction of such right.

A purchase by a co-sharer of jote rights in lands held in common by the co-sharers will in law be held to be a purchase for the benefit of all the co-sharers, and the jote rights so purchased will by the purchase be extinguished. (Sir John Edge.) MIDNAPORE ZEMINDARY CO., LTD. v. NARESH NARAYAN ROY.

(1924) 51 I.A. 293 (297-8) = 51 C. 631 =
26 Bom. L.R. 651 = A.I.R. 1924 P.C. 144 =
35 M.L.T. 169 = 20 L.W. 770 = 23 A.L.J. 76 =
(1924) M.W.N. 723 = 80 I.C. 827 = 29 C.W.N. 34 =
47 M.L.J. 23.

———Joint estate—Profit by use of—Right of one of co-owners to make—Share of other co-owners in such profits—Right to—Condition—No exclusion by co-owner making profitable use—Effect.

The respondents instituted the suit against the appellant in respect of a ferry worked by him across a river, at a place where it flowed through mauzah B. The plaintiffs were proprietors of 14 annas of that mauza, and the other 2 annas were vested in the defendant, who was also the proprietor of a factory and land in the adjoining mauza of K. The lands were held in several pattis, but the river-bed and the landings of the ferry had never been divided, and were even at the date of the suit ijmali land of the mauza. The plaintiffs prayed for a declaration that the river and the ferry were within mauza B, for an injunction restraining the defendant from offering opposition to their possession, and for a declaration that they were entitled to get the profits of the ferry in proportion to the extent of their own share.

The High Court found that the defendant had made use of the joint property in a way quite consistent with the continuance of the joint ownership and possession, and that he had not acquired any easement or any title by adverse possession. They nevertheless declared that the defendants were only entitled to hold possession and appropriate the profits of the said ferry in proportion to their proprietary right in the said mauzah B, and they directed the defendants to account for the profits of that ferry from date of suit.

Held, reversing the High Court, that the plaintiffs were not entitled to any of the profits (59).

If the defendants' use of the landing places and the river is consistent with joint possession, why should the plaintiffs have any of the profits? They have not earned any, and none have been earned by the exclusion of them from possession. By the defendants' acts they have lost nothing, and have received some substantial convenience in the shape of being allowed to cross free of tax. It will be time enough to give them remedies against the defendant when he encroaches on their enjoyment (59). (Lord Hobhouse.) MAHARAJAH SIR LUCHMESWAR SINGH BAHADOOR v. SHEIK MANOWAR HOSSEIN. (1891) 19 I.A. 48 =

19 C. 253 (265-6) = 6 Sar. 133.

———Joint estate—Use of, by one co-owner to greater profit—Effect on joint nature of estate.

Property does not cease to be joint merely because it is used so as to produce more to one of the owners who has incurred expenditure or risk for that purpose (57). (Lord Hobhouse.) MAHARAJAH SIR LUCHMESWAR SINGH BAHADOOR v. SHEIK MANOWAR HOSSEIN.

(1891) 19 I.A. 48 = 19 C. 253 (264) = 6 Sar. 133.

CO-SHARERS—(Contd.)

———Mesne profits decreed against—Payment towards, from funds held in separate accounts of sharers—Credit as between them for—Credit for amount held in separate account of sharer or for his share of total amount according to share in property.

Some of the payments made in execution of a decree for mesne profits obtained against co-sharers had been made from the local Treasury, in which the money was held not on joint account, but on separate accounts to the credit of the several shareholders. In a suit for contribution brought by one of the sharers, who had paid more than his share of the amount of the decree, against his co-sharers, it was contended by one of the parties that in assessing the contribution he should be credited with a share of such money proportionate to the share to which he was entitled in the estate.

Held, that he was rightly credited only with the amount standing to his credit in the Treasury. (Sir Arthur Wilson.) JOTINDRA MOHUN LAHIRI v. GURU PROSUNNO LAHIRI. (1904) 31 I.A. 94 = 31 C. 597 (611-2) =

8 C.W.N. 625 = 8 Sar. 645.

———Money received by one of, in excess of his own share—Suit by other co-sharer for recovery of—Measure of defendant's liability—Loss caused to plaintiff by such receipt by defendant or amount received in excess by him. See LIMITATION ACT OF 1908, ART. 62—CO-SHARERS—MONEY RECEIVED BY ONE OF, IN EXCESS OF HIS OWN SHARE—SUIT BY OTHER CO-SHARER FOR RECOVERY OF—LIMITATION. (1871) 16 W. R. (P. C.) 20 =

9 B.L.R. 348 (355) (P.C.)

———Mortgage by one of—Partition between sharers subsequent to—Substitution of property got at, for mortgage security—Provision in mortgage deed for—Validity of.

Where there was a clause in a mortgage deed that after partition between the mortgagor and her co-sharers, the property allotted to her at that partition should be substituted for the mortgaged properties as security, held, that, if the mortgage was otherwise valid, the clause would have been legally operative and would have subjected the whole of the lady's share to the mortgage (16). (Lord Moulton.) LALA MAHABIR PERSHAD v. MUSSAMAT TAJ BEGAM.

(1914) 1 L.W. 959 = 19 C.W.N. 162 =
(1915) M.W.N. 387 = 23 I.C. 642 = 27 M.L.J. 13.

———Mortgage by one of, of share in estate joint and undivided but enjoyed in severalty—Partition between sharers subsequent to, and allotment of different properties to mortgagor—Effect of, on mortgagee's rights—Partition through Court—Partition by private arrangement—Fraud in—Effect—Execution purchaser of mortgagor's share in substituted properties—Mortgagee's rights against.

Where, after a mortgage by a co-sharer of his undivided share in an estate which was joint and undivided but which was enjoyed by the sharers not as members of a joint and undivided Hindu family but in severalty according to their respective shares, but before the mortgagees had completed their title by foreclosure and the consequential decree for possession, a partition was effected among the co-sharers under the provisions of Regulation XX of 1814, held, that the mortgagees of the undivided share would have no recourse against the lands allotted to such sharers but must pursue their remedy against the lands allotted to their mortgagor, that, as against him, they would have a charge on the whole of such lands, and that they would take the subject of the pledge in the new form which it had assumed (120).

Quere, as to the exact right of the mortgagee in cases in which the security did not cover his (mortgagor's) undivided share in the whole estate, i.e., as to which of the lands allotted in substitution of his share would be subject to the pledge (p. 122).

CO-SHARERS—(Contd.)

The representatives of the mortgagor, *e.g.*, mere purchasers at execution sales of his right, title, and interest, acquire no higher rights than he possesses at the date of the purchase and the property in their hands is equally subject to the claim of the mortgagee. In respect of such purchases, the question whether they were made with notice of the mortgagee's title is not very material (pp. 122-3).

Quære, as to the remedy of the mortgagee in cases in which fraud was effected by means of the butwara (partition) proceedings (p. 121).

Semble if the partition was a private arrangement and was intended to defeat the rights of the mortgagee, he would have a clear remedy against all who were parties to it in the Civil Court (121). (*Sir Montague E. Smith.*) *BYJNATH LALL v. RAMOODDEEN CHOWDRY.*

(1876) 1 I. A. 106 = 21 W.R. 233 = 3 Sar. 333 = 2 Suth. 942.

——Mortgage by one of, of share in estate joint and undivided but enjoyed in severalty—Validity of—Partition of estate—Right of other sharers to—Effect of mortgage on.

A sharer of an undivided moiety in two out of three villages forming a joint and undivided estate but enjoyed by the sharers, not as members of a joint and undivided Hindu family, but in severalty according to their respective shares, has power to pledge his own undivided share in those villages. He cannot, however, by so doing, affect the interest of the other sharers in them, and the persons who take the security take it subject to the right of those sharers to enforce a partition, and thereby to convert what was an undivided share of the whole into a defined portion held in severalty (119). (*Sir Montague E. Smith.*) *BYJNATH LALL v. RAMOODDEEN CHOWDRY.*

(1874) 1 I. A. 106 = 21 W.R. 233 = 3 Sar. 333 = 2 Suth. 942.

——Partition—Suit for—Decree in—Effect of—Error in—Remedy in case of. *See* HINDU LAW—JOINT FAMILY—PARTITION—SUIT FOR—DECREE IN.

——Partition suit by one of—Exclusive use of joint property by defendant co-sharer prior to suit—Relief appropriate to plaintiff in case of—Mesne profits or compensation.

In a suit by the plaintiff for partition of certain lands in which he and the defendants were co-sharers, the courts below gave a decree to the plaintiff for partition and for mesne profits. Their Lordships varied the decree of the courts below by substituting for their order as to mesne profits an order that the defendants were to pay compensation to the plaintiff for the exclusive use by the defendants themselves or by their tenants of the suit lands until partition was effected and the plaintiff's share delivered to him. (*Sir John Edge.*) *MIDNAPORE ZEMINDARY CO., LTD. v. NARESH NARAYAN ROY.*

(1924) 51 I. A. 293 (303-4) = 51 C. 631 = 26 Bom. L.R. 651 = A.I.R. 1924 P. C. 144 = 35 M.L.T. 169 = 20 L.W. 770 = 1924 M.W.N. 723 = 23 A.L.J. 76 = 80 I.C. 827 = 29 C.W.N. 34 = 47 M.L.J. 23.

——Partition suit by one of—Mesne profits to plaintiff in—Period for which, allowed—Joint possession—Decree prior in plaintiff's favour for, under S. 264 of Code of 1882—Symbolical possession obtained by plaintiff in execution of.

In a suit for partition and separate possession by a co-sharer who had been given symbolical possession in execution of a decree for joint possession under S. 264 of C.P. Code of 1882, *held*, that he was entitled to mesne profits only for a period of 6 years prior to the suit. *MIDNAPORE ZEMINDARY CO., LTD. v. KUMAR NARESH NARAYAN.* (1924) 29 C.W.N. 270 = A.I.R. 1925 P.C. 93 (1).

CO-SHARERS—(Concl'd.)

——Rent due to—Suit for, by one or some only—Maintainability. *See* LANDLORD AND TENANT—RENT—SUIT FOR—CO-SHARER LANDLORDS.

——Revenue sale of joint estate—Purchase fraudulent by one sharer at—Remedy of others in case of.

In respect of the payment of revenue each co-sharer must observe such measure of candid dealing and good faith towards his co-sharers as would ensure that a sharer would not be tempted to make a deliberate default with a view to ousting his co-sharer and appropriating to himself their common property. Where a co-sharer intentionally allows Government revenue to fall into arrear with a view to the property being put up for sale and purchases it himself at such sale, though the sale may stand, the purchaser must hold the property for the benefit of all the co-sharers according to their several interests at the date of the sale. Fraud in its strictest sense, that is, such fraud as would support a common law action of deceit is not the test by which to judge such transactions. In the case of a purchase of the common property by one of the co-sharers in breach of his duty towards his co-sharers the remedy of the latter is not to sue for a declaration that the sale and purchase are invalid, but to sue for a declaration that the property purchased must be held for the benefit of all the sharers according to their several interests at the date of the sale and for a decree directing the execution of a conveyance in their favour. They will however be entitled to this relief only on their contributing to the expenses properly incurred by the purchaser in the purchase of the property together with interest thereon.

In this case their Lordships enunciated the above rules and applied them to a case in which property belonging to several sharers was purchased at a revenue sale on behalf of a minor mortgagee of a share in the property from one of the sharers. Under this mortgage the mortgagee was entitled to remain in possession of the property mortgaged and was bound to pay the Government revenue therefor. The agent of the minor mortgagee intentionally defaulted to pay Government revenue due by him and purchased the property at the revenue sale on behalf of the minor. It was not shown that the co-sharers were aware of the default or sale. *Held*, that the minor mortgagee could not be allowed to hold for himself the advantage gained by the default of his agent and was bound to hold the property for the benefit of all the co-sharers and the mortgagee subject to their paying him the expenses properly incurred in the purchase with interest thereon. (*Sir Lawrence Jenkins.*) *DEONANDAN PRASHAD v. JANKI SINGH.*

(1916) 44 I. A. 30 = 44 C. 573 =

19 Bom. L.R. 410 = 15 A.L.J. 154 =

21 C.W.N. 473 = (1917) M.W.N. 255 =

1 Pat. L.W. 294 = 25 C.L.J. 259 = 21 M.L.T. 240 =

5 L.W. 526 = 39 I.C. 346 = 32 M.L.J. 206.

COSTS.

(*See also* PRIVY COUNCIL—APPEAL—COSTS, COSTS OF, COSTS OF, AND OF HIGH COURT, AND COSTS OF, AND OF COURTS BELOW.

Appeal—Costs of—Liability for—Agent—Suit in principal's name by.

——Dismissal of, on ground of want of authority—Appeal by principal against—Dismissal of—Costs on—Principal's liability for. *See* PRINCIPAL AND AGENT—AGENT—SUIT IN NAME OF PRINCIPAL.

(1892) 19 I. A. 135 (139) = 19 C. 678 (683).

Appeal as regards mere—Right of.

——Discretion vested in court below. (*Mr. T. Erskine.*) *MUSST. KUMEE BAE v. LUCHMAN DASS NARAIN DASS.* (1837) 1 M.I.A. 470 (479-80) = 5 W.R. 59 (P.C.) = 1 Suth. 75 = 1 Sar. 141.

COSTS—(Contd.)**Appeal as regards mere—Right of—(Contd.)**

—Discretion not vested in court below. (*Mr. T. Erskine.*) *MUSST. KUMEE BAE v. LUCHMUN DASS NARAIN DASS.* (1837) 1 M.I.A. 470 (479-80) =

5 W.R. 59 (P.C.) = 1 Suth. 75 = 1 Sar. 141.

—An objection to the costs awarded by an order cannot be made the sole and substantive ground of appeal itself. Undoubtedly, if there is a good ground of appeal independently of that point, the court will take it into consideration (260). (*Lord Brougham.*) *RAJUNDER NARAIN RAE v. BIJOY GOVIND SING.*

(1839) 2 M.I.A. 253 = 1 Sar. 253.

—(*Lord Cairns.*) *RANEE BISTOOPRIA PUTNADAYE v. NUND DHUL.* (1870) 13 M.I.A. 602 (606) =

6 B.L.R. 190 = 2 Suth. 391 = 2 Sar. 631 = 15 W.R. 19.

Charity—Suit relating to.

—Costs of one party to come out of fund in dispute, while other party made to bear his own costs—Order for.

In a suit by one of the trustees named in the will of a Hindu testator against his nephew for the appointment of a new trustee or trustees to carry out the trusts of the charity established by the will and for incidental relief, the Court below directed the nephew to bear his own costs, while it directed the costs of the other parties to be paid out of the charity fund. The Court below made the said order as regards the costs of the nephew on the ground that the nephew, who was the heir and the residuary legatee under the will, had on attaining age assented to the appropriation by the executors of a proper sum to answer the charitable trusts, and took all the residue clear of that liability and nevertheless disputed in the suit the validity of the charitable bequests on the ground that the property bequeathed was joint family property and that the testator was incompetent to dispose of it by will. *Held*, that there was no reason for disturbing the order of the court below (97-8). (*Sir Arthur Hobhouse.*) *PURMANUNDASS JEEVUNDASS v. VENAYAKRAO.* (1882) 9 I.A. 86 = 7 B. 19 (33) = 12 C.L.R. 92 = 4 Sar. 366.

Criminal appeal—Costs of—Crown—Payment to accused by.

—Order for. See PRIVY COUNCIL — CRIMINAL APPEAL—COSTS OF. (1913) 26 M. L. J. 1 (8).

Estate in dispute—Costs to come out of.

—Order as to.

Being of opinion that the case was one in which it was necessary for an executor to have the judgment of a Court upon, their Lordships thought under the special circumstances, that the costs on both sides, both in the Privy Council and in India, should be paid out of the fund, the subject-matter in dispute (447). (*Dr. Lushington.*) *ARBUTHNOT v. NORTON.* (1846) 3 M. I. A. 435 =

5 Moo. P. C. 219 = 10 Jur. 145 = 1 Sar. 300.

—In a suit for the administration of the estate of a native of Burma, subject to the Burmese Buddhist law, their Lordships, in view of the importance of the case, and the difference of opinion prevailing until the decision of the Full Bench (in the case on appeal before them) on the questions at issue, directed that the costs of both parties should come out of the estate, though they dismissed the appeal to them. (*Mr. Ameer Ali.*) *KIRKWOOD alias MA THEIN v. MAUNG SIN.* (1924) 51 I. A. 334 (357) = 2 B. 693 =

A. I. R. 1924 P. C. 238 = 3 Bur. L. J. 304 = 29 C. W. N. 653 = 84 I. C. 867 = 48 M. L. J. 1.

Government—Liability of.

—Persistence in claim after several decisions—Effect.

The Government, having persisted in their claim after several decisions against them by their own officers acting as

COSTS—(Contd.)**Government—Liability of—(Contd.)**

Judges, were adjudged liable to pay all the costs of the case (133).

"Their Lordships do not doubt that the Government in bringing forward this claim have acted under a sense of public duty; but it is an attempt to disturb, upon insufficient grounds, a settlement which subsisted without dispute for above forty years; and the appellant has been exposed to a long and most expensive litigation. Under these circumstances the Government should bear all the costs" (133). (*Mr. Pemberton Leigh.*) *RAJA LEELANUND SINGH BAHDOOR v. THE GOVERNMENT OF BENGAL.*

(1855) 6 M. I. A. 101 =

4 W. R. 77 (P.C.) = 1 Suth. 248 = 1 Sar. 505.

Interest on.

—Appellate decree—Costs of all courts awarded by—Interest on—Costs of each Court—Interest on, as from date of its decree—Right to—Appellate decree not expressly providing for same—Executing Court—Jurisdiction to award. See PRIVY COUNCIL—APPEAL—DECREE IN—CONSTRUCTION—COSTS OF ALL COURTS AWARDED BY.

(1877) 4 I. A. 137 (142) = 3 C. 161 (169).

—Award of—Discretionary or obligatory.

S. 10 of C.P.C. of 1861 seems to give the Courts a discretionary power to allow interest on costs, rather than to make it imperative upon them to do so (143). (*Sir James W. Colville.*) *FORESTER v. SECRETARY OF STATE FOR INDIA.*

(1877) 4 I. A. 137 = 3 C. 161 (169-70) = 3 Sar. 717 = 3 Suth. 405 = 1 P. R. 1877.

—Calculation of—Mode of—Appellate decree allowing costs of all courts below—Costs of each Court—Interest on, as from date of its decree—Right to—Appellate Court not expressly providing for the same—Executing Court—Jurisdiction to award. See PRIVY COUNCIL—APPEAL—DECREE IN—CONSTRUCTION—COSTS OF ALL COURTS AWARDED BY. (1877) 4 I. A. 137 (142) = 3 C. 161 (169).

Interlocutory proceeding—Costs of—Order as to.

—Supersession of, by subsequent order as to general costs of suit—Former order in favour of one party—Latter in favour of his opponent.

A suit brought by the appellant for the recovery of certain lands was resisted by the respondents on the ground of limitation. The Sub-Judge upheld the plea of limitation, and dismissed the suit on that ground on 31-7-1868. His decree was reversed on appeal by the High Court. By their judgment dated 26-4-1869, the High Court ordered that the respondents should pay to the appellant the sum of Rs. 2,499-13-5, being the amount of costs incurred by him in the High Court with interest; and further ordered that the respondents should pay to the appellant the costs incurred by him in the lower court with interest. With that order the suit was remanded. On the trial after the remand, the appellant's suit was dismissed by the High Court by decree dated 10-6-1874, and he was ordered to pay the costs of the suit generally.

On an application by the respondents for execution for their costs, *held*, reversing the High Court, that the appellant was entitled to set off against the costs claimed by the respondents the costs which were due under the decree of 26-4-1869 (116).

The ground taken by the High Court seems to be that the decree made on 10-6-1874, giving the whole costs of the suit, overrode the decree of 26-4-1869, which gives the costs of a portion of the suit in which the respondents had failed. Their Lordships think that there is no ground for so construing the decree of 1874.

COSTS—(Contd.)**Interlocutory proceeding—Costs of—Order as to—(Contd.)**

The question of costs awarded by the decree of April, 1869, was not before the Court in 1874; nor is it the usual practice, when costs of an interlocutory proceeding have been disposed of, to consider that an award of the general costs of the suit interferes with the order disposing of those partial costs. It is neither the intention nor the effect of the decree of 10—6—1874, to interfere with the costs awarded by the order of 26—4—1869 (116). (*Sir Arthur Hobhouse.*) **RADHA PERSHAD SINGH v. RAM PURMESWAR SINGH.** (1883) 10 I. A. 113 = 9 C. 797 = 13 C. L. R. 22 = 4 Sar. 421.

Judge an officer of East India Company—Misconduct of—Costs occasioned by.**—Order as to.**

In an appeal to the Privy Council it was found that certain costs had been incurred in consequence of the misconduct of the Zillah Judge (Trial Judge). The Judge having been an officer of the East India Company, their Lordships observed that it was worthy of their consideration how far they would have regard to the costs which the parties had been put to, in consequence of such misconduct of their Judge (328). (*Lord Langdale.*) **JUVEER-BHAE v. VURUJ BHAE.** (1844) 3 M. I. A. 324 = 1 Sar. 286.

Legal Practitioner—Fees allowed to—Appeal against.

—Right of. See **LEGAL PRACTITIONER—FEES ALLOWED TO—APPEAL AGAINST.**

(1839) 2 M. I. A. 253 (260).

Overstatement of claim by each party—Costs in case of.**—Order as to.**

Where throughout the litigation the plaintiffs had been asking too much and the defendant conceding too little, their Lordships directed that there should be no costs in any of the Courts, nor of the Privy Council appeal (60). (*Lord Hobhouse.*) **MAHARAJAH SIR LUCHMESWAR SINGH BAHADUR v. SHEIK MANOWAR HOSSEIN.**

(1891) 19 I. A. 48 = 19 C. 253 (266) = 6 Sar. 133.

Preliminary point—Dismissal of suit on—Appeal against—Decree allowing—Costs awarded by—Items recoverable under.

—Decree dismissing suit ultimately awarding to defendant costs of suit generally.

A decree dismissing a suit on the ground of limitation was on appeal reversed by the High Court. By their decree, dated 26—4—1869, the High Court ordered that the defendants should pay to the plaintiff a specified sum for costs incurred by him in the High Court with interest; and further ordered that they should pay to the plaintiff the costs incurred by him in the lower Court with interest. The High Court remanded the suit to the Court below. After the remand, the plaintiff's suit was dismissed, and he was ordered to pay the costs of the suit generally. The question arose as to the items which the plaintiff was entitled to recover under the head of costs incurred by him in the lower Court under the decree of 26—4—1869, more especially, whether he was entitled to recover (1) a sum of Rs. 3,245, which was the court-fee, and (2) a sum of Rs. 2,490 for pleader's fee.

Held, that the plaintiff was entitled to recover all such costs in the lower Court (the trial Court) as were occasioned by the defence of the law of limitation, and the costs of the trial and hearing thereon, and of the original decree of the trial Court dismissing the suit on the ground of limitation (117).

The court-fee applies not only to the hearing which resulted in the dismissal of the suit on the ground of limitation, but to the whole of the litigation; and inasmuch as the

COSTS—(Contd.)**Preliminary point—Dismissal of suit on—Appeal against—Decree allowing—Costs awarded by—Items recoverable under—(Contd.)**

general costs of the suit are awarded to the defendants, it would be improper that they should have to pay the court-fee on account of their failure in the first stage of the suit (117).

As regards the sum claimed for pleader's fee it may be that a portion of that should be referred to the general costs of the suit, and not to the costs of the hearing on the question of limitation (117). (*Sir Arthur Hobhouse.*) **RADHA PERSHAD SINGH v. RAM PURMESWAR SINGH.**

(1883) 10 I. A. 113 = 9 C. 797 = 13 C. L. R. 22 = 4 Sar. 421.

Principal—Suit by agent in name of.

—Dismissal of, on ground of want of authority—Appeal by principal against—Dismissal of—Costs on. See **PRINCIPAL AND AGENT—AGENT—SUIT IN NAME OF PRINCIPAL.**

(1892) 19 I. A. 135 (139) = 19 C. 678 (683).

Proportionate Costs.**—Order as to.**

The costs of an action in India, particularly the stamp duties payable on the proceedings, depend a good deal on the value of the thing claimed. It is accordingly the practice of the Courts in India, when a plaintiff has recovered less than he has claimed, to apportion the costs in the proportion which the amount recovered bears to that which was claimed (575-6). (*Sir James W. Colville.*) **MUDHUN MOHUN DOSS v. GOKUL DOSS.** (1866) 10 M. I. A. 563 = 5 W. R. (P. C.) 91 = 1 I. J. N. S. 269 = 1 Suth. 644 = 2 Sar. 202.

—Costs of parties in the Courts in India should be apportioned according to the course of those courts in cases where the plaintiff is only partially successful (665). **COLLECTOR OF MOORSHEDEBAD v. RANEE SHEBESSURREE.** (1872) 2 Suth. 661 = 18 W. R. 226.

Success in part only—Party having.

—Right to costs of—Opposition to his entire claim by unsuccessful party wrong. See **COSTS—UNSUCCESSFUL PARTY.**

(1883) 10 I. A. 113 (117-8) = 9 C. 797.

Success substantial—Party having.**—Right to costs of.**

The plaintiff is entitled to succeed in the substance of his demand, and that being the case, there is nothing in the Regulations in force in India any more than in this country to hinder the plaintiff from recovering his costs (308). (*Sir William H. Maule.*) **BAMUNDOSS MOOKERJEE v. OMEISH CHUNDER RAE.** (1856) 6 M. I. A. 289 = 1 Sar. 542.

Successful defendant—Disallowance of costs to.

—Discretion of Court—Dismissal of suit on ground of no right in plaintiff to sue. See **BOMBAY REGULATIONS—SUITS IN CIVIL COURTS REGULATION II OF 1800, S. 7—COSTS OF SUIT.** (1837) 1 M. I. A. 470 (479-80).

Successful party—Disallowance of costs to—Grounds.**—False case—Putting forward of.**

False charges of fraud, perjury, and forgery having been made by the respondents against the appellant, the party who propounded the will, their Lordships, in reversing the decree of the Court below, ordered the respondents to pay all the costs of the suit in both courts below, and of both the

COSTS—(Contd.)**Successful party—Disallowance of costs to—
Grounds—(Contd.)**

appeals to Her Majesty (122-3). (*Lord Kingsdown.*) NANA NURAIN RAO *v.* HUREE PUNTH BHAO.

(1862) 9 M. I. A. 96 = 1 Sar. 843 = Marsh. 437.

False evidence—Use of.

I hope that, if religion has not sufficient moral influence on the minds of Hindus to prevent them from supporting their claims by perjury and forgery, self-interest will; and when they learn that the calling perjured witnesses or producing forged documents, will be visited with costs, I hope we shall have less reason to complain of parties attempting to avail themselves of those wicked means of supporting or defending causes. (*Lord Wynford.*) SUTROOGUN SUTPUTTY *v.* SABITRA DYE. (1835) 5 W. R. 109 (P. C.) =

1 Suth. 36 (38) = 2 Knapp. 287.

While sustaining the appellant's appeal and dismissing the respondent's suit, their Lordships disallowed to the appellant the costs of the appeal to them and the costs of all proceedings in the courts below, because he had foolishly and wickedly attempted to support a just case by false evidence (150). (*Lord Justice Turner.*) RANEE SURNO MOYEE *v.* MAHARAJAH SUTTEESCHUNDER ROY.

(1864) 10 M. I. A. 123 = 2 W. R. 13 = 2 Sar. 60 = 1 Suth. 548.

Fraudulent conduct and false allegations of that party—Litigation caused by.

In a case in which their Lordships were of opinion that the false allegations and the fraudulent conduct of the defendant forced the plaintiff into litigation which would have been avoided but for such false allegations and fraudulent conduct, and that the conduct of the defendant throughout in the litigation was such as to disentitle him to any costs either in the appeal to the Privy Council or in either of the Courts below, their Lordships, while dismissing the plaintiff's appeal, directed that the defendant should not have any costs of the appeal to the Privy Council and that neither party should have any costs in either Court below (240). (*Sir John Edge.*) MARY LILIAN HIRA DEVI *v.* KUNWAR DIGBIJAI SINGH. (1917) 42 I. C. 236 =

21 C. W. N. 1137 (1142) = (1917) M. W. N. 636 = 7 L. W. 133.

Successful party—Right to costs of.**Rule as to.**

As regards costs, the general rule should be that they followed the event of the verdict (136). (*Mr. Baron Parke.*) DOOLUBDASS PETTAMBERDASS *v.* RAMLOL THACKORSEYDASS. (1850) 5 M. I. A. 109 = 7 Moo. P. C. 239 = Perry, O. C. 232 = 1 Sar. 403.

The general rule as to the costs of litigation is, that where an appellant succeeds he gets the costs of the appeal, and that where a respondent succeeds he gets the costs (26). (*Lord Blackburn.*) CHOORAMUN SINGH *v.* SHAIK MAHOMED ALI. (1882) 9 I. A. 21 = 11 C. L. R. 1 =

Bald. 426 = 4 Sar. 329.

**Successful plaintiff — Disallowance of costs to—
Grounds.**

Separate suits unnecessary though not barred by *res judicata*—Costs of subsequent suit in case of—Disallowance of.

Where, in a case in which, though the trial Court held that the claim was not barred by *res judicata*, it disallowed the costs of the suit to the successful plaintiff on the ground that the relief prayed for could have been obtained in the prior suit if the plaintiff had not committed an error in his

COSTS—(Contd.)**Successful plaintiff—Disallowance of costs to—
Grounds—(Contd.)**

plaint in that suit, and that full costs had been given to him in that suit, held, that that was a sufficient reason for not allowing the plaintiff his costs of the subsequent suit (194). (*Sir Richard Couch.*) KALI KRISHNA TAGORE *v.* SECRETARY OF STATE FOR INDIA. (1888) 15 I. A. 186 =

16 C. 173 (183 4) = 5 Sar. 237.

Suit.

Costs of—Defendants' liability for—Provision in compromise of suit for—Costs of subsequent proceedings by plaintiff improperly impeaching compromise if included in.

A decided agreement for the settlement of a suit brought by the plaintiff-appellant provided for the costs of the suit as follows:—"The costs of the Court are agreed to be at the responsibility of the defendants."

Held that, if the appellant had performed his part of the agreement, he would have been entitled to receive the amount stipulated to be paid to him by the defendants under the agreement of compromise quite free from any charge of costs, and the defendants would have to pay the costs of the Court at least.

Held further, that the defendants were not, however, responsible for all the costs which afterwards arose in consequence of the unsuccessful and apparently most unjust litigation in reference to the claim which the appellant instituted and carried on for the purpose of freeing himself from the obligation which he had entered into by the agreement of compromise (134-5). (*Lord Langdale.*) MUNNI RAM AWASTY *v.* SHEO CHURN AWASTY. (1846) 4 M. I. A. 114 = 7 W. R. 29 (P. C.) = 1 Suth. 166 = 1 Sar. 323.

Costs of—Suit for, against person not party to suit—Maintainability—English law.

By English law an action cannot be maintained against a third person on the ground that he was a mover of, and had an interest in the suit, in the absence of malice and want of probable cause (50). (*Sir Montague E. Smith.*) RAM COOMAR COONDOL *v.* CHUNDER CANTO MOOKERJEE. (1876) 4 I. A. 23 = 2 C. 233 (260) = 3 Sar. 654 = 3 Suth. 361.

Defendant's costs of, on dismissal of suit on ground of no right in plaintiff to institute suit—Disallowance of—Validity of—Discretion as to. See BOMBAY REGULATIONS—SUITS IN CIVIL COURTS REGULATION II OF 1800, S. 7. (1837) 1 M. I. A. 470 (479 80).

Interlocutory proceeding in—Costs of—Order giving, to one party—Costs of suit generally—Order subsequent giving, to his opponent—Former order if superseded by latter. See COSTS—INTERLOCUTORY PROCEEDING. (1883) 10 I. A. 113 (116) = 9 C. 797.

Person not a party to—Liability of, for costs of suit—Champertous agreement between him and defeated party on record—He being real actor in suit and acquiring in it—Malice and want of reasonable cause—Absence of.

The appellants sued to recover from the respondent the costs which had been directed to be paid to them in a litigation brought by one M and his wife against the appellants but which the appellants were unable to recover from M and his wife on the ground of their poverty.

The respondent was not a party to that litigation. Though the appellants alleged in their plaint that the suit by M and his wife was brought or instigated by the respondent

COSTS—(Contd.)**Suit—(Contd.)**

maliciously and without probable cause, those allegations were not proved. The appellants contended that the action against the respondent was nevertheless maintainable on either of two grounds:—(1) That the respondent had entered into an agreement with *M* and his wife regarding the subject-matter of their suit against the appellants, that that agreement and the acts of the respondent amounted to champerty, or were otherwise illegal as being against public policy, and that the appellants had suffered special damage from them; and (2) that the respondent was the real actor in the former suit and had an interest in it, and was, therefore, responsible for the costs thereof.

Held, that the suit was not maintainable upon either of the grounds suggested (47-8).

Assuming that the contract between the respondent and *M* and his wife was unconscionable, and one which ought not to have been enforced against *M* and his wife, no action could arise to the appellants therefrom against the respondent for the losses and costs of that litigation (47-8).

Again the facts that, under his agreement with *M* and his wife, the respondent acquired an interest in the subject-matter of that litigation, that he agreed to supply all the funds required to carry it on, and that he obtained the virtual conduct of the proceedings, created no legal privity between him and the appellants from which a promise can be implied on the part of the respondent to pay the appellants the costs of the former suit, on which an action of contract can be founded; nor does that state of things establish a legal wrong, for the former suit was brought without improper motives, and upon reasonable cause (48).

Held, further, that the fact that, pending the appeal to the P.C. in the former suit, the respondent purchased all the rights of *M* and his wife in the property and the suit did not make him liable for the costs of the appeal to the P.C. (49-50). (*Sir Montague E. Smith.*) *RAM COOMAR COONDOO v. CHUNDER CANTO MOOKERJEE.*

(1876) 4 I. A. 23 = 2 C. 233 (257-9) = 3 Sar. 654 = 3 Suth. 361.

—Person not a party to—Liability of, for costs of suit—English law.

The instances in which persons other than parties to the suit have been held liable to costs in England, have been principally those of solicitors, over whom the Court exercises disciplinary jurisdiction. The Courts have also ordered the real parties to pay the costs in actions of ejectment, originally on the ground that that action was in form a fictitious proceeding, and having once assumed this power they have continued to exercise it in the actions substituted for that of ejectment. Again, the Courts, it has been said, would so interfere in case of any contempt or abuse of proceedings (49). (*Sir Montague E. Smith.*) *RAM COOMAR COONDOO v. CHUNDER CANTO MOOKERJEE.*

(1876) 4 I. A. 23 = 2 C. 233 (259) = 3 Sar. 654 = 3 Suth. 361.

—Preliminary point—Dismissal on—Appeal against—Decree allowing—Costs awarded by—Items recoverable under—Decree dismissing suit ultimately awarding to defendant costs of suit generally *See* COSTS—PRELIMINARY POINT. (1883) 10 I. A. 113 (117) = 9 C. 797.

Unsuccessful party—Liability for costs of.

—Opponent successful only in part but opposition to his entire claim wrong.

Even in a case in which the appellant did not wholly succeed, their Lordships *held*, in view of the fact that the whole of his claim was opposed in the Court below on an entirely wrong ground, that there was no sufficient reason for departing from the sound general rule that the defeated

COSTS—(Contd.)**Unsuccessful party—Liability for costs of—(Contd.)**

party should pay the costs. (*Sir Arthur Hobhouse.*) *RADHA PERSHAD SINGH v. RAM PURMESWAR SINGH.*

(1883) 10 I. A. 113 (117-8) = 9 C. 797 = 13 C. L. R. 22 = 4 Sar. 421.

Will—Construction of—Suit for.

—Costs of. *See* HINDU LAW—WILL—CONSTRUCTION OF—SUIT FOR—COSTS OF.

COUNTER-CLAIM.

—*See also* C. P. C. OF 1908, O. 8, R. 6.

—Agent—Security deposited by, with principal for latter's monies in his hands in the matter of the agency—Set-off or counter-claim in respect of—Agent's right of, as against party taking over from principal benefit of sums due by agent. *See* PRINCIPAL AND AGENT—AGENT—SET-OFF. (1920) 15 L. W. 201.

—Punjab—Admissibility in.

A counter-claim in the Punjab is not admissible. (*Lord Dunedin.*) *KANHAYA LAL v. NATIONAL BANK OF INDIA, LTD.*

(1923) 50 I. A. 162 (170) = 4 Lah. 284 = 33 M. L. T. 349 = 25 Bom. L. R. 1248 = A. I. R. 1923 P. C. 114 = 28 C. W. N. 689 = 40 C. L. J. 1 = 75 I. C. 7 = 45 M. L. J. 497.

COURT.

—(*See also* JUDGE.)

—Act of—Construction—Validating Construction—Necessity.

When an act of a Court can be so construed as to have an operation consistently with law, it would be contrary to ordinary rules of construction to attach to it another signification which would altogether destroy its effect (539). (*Sir Montague E. Smith.*) *SARODA PROSAUD MULLICK v. LUCHMEEPUR SINGH DOOGUR.*

(1872) 14 M. I. A. 529 = 17 W. R. 289 = 10 B. L. R. 214 = 2 Suth. 560 = 3 Sar. 77.

—Act of, ought not to injure any of suitors.

A Judge should always be vigilant not to allow the act of the Court itself to do wrong to the suitor (48). (*Lord Justice James.*) *SYUD TUFFUZZOOL KHAN v. RAGHONATH PERSHAD.*

(1871) 14 M. I. A. 40 = 7 B. L. R. 186 = 2 Suth. 434 = 2 Sar. 656 = R. & J.'s No. 10 (Oudh).

—*See* C. P. C. OF 1908, S. 144—DECREE REVERSED ON APPEAL—*Status quo.* (1922) 49 I. A. 351 (355-6) = 2 Pat. 10 (16).

—Arbitration by—Agreement of parties as to—Local visit—Court's suggestion as to—Consent to—Proceeding if amounts to such an agreement. *See* APPEAL—LOCAL VISIT. (1907) 34 I. A. 115 (124) = 31 B. 381 (392).

—Arm of—Long enough to reach any offender.

The arm of the Court is long enough to reach the offender, whatever his position may be. (*Lord Macnaghten.*) *FISCHER v. SECRETARY OF STATE FOR INDIA.*

(1898) 26 I. A. 16 (29) = 22 M. 270 (283) = 3 C. W. N. 161 = 7 Sar. 459.

—Case stated to—Order of Court on—Advisory or Final—Test—“Opinion” of Court—“Decision or determination” of Court—Case stated for—Distinction.

The fact that the functionary who states a special case for the opinion of the Court is or is not bound to act upon it does not necessarily determine whether the order and decision of the Court is or is not merely advisory. In order to determine whether an order made by a Court on a case stated is final or merely advisory, it is necessary to examine

COURT—(Contd.)

closely the language of the enactment, whether statute, rule or order, giving the power to state a case.

When a case is stated for the "opinion" of the Court, that would serve *prima facie* to indicate that the order made by the Court was only advisory. Where the case is referred for the "decision" or "determination" of a question, there is a *prima facie* difficulty in holding that the order embodying this determination or decision is advisory, but the use of these words or one of them is not decisive. (*Lord Atkinson.*) **TATA IRON AND STEEL CO. v. CHIEF REVENUE AUTHORITY, BOMBAY.** (1923) 50 I.A. 212 (224-5) =

47 B. 724 (739-40) = 21 A. L. J. 675 =
A. I. R. 1923 P. C. 148 = 25 Bom. L. R. 908 =
18 L. W. 372 = (1923) M. W. N. 603 = 33 M.L.T. 301 =
9 O. & A. L. R. 783 = 28 C. W. N. 307 = 39 C.L.J. 16 =
74 I. C. 469 = 45 M. L. J. 295.

——Competent jurisdiction—Court of. See C. P. C. OF 1877, S. 13, COURT OF COMPETENT JURISDICTION AND C. P. C. OF 1908, S. 11—COURT OF COMPETENT JURISDICTION.

——Concurrent jurisdiction—Court of. See JURISDICTION—CONCURRENT JURISDICTION.

(1882) 9 I. A. 197 (203-4) = 9 C. 439 (444-5).

——Decision of—Effect of—Declaration of law as it had existed—Enacting law for first time—Statute—Effect of—Distinction.

The decision of a court ought not to be treated as if it were a statute which imposed law for the first time. It is nothing of the sort. It is declaratory of the law as it had existed (221). (*Lord Duncedin.*) **BALWANT RAO v. BAJI RAO.** (1920) 47 I. A. 213 = 48 C. 30 (42) =

25 C. W. N. 243 = 18 A. L. J. 1049 =
(1920) M. W. N. 483 = 28 M. L. T. 157 =
12 L. W. 679 = 22 Bom. L. R. 1070 = 57 I. C. 545 =
39 M. L. J. 166.

——Deed in favour of—Propriety. See COURT—SUIT BY OR AGAINST. (1919) 46 I. A. 228 = 42 A. 158 (167).

——Discipline—Power of—Neglect and delay—Powers of checking—Necessity.

Their Lordships are fully sensible of the necessity of leaving the judges in India with ample power of discipline, and means to check neglect and delay. (*Lord Phillimore.*) **LACHMI NARAIN MARWARI v. BALMAKUND MARWARI.** (1924) 51 I. A. 321 (325) = 4 P. 61 =

29 C. W. N. 391 = A. I. R. 1924 P. C. 198 =
20 L. W. 491 = 35 M. L. T. 143 = 26 Bom. L. R. 1129 =
22 A. L. J. 990 = 5 Pat. L. T. 623 = 40 C. L. J. 439 =
1 O. W. N. 629 = 10 O. & A. L. R. 1033 =
(1924) M. W. N. 707 = 81 I. C. 747 = 47 M. L. J. 441.

——Executive—Suggestion to—Weight due to—Criminal case—Accused—Consideration of case of—Suggestion as to. See CRIMINAL CASE—ACCUSED—CONSIDERATION OF CASE OF. (1862) 9 M. I. A. 168 (194.)

——Highest Civil jurisdiction—Court of. See APPEAL TO QUEEN IN COUNCIL—ACT II OF 1863, S. 1—CONSTRUCTION. (1877) 4 I. A. 178 (183) =

3 C. 522 (527).
——Highest civil jurisdiction in province—Court of—Final judgment of—Meaning of—Affirming judgment of a Court made final by statute if within—Reversing judgment of that court not so made final—Effect. See P. C.—APPEAL—COMPETENCY OF—COURT OF HIGHEST CIVIL JURISDICTION IN PROVINCE. (1877) 4 I. A. 178 (183) =

3 C. 522 (527).

——Honesty of—Standard of—At least that of litigant.

The court must at any rate not fall below the standard of honesty which it exacts from those on whom it has to pass

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judgment. (*Lord Macnaghten.*) **MAHOMED KALA MEA v. HARPERINK.** (1908) 36 I.A. 32 (37) = 36 C. 323 (334) =
5 M. L. T. 126 = 9 C. L. J. 165 = 13 C. W. N. 249 =
11 Bom. L. R. 227 = 6 A. L. J. 34 = 5 L. B. R. 25 =
1 I. C. 122 = 19 M. L. J. 115.

——Injury to suitors—Duty to avoid. See COURT—ACT OF, OUGHT NOT TO INJURE ANY OF SUITORS.

——Invalid order—Recalling and cancellation of—Power and duty of Court. See C. P. C. OF 1908, S. 151—INVALID ORDER. (1871) 14 M. I. A. 40 (47-8).

——Judicial notice—Duty to take—Statute—Provisions of. See ARBITRATION—AWARD—DECREE IN ACCORDANCE WITH—VALIDITY—AWARD MADE AFTER, ETC. (1891) 18 I. A. 51 (58) = 13 A. 300.

——Judicial notice—Power to take—Government sale at Calcutta—Opium to be sold at—Ownership of.

We must take judicial notice that the opium to be sold at a Government sale at Calcutta was the property of the Government of India, and that the produce was to form part of the public revenue (348). (*Lord Campbell.*) **RAM-LOLL THACKOORSEYDASS v. SOOJUMNULL DHOND-MULL.** (1848) 4 M. I. A. 339 = 6 Moo. P. C. 300 =

Perry O. C. 193 = 1 Sar. 361.

——Judicial notice—Power to take—Political change in neighbouring state.

Quære, whether a Court can take judicial notice of a political change in a neighbouring state (994). (*Lord Sumner.*) **IBRAHIM v. EMPEROR.** (1914) 1 L. W. 989 =

18 C. W. N. 705 = 23 I. C. 678 = 15 Cr. L. J. 326 =
(1914) A. C. 599 = 4 Cr. L. R. 225 = 3 Con. L. R. 187.

——Jurisdiction of. See JURISDICTION.

——Justice—Administration of. See JUSTICE.

——Law—Administration of—Duty as to—Policy—Topics of—Consideration of—Propriety. See COURT—POLICY. (1926) 30 C. W. N. 961.

——Law—Application of. See LAW—APPLICATION OF.

——Law—Declaration of, with reservation of rights acquired under different view of it—Power of. See LAW—COURT'S DECLARATION OF, ETC.

(1899) 26 I. A. 113 (152) = 22 M. 398 (430).

——Law—Function in regard to—Declaration of law—Alteration or enactment of it. See LAW—COURT'S FUNCTION IN REGARD TO.

——Legal rights—Decision on—Duty as regards.

The duty of a Court of Law is to decide upon legal rights, and it best discharges that duty when it strictly confines itself to its performance. (*Mr. Baron Parke.*) **KIRT CHUNDER ROY v. THE GOVERNMENT AND OTHERS.** (1837) 1 M. I. A. 383 (403) = 5 W. R. 41 (P. C.) =

1 Suth. 63 = 1 Sar. 131.

——Legislation—Need for and lines of—Suggestions as to.

Their Lordships deem it right to observe that this state of the law (on mortgages by conditional sale) is eminently unsatisfactory, and one which seems to call for the interposition of the Legislature. An Act affirming the right of the mortgagor to redeem until foreclosure by a judicial proceeding, and giving to the mortgagee the means of obtaining such a foreclosure, with a reservation in favour of mortgagees whose titles, under the law as understood before 1858, had become absolute, before a date to be fixed by the Act, would probably settle the law, without injustice to any party (255). (*Sir James W. Colville.*) **THUMBUSWAMY MUDELLY v. MAHOMED HOOSAIN ROWTHER.** (1875) 2 I. A. 241 =

1 M. 1 (23) = 3 Sar. 531 = 3 Suth. 198.

——Legislature—Functions of—Usurpation of. See LEGISLATURE—FUNCTIONS OF—COURT'S USURPATION OF.

(1875) 2 I. A. 241 (253-4) = 1 M. 1 (21-2).

COURT—(Contd.)

—Legislature — Where Legislature has stopped, the courts must stop. *See* LEGISLATURE—COURT—WHERE LEGISLATURE, ETC. (1872) 14 M. I. A. 496 (528).

—Local visit—Suggestion as to—Consent of parties to—Effect of—Arbitration by Court—Agreement for—Consent if amounts to—Decision of Court based on such inspection and ignoring evidence in case—Legality of. *See* APPEAL—LOCAL VISIT. (1907) 34 I. A. 115 (124) = 31 B. 381 (392).

—Mistake inadvertent of—Rectification of—Power of. *See* C. P. C. OF 1908, S. 151—MISTAKE INADVERTENT OF COURT. (1913) 40 I. A. 151 = 35 A. 331 (337).

—Moral obligations—Concern with—Legal rights—Basis of—Acts of grace—Repetition of—Effect.

From these facts, if they existed, moral obligations (with which this Board is not concerned) may arise, but the mere repetition of such acts of grace cannot *per se* create legal right to their continuance (239). (*Lord Atkinson.*) SECRETARY OF STATE FOR INDIA *v.* BAI RAJBAL.

(1915) 42 I. A. 229 = 39 B. 625 (649) = 19 C. W. N. 1087 = 18 M. L. T. 179 = 17 Bom. L. R. 730 = 13 A. L. J. 953 = 2 L. W. 731 = (1915) M. W. N. 563 = 30 I. C. 303 = 29 M. L. J. 242.

—Officers of—Conduct of—Influence of, by personal considerations—Suspicion as to—Freedom from—Necessity.

It is of great importance in all countries, and more particularly in a country like India, that no officer of a Court of Justice should be even exposed to the suspicion, that in the discharge of his official duties his conduct may be influenced by any personal consideration; and when there is room for the operation of sinister motives, the belief of their operation can hardly be excluded from the minds of the parties (346). (*Mr. Pemberton Leigh.*) KERAKOOSSE *v.* SERLE. (1844) 3 M. I. A. 329 = 4 Moo. P. C. 459 = 1 Sar. 286.

—Officers of—Fees from suitors—Receipt of, in accordance with practice of predecessors—Dismissal for—Legality of.

In almost every Court of Justice it has happened that in the progress of time, and unnoticed by the Court, the practice of receiving from suitors sums not legally sanctioned, but which in themselves are reasonable, and would have been sanctioned if duly noticed, has grown up, together with the practice of receiving sums which are both illegal and unreasonable, and which would have been forbidden if duly noticed. Such practice having been followed by one officer of the Court after another, who succeeded his immediate predecessor, becomes at length, in the absence of any reference to a duly established title, a sort of evidence of right, or supposed right, and the office is innocently accepted upon the notion, and on the reliance, that the right was established, by the usage which has been acquiesced in, and prevailed under the allocatur of the Judges. When a practice of this sort comes under observation, it is the duty of the Court to exercise, or procure the exercise of a legal authority to retrench fees, if not legal and reasonable, and to establish fees which may be reasonable and just, though not legal, until duly sanctioned. But in consideration of such circumstances, it ought to be carefully observed, that an officer, following the steps of his predecessor, may have received fees, which ought not to have been allowed, or continued, may, nevertheless, not be justly chargeable with any corruption or moral guilt (231).

On an appeal by the late Master of the Supreme Court of Madras, against an order of that Court dismissing him from his office of Master, for alleged official misconduct in the taxation of a bill of costs, in a particular cause, it appeared that the late Master had, in conducting himself as he did, followed the example of those who went before him and under circumstances which might reasonably lead him to

COURT—(Contd.)

think that the past allowance of such fees as were collected by him amounted to an authority to him, to allow, charge and receive them, and that he was not guilty of wilful corruption or fraud, or grave misconduct.

Held that, in the absence of any evidence of wilful corruption or fraud, or grave misconduct, the appellant ought not to have been dismissed from his office, though the fees improperly received by him might have been prohibited or disallowed for the future by proper authority (232).

If the fees were improper, it was the duty of the Court to prohibit the allowance of them for the future, but in the absence of misconduct by corruption, or disobedience proved, it does not appear to us to have been the duty of the Court to have dismissed the appellant from his office (232). (*Lord Langdale.*) MINCHIN, *In re.* (1847) 4 M. I. A. 220 = 6 Moo. P. C. 43.

—Officers of—Integrity of—Standard of, required.

The administration of justice must be kept most pure, and free from suspicion, and the public, who are so deeply interested in the due discharge by the officers of Court of the duties incident to their offices, are entitled to require, that those to whom such great interests are submitted, should be free from all suspicion of disregarding the sacred obligation of duty or of being tempted, for any consideration, to give their sanction to statements specious in appearance, but in fact and reality, erroneous and deceptive (159). (*Dr. Lushington.*) WILLIAM PATRICK GRANT, *In re.* (1850) 7 Moo P. C. 141.

—Officers of—Misconduct of—Charge of—Inquiry into—Court's duty.

When a charge of this most grave character was brought against an officer of the Court placed in a situation of great importance to the due administration of Justice, which, if the charge were true, he ought not to have been permitted for a single hour longer to retain, it would naturally be expected that a most strict inquiry would be immediately made by the Court into the truth or falsehood of this charge. Yet, as far as their Lordships can discover, not the slightest notice appears to have been taken of it (108).

N.B.—The question in this case was as to the genuineness of a will. The officer referred to above was a clerk of the office of the Judge by whom the suit was tried, and employed as English translator. The charge against the officer was that he wanted a bribe for deposing to the will and threatened to throw obstacles in the suit, if his proposal was not accepted. Petitioner (the party propounding the will) presented a petition to the Court to the above effect and yet no action was taken on it. (*Lord Kingsdown.*) NANA NURAIN RAO *v.* HAREE PUNTH BHAO.

(1862) 9 M. I. A. 96 = 1 Sar. 843 = Marsh. 436.

—Officers of—Misconduct of—Suspension or dismissal for. *See* SUPREME COURT—OFFICERS OF.

—Officers and solicitors of—Extortions upon suitors by—Prevention of—Duty as to.

We undoubtedly consider it to be the duty of those who preside over the Courts and offices of justice, to use their utmost vigilance and endeavours, to prevent any extortion upon suitors, and to take care that every fee or sum of money, which is sought to be received by the officers and solicitors, has a legal sanction for its receipt, and that no more than the sum legally sanctioned should be received (230-1). (*Lord Langdale.*) MINCHIN, *In re.* (1847) 4 M. I. A. 220 = 6 Moo. P. C. 43.

—Opinion of, on case stated to it—Order of Court on—Advisory or final—Test. *See* COURT—CASE STATED TO. (1923) 50 I. A. 212 (224-5) = 47 B. 724 (739-40).

—Order of—Ambiguity in—Validity thereof—Presumption in favour of.

COURT—(Contd.)

Where there is an ambiguity as to the effect of a judicial order, it is to be presumed that that was done which the law required and that construction ought to be adopted which will give effect to that presumption. (*Lord Robertson.*) **RAI RADHA KISHEN v. COLLECTOR OF JAUNPORE.**

(1900) 28 I.A. 28 (33) = 23 A. 220 (226) =
5 C.W.N. 153 = 3 Bom. L.R. 78 = 7 Sar. 800 =
11 M.L.J. 65.

———Order of—Government's disobedience of—Improbability of. See GOVERNMENT—COURT'S ORDER.

(1898) 26 I.A. 16 (29) = 22 M. 270 (283).

———Order against party without hearing him—Making of—Propriety. See MAXIM—*Audi Alteram partem*.

(1906) 33 I. A. 134 (138) = 33 C. 1178 (1182).

———Policy—Topics of consideration of—Propriety.

The question which their Lordships have to consider is whether the conclusion of the court below was right in point of law. Into any topic of policy they are precluded from entering. (*Viscount Haldane.*) **SOBHUZA II v. MILLER.**

(1926) 30 C. W. N. 961 = 99 I.C. 265 =
A.I.R. 1926 P.C. 131 (132).

———Property—Taking or assignment of—Power of. See COURT—SUIT BY OR AGAINST. (1919) 46 I.A. 228 =
42 A. 158 (167).

———Statute—Provisions of—Extension of, beyond what Legislature intended—Propriety. See LEGISLATURE—COURT—WHERE LEGISLATURE, ETC.

(1872) 14 M. I. A. 496 (528).

———Statute—Provisions of—Notice of—Duty to take. See ARBITRATION—AWARD—DECREE IN ACCORDANCE WITH—VALIDITY—AWARD MADE AFTER.

(1891) 18 I. A. 55 (58) = 13 A. 300.

———Suit by or against—Maintainability—Property—Taking or assignment of—Court's power of.

The Court is not a judicial person. It cannot be sued. It cannot take property, and as it cannot take property it cannot assign it.

In a case in which a bond executed by sureties giving security for restoration of mesne profits by the decree-holder who was allowed to take possession pending an appeal did not purport to bind the sureties to any individual officer or to any one, it was suggested that they were bound to the Court. Their Lordships rejected the suggestion with the above-mentioned observations. (*Lord Phillimore.*) **RAGHUBAR SINGH v. JAI INDRA BAHADUR SINGH.**

(1919) 46 I.A. 228 = 42 A. 158 (167) =
13 L. W. 82 = 18 A. L. J. 263 = 22 Bom. L.R. 521 =
55 I.C. 550 = 22 O.C. 212 = 38 M.L.J. 302.

———Suitors—Injury to—Duty to avoid. See COURT—ACT OF, OUGHT NOT TO INJURE ANY OF SUITORS.

COURT-FEE.

———(See also COURT FEES ACT.)

———Appeal or plaint presented in time with deficient Court-fee—Procedure on—Deficiency made up after expiry of period allowed for suit or appeal—Date of presentation of appeal or plaint in case of. See C. P. CODE OF 1908, S. 149.

———Deficiency in or non-payment of—Objection on ground of—Nature and effect of.

In a case in which as to any part of a suit a deficient or no court-fee is paid, the objection would be, not that the suit is outside the court's jurisdiction, but that the proper fee had not been paid, and that in contravention of S. 6 of the Court Fees Act a document had been filed in court in respect of which the fee indicated in the Schedules had not

COURT-FEE—(Contd.)

been paid. (*Sir Lawrence Jenkins.*) **RACHAPPA SUBRAO JADHAV v. SHIDAPPA VENKATRAO JADHAV.**

(1918) 46 I.A. 25 (31) = 43 B. 507 (517) =
24 C.W.N. 33 = 17 A.L.J. 418 = 25 M.L.T. 298 =
29 C.L.J. 452 = 21 Bom. L.R. 489 = 10 L.W. 274 =
50 I.C. 280 = 36 M.L.J. 437.

———Sufficiency of—Objection to, by private party—Maintainability. See COURT-FEES ACT OF 1870—OBJECT OF. (1918) 46 I.A. 25 (32) = 43 B. 507 (518).

———Valuation for purposes of—Value of subject-matter of suit—Distinction—Former not conclusive as to latter. See C. P. CODE OF 1908, S. 110—SUBJECT-MATTER—VALUE OF—COURT-FEE VALUATION.

———Valuation of suit for purposes of—Statutory provision as to—Strict compliance with—Necessity.

The provisions of Bengal Regulation X of 1829 upon the subject of value should be carefully attended to (496-7).

So held in a case in which a suit was allowed to proceed although the plaint did not, as was required by the Regulation, give the real or market value of the property sued for, but gave only the price of the land at a past auction. (*Lord Justice Turner.*) **MOHUN LALL SOOKUL v. BEBEE DOSS.**

(1861) 8 M.I.A. 492 = 2 W.R. 9 =
1 Suth. 458 = 1 Sar. 811.

COURT-FEES ACT (VII OF 1870).

———(See also COURT-FEE.)

———Object of—Revenue—Securing of—Weapon of technicality against opponent—Use of objection as.

The Court-Fees Act was passed not to arm a litigant with a weapon of technicality against his opponent but to secure revenue for the benefit of the state. This is evident from the character of the Act, and is brought out by S. 12, which makes the decision of the first court as to value final as between the parties, and enables a Court of appeal to correct any error as to this, only where the first Court decided to the detriment of the revenue. (*Sir Lawrence Jenkins.*) **RACHAPPA SUBRAO JADHAV v. SHIDAPPA VENKATRAO JADHAV.**

(1918) 46 I.A. 25 (32) = 43 B. 507 (518) =
24 C.W.N. 33 = 17 A.L.J. 418 = 25 M.L.T. 298 =
29 C.L.J. 452 = 21 Bom. L.R. 489 = 10 L.W. 274 =
50 I.C. 280 = 36 M.L.J. 437.

———S. 7 (1v) (f)—Partnership—Accounts—Suit for—Plaintiff's claim for Rs. 3,000—Defence disputing, and counter-claiming Rs. 29,000—Decree dismissing plaintiff's claim and decreeing counter-claim to extent of Rs. 19,991—Appeal by plaintiff as regards both parts of decree—Valuation of, at Rs. 19,991 and Court-fee paid thereon—Sufficiency of, to include appeal as regards Rs. 3,000.

The case between the parties had reference to the rendering of accounts and the settlement of the sums due thereon in connection with a dissolved partnership. The plaintiffs valued their suit at Rs. 3,000 for the purpose of court-fees, and asked for a rendering of accounts and a decree for Rs. 3,000, with the statement "if more than Rs. 3,000 be found due to the plaintiffs they will pay an additional court-fee." In his pleas the first defendant asked for a decree in his own favour for Rs. 29,000, and he challenged the shares as given by the plaintiffs, and asked for dismissal of their suit. The final decree passed in the suit declared Rs. 19,991 to be due to the first defendant by the plaintiffs. No sum was found due to the plaintiffs under their claim for Rs. 3,000. Both parties appealed from the judgment. The plaintiffs by their appeal challenged the decree against them for over Rs. 19,000 and maintained that that sum in whole or in part should be disallowed, and that their own claim of Rs. 3,000 or less or more should be granted in their favour. They valued their appeal, for pur-

COURT FEES ACT (VII OF 1870).

poses of court-fee, at Rs. 19,991, and paid the court-fee of Rs. 975 due thereon. The appellate court held that only a sectional and not a fee covering all the relief sought had been paid, and that therefore the claim for Rs. 3,000 had finally dropped out of the case. It accordingly held that a remand should only be granted as to the Rs. 19,000.

Held, reversing the court below, that the memorandum of appeal by the plaintiffs to the court below did state in terms of the Court-Fees Act the amount at which the relief was sought, and that the court-fee paid thereon was sufficient to cover also the relief as regards the Rs. 3,000.

There is no reason for treating the payment of Rs. 975 either as upon an under-value or a split value. It was a mistake to treat the payment of Rs. 975 as a fee made only on the amount of the decree passed against the plaintiffs. That amount may be not only in full but largely in excess of the true sum of relief at which a sound valuation could, in the present circumstances, be said to reach and it covered the appeal as a whole, including that sum on the one hand and a much smaller figure of Rs. 3,000 on the other. (*Lord Shaw.*) **FAIZULLAH KHAN v. MAULADAD KHAN.**

(1929) 56 I. A. 232 = 33 C. W. N. 781 =
31 Bom. L. R. 841 = 50 C. L. J. 39 = 30 L. W. 104 =
117 I. C. 493 = I. R. (1929) P. C. 261 =
A. I. R. 1929 P. C. 147 = 57 M. L. J. 281.

—Sch. I, Art. 1—Mortgage decree—Appeal against, by person claiming under title paramount—Value of. *See* MORTGAGE—SUIT TO ENFORCE—DECREE IN—APPEAL AGAINST—VALUE OF.

—Sch. II, Art. 17 (1)—Claimant unsuccessful—Suit by, under O. 21, R. 63 of C.P.C.—Court-fee payable on plaint in. *See* C. P. CODE OF 1908, O. 21, R. 63—SUIT UNDER—COURT-FEE PAYABLE ON PLAINT IN.

(1907) 35 I. A. 22 (24-5) = 35 C. 202 (206).

—Sch. II, Art. 17 (iii)—*Declaratory decree without consequential relief—Suit for—Court-fee on—Valuation of suit at Rs. 130—Practice in Bombay of—Propriety of.*

It is contrary to the scheme of the Court Fees Act that there should be any valuation of a suit for a declaration of title only. The practice not uncommon in Bombay of valuing a prayer for a declaratory decree at Rs. 130 as being the value on which the fee nearest to Rs. 10 would be leviable has no warrant in law, and is misleading. (*Sir Lawrence Jenkins.*) **RACHAPPA SUBRAO JADHAV v. SHIDAPPA VENKATRAO JADHAV.**

(1918) 46 I. A. 25 (30) = 43 B. 507 (516-7) =
24 C. W. N. 33 = 17 A. L. J. 418 = 25 M. L. T. 298 =
29 C. L. J. 452 = 21 Bom. L. R. 489 = 10 L. W. 274 =
50 I. C. 280 = 36 M. L. J. 437.

COURT FEES AMENDMENT ACT (XL OF 1899).

—S. 19-H, Sub S. (4) Proviso—*Amendment of valuation—Proceedings for—Limitation—Starting point.*

It is not a justifiable construction of the proviso of Sub-S. 4 of S. 19-H of Act XL of 1899 to date the period of running from anything less than the lodging of the inventory required by the statute. It will not satisfy this proviso that 6 months have elapsed from a period when a certain document, which might be classed as or denominated an inventory, satisfied a District Judge or any judge. What he has to be satisfied of is that the *punctum temporis* from which the 6 months run is the lodging of an inventory as required by S. 98 of the Probate and Administration Act, 1881. (*Lord Shaw.*) **RAMESHWAR KUMAR v. COLLECTOR OF GAYA.**

(1913) 40 I. A. 236 = 41 C. 556 =
21 I. C. 975 = 18 C. W. N. 153 = (1914) M. W. N. 13 =
19 C. L. J. 136 = 12 A. L. J. 69 = 15 M. L. T. 87 =
16 Bom. L. R. 95 = 26 M. L. J. 56.

COURT OF DIRECTORS.

—*Secretary of State for India—Declarations on behalf of Crown—Weight of.*

The declarations of the Court of Directors and of the Secretary of State that Kathiawar is not within the dominion of the Crown were no mere expressions of opinion. They were rulings by those who were for the time being entitled to speak on behalf of the Sovereign power, and rulings intended to govern the action of the authorities in India, by determining the principle upon which they were to act in dealing with Kathiawar. (*Sir Arthur Wilson.*) **HEMCHAND DEVCHAND v. AZAM SAKARLAL CHHOTAM LAL.**

(1905) 33 I. A. 1 = 33 C. 219 (252) =
10 C. W. N. 361 = 8 Bom. L. R. 129 = 3 A. L. J. 250 =
3 C. L. J. 395 = 1 M. L. T. 115 = 9 Sar. 5 = 16 M. L. J. 115.

COURT OF WARDS.

ADMISSION BY.

ADMISSION OF—DECREE AGAINST WARD BASED ON—VALIDITY OF.

ALIENATION OF PROPERTY OF WARD.

ALIENEE OF ESTATE OF WARD—TITLE OF—RECOGNITION OF.

ASSERTION OF RIGHTS OF PROPRIETOR IN GOVERNMENT TRACTS BY—EFFECT OF.

CONTRACT BY PREDECESSOR OF WARD—TERMS OF ALTERATION OF.

DECREE AGAINST WARD BY ADMISSION OF—VALIDITY AGAINST WARD OF.

DISQUALIFIED PROPRIETOR.

DISQUALIFICATION OF PROPRIETOR.

HINDU JOINT FAMILY.

HINDU WIDOW—ESTATE OF, UNDER MANAGEMENT.

LEASE BY PREDECESSOR OF WARD.

LIABILITY INCURRED BY, FOR PROTECTING WHOLE ESTATE.

MANAGEMENT OF ESTATE BY.

MANAGER UNDER.

PROPERTY VESTED IN.

Admission by.

—Effect against ward of. *See* COURT OF WARDS—LEASE BY PREDECESSOR OF WARD—VALIDITY AGAINST WARD OF. (1871) 16 W. R. (P. C.) 9 = 8 B. L. R. 113 (116-7).

Admission of—Decree against ward based on—Validity of.

—Manager's fraud—Admission based on. *See* COURT OF WARDS—DECREE AGAINST WARD BY ADMISSION OF. (1897) 24 I. A. 107 = 24 C. 853.

Alienation of property of ward.

—*Gift of such property—Powers in regard to—Not co-extensive with those of ward if of age.*

The Court of Wards has no power to alienate land of its ward to a Municipality for the purpose of enabling it to construct a public ghat. *A fortiori* it has no power to make a present of the land to the municipality. It has not, in this respect, the same powers as the ward would have if he were of age (95-6). (*Sir Richard Couch.*) **MAHARAJA LUCHMESWAR SINGH v. CHAIRMAN OF THE DARBHANGA MUNICIPALITY.**

(1890) 17 I. A. 90 =
18 C. 99 (105-6) = 5 Sar. 564.

—Power of—Voluntary alienation in perpetuity—Validity. *See* OUDH LAND REVENUE ACT, 1876, S. 172. (1901) 28 I. A. 190 (195-6) = 23 A. 394.

COURT OF WARDS—(Contd.)

Alienee of estate of ward—Title of—Recognition of.
 ———*Validity against ward of.*

Quære, whether the Court of Wards has the power of binding its infant ward by a recognition of a lease granted by the adoptive mother of the father of the ward posterior to the date of his adoption and at a time, therefore, when she had no power to make the grant (116-7). (*Sir James W. Colville.*) RANI SARAT SUNDARI DEBI *v.* KUMAR PARESNARAYAN. (1871) 8 B. L. R. 113 =

16 W. R. (P. C.) 9 = 2 Sar. 661.

Assertion of rights of proprietor in Government tracts by—Effect of.

———*Proprietor's title to such tracts—Government's right subsequent to dispute—Estoppel.*

The question in dispute was whether the proprietary right in certain tracts, mainly hill tracts, known as the "maliahs" of Parlakimidi, belonged to the plaintiff-appellant, as Zemindar of Parlakimidi, or to the Crown. It was found as a fact that the proprietary right vested in the Crown and not in the Zemindar. It was, however, contended that the Government were estopped from denying the Zemindar's title to the maliahs. The circumstances on which the plea of estoppel was founded were as follows:—

It appeared that for some years, in consequence of the disability or incapacity of successive Zemindars, the Zemindari of Parlakimidi was under the charge of the Court of Wards. And during the whole or part of that time the view prevailed that the maliah forest belonged to the Zemindari. The officers acting under the Court of Wards, the principal of whom was, of course, the Collector of the district, worked those forests for the benefit of the Zemindari, and no one on behalf of Government disputed the propriety of what was being done. It was further shown, however, that while the Court of Wards was in charge, money out of the funds of the Zemindari was expended upon the making of roads in the maliahs, partly, it would seem to increase the profits derived from the working of the forests, and partly for objects of more general importance. And that expenditure was approved and encouraged by the Government.

The trial Judge thought that those facts estopped the Government from denying the Zemindar's title to the maliahs. From that view the High Court dissented.

Their Lordships agreed with the High Court (70-1).

The Court of Wards, on behalf of the Zemindar, was in possession of the maliah forests under the mistaken idea that they belonged to the Zemindari. The Government officials, under the same mistake, acquiesced in that possession, and while that state of things continued, they encouraged such an expenditure of Zemindari funds upon the maliahs as seemed good in the public interest. It seems impossible to put the Zemindar's case higher than this. And their Lordships can see in this no such representation as could give rise to the estoppel contended for (71). (*Sir Arthur Wilson.*) RAJA OF PARLAKIMIDI *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL. (1905) 32 I. A. 53 = 28 M. 130 (150-1) = 1 C. L. J. 460 = 9 C. W. N. 553 = 8 Sar. 749.

Contract by predecessor of ward—Terms of—Alteration of.

———*Power of Court of Wards as to.* See COURT OF WARDS—LEASE BY PREDECESSOR OF WARD—SECURITY ADDITIONAL, ETC. (1848) 4 M. I. A. 321 (334-5).

Decree against ward by admission of—Validity against ward of.

———*Manager's fraud—Admission based on.*

During plaintiff's infancy his estate was under the management of the Court of Wards. During that period an order was passed by the settlement court decreeing one of the

COURT OF WARDS—(Contd.)

Decree against ward by admission of—Validity against ward of—(Contd.)

villages in plaintiff's estate "for birt" to defendant's predecessor in interest. That order was obtained on an admission by the Court of Wards of a birt tenure made on the report of a manager of the estate who was related to the alleged birtdar and who had a joint interest in the alleged birt tenure but who concealed his relationship and interest from the Court of Wards. In a suit brought by plaintiff on attaining his majority for possession of the village and for cancellation of the order of the Settlement Court, *held*, that the order was, in the circumstances of the case, not binding on plaintiff, and that the onus was on defendant to establish the birt tenure alleged. (*Lord Watson.*) RAM AUTAR *v.* RAJA MUHAMMAD MUMTAZ ALI KHAN. (1897) 24 I. A. 107 = 24 C. 853 = 1 C. W. N. 417 = 7 Sar. 148.

Disqualified Proprietor.

———*Adoption without sanction by—Prohibition of—Authority to adopt—Giving of—If applies also to.* See BENGAL REGULATIONS—COURT OF WARDS REG. X OF 1793—DISQUALIFIED PROPRIETOR.

(1876) 3 I. A. 72 (83) = 1 C. 289 (295).

———*Contract by—Competency for—Holding out of, by Court of Wards—Effect of.*

Quære, whether in a case in which the proprietor of an estate was incompetent when the Court of Wards took possession of his estate, any conduct of the Court of Wards could render him competent (193). (*Sir Robert P. Collier.*) RAI BALKRISHNA *v.* MUSSUMAT MASUMA BIBI. (1882) 9 I. A. 182 = 5 A. 142 (154) = 13 C. L. R. 232 = 4 Sar. 398.

———*Contract by—Competency for—Holding out of, by Court of Wards—Proof of—Quantum.*

In a case in which the Court of Wards had assumed the management of the estate of *M*, under the Bengal Court of Wards, Ceded Provinces Regulation LII of 1803, a petition was presented by her son-in-law stating that the term of a conditional sale under which one had held the estate in question had expired, that it was impossible to liquidate his debt without raising a fresh loan, that arrangements had been made with certain bankers for a fresh loan, and that the written permission of the Court of Wards was necessary for contracting the fresh mortgage loan. The petition accordingly prayed for permission to raise the said loan. The Court granted the permission sought for, whereupon *M*, her daughter and son-in-law contracted fresh loans, and entered into four bonds. The bonds themselves recited that the estate was held by the Court of Wards, that the executants of the bonds were forbidden by law to borrow debt without the sanction of the Court; and that they had obtained a written permission of the Commissioner and executed the bonds.

Held, that the giving on the part of the Court of Wards of that limited authority to raise loans for the purpose of paying antecedent debts, was not such a holding out to the world of the competency of *M*, and her daughter and son-in-law, as would induce any reasonable person to suppose that they had the power to contract debts (195). (*Sir Robert P. Collier.*) RAI BALKRISHNA *v.* MUSSUMAT MASUMA BIBI. (1882) 9 I. A. 182 = 5 A. 142 (156-7) = 13 C. L. R. 232 = 4 Sar. 398.

———*Contract by—Incompetency for—Notice express of—Mortgage by proprietor reciting prior mortgage—Recital in latter of incapacity to borrow without sanction of Court of Wards—Mortgagee if must be held to have notice of incapacity by reason of.*

The question was whether when the plaintiff entered into the suit mortgage of the 4th of March, 1874, he had express

COURT OF WARDS—(Contd.)**Disqualified Proprietor—(Contd.)**

notice that *M*, the mortgagor, had no power to contract without the written permission of the Court of Wards, who had the management of her estate. That mortgage recited a previous mortgage, which stated that she was forbidden by law to borrow debt without the sanction of the Court of Wards, and that she had obtained a written permission of the Court and executed that previous mortgage.

Held, that the plaintiff had express notice when he entered into the mortgage of the 4th of March, 1874, that she was acting without authority (195). (*Sir Robert P. Collier.*) *RAI BALKRISHNA v. MUSSUMAT MASUMA BIBI*.

(1882) 9 I. A. 182 = 5 A. 142 (156-7) = 13 C.L.R. 232 = 4 Sar. 398.

—Contract by—Incompetency for—Plea of, by Court of Wards—Maintainability—Estoppel—Holding out of competency by it—No misleading.

In a case in which the Court of Wards disputed the validity of a mortgage effected by a disqualified proprietor on the ground that the estate was at the time of the mortgage under the management of the Court of Wards, the mortgagee insisted that the Court of Wards were estopped from raising the plea of the mortgagor's incompetency to contract inasmuch as they had held out that he was competent to do so. It appeared, however, that the mortgagee was at the time of his mortgage fully aware of the mortgagor's incompetency and that he had not been misled into taking the mortgage by the conduct of the Court of Wards.

Held, that the Court of Wards were not, under the circumstances, estopped from raising the plea of the mortgagor's incompetency to contract (195). (*Sir Robert P. Collier.*) *RAI BALKRISHNA v. MUSSUMAT MASUMA BIBI*. (1882) 9 I. A. 182 = 5 A. 142 (156-7) = 13 C. L. R. 232 = 4 Sar. 398.

—Contract entered into while under disability—Ratification of, after order for release of estate from management—Specific performance of contract. See CHOTA NAGPUR ENCUMBERED ESTATES ACT OF 1876—DISQUALIFIED PROPRIETOR—CONTRACT, ETC.

(1889) 16 I. A. 221 (231-2) = 17 C. 223 (232).

—Debts—Right to contract—Simple debt bond executed while estate under charge—Validity. See OUDH LAND REVENUE ACT OF 1876, SS. 173 AND 174.

(1906) 33 I. A. 118 (123-4) = 28 A. 570 (580-1).

—Debt of—Suit for—Party-Defendant in—Court of Wards—Guardian appointed for proprietor. See OUDH LAND REVENUE ACT OF 1876, SS. 175 AND 176.

(1895) 22 I. A. 90 = 22 C. 729.

—Debt of, incurred while estate under management—Decree for—Execution of, against estate after release from management. See OUDH LAND REVENUE ACT OF 1876, S. 174—DISQUALIFIED PROPRIETOR—DEBT OF, ETC.

(1916) 43 I. A. 69 (71-2) = 38 A. 271 (275-6).

—Person not validly made a, though his estate in fact under management—Contract by—Validity. See BENGAL REGULATIONS—COURT OF WARDS CEDED PROVINCES REG. LII OF 1803—PERSON NOT, ETC.

(1867) 11 M. I. A. 468 (483).

—Sale by Court of Wards—Suit to set aside, and to recover property sold—Limitation—Starting point. See BENGAL ACTS—COURT OF WARDS ACT OF 1879, SS. 6 (A) AND 27.

(1918) 46 I. A. 60 (63) = 46 C. 694.

—Transaction commenced by, while under disability—Completion of, after cessation thereof—Validity. See CHOTA NAGPUR ENCUMBERED ESTATES ACT OF 1876—DISQUALIFIED PROPRIETOR—TRANSACTION, ETC.

(1889) 16 I. A. 221 (231) = 17 C. 223 (232).

COURT OF WARDS—(Contd.)**Disqualification of Proprietor.**

—Conditions of statute as to—Strict compliance with—Necessity. See BENGAL REGULATIONS—COURT OF WARDS CEDED PROVINCES REGULATION LII OF 1803—DISQUALIFICATION, UNDER.

(1867) 11 M. I. A. 468 (477-8).

Hindu joint family.

—Manager of—Application by, for assumption of management—Scope of—Entire joint family property or only manager's interest in it. See CENTRAL PROVINCES GOVERNMENT WARDS ACT OF 1885, S. 7 (C) (4).

(1913) 40 I. A. 117 (128-9) = 40 C. 784 (797-8).

—Property of—Management of—Assumption of—Power of. See CENTRAL PROVINCES GOVERNMENT WARDS ACT OF 1885—JOINT FAMILY PROPERTY.

(1913) 40 I. A. 117 (128-9) = 40 C. 784 (801).

—Property of—Management of—Assumption of, on manager's application. See CENTRAL PROVINCES GOVERNMENT WARDS ACT OF 1885, S. 7 (C) (4).

(1913) 40 I. A. 117 (128-9) = 40 C. 784 (802).

—Property of—Member's undivided interest in—Assumption of management of—Power of. See CENTRAL PROVINCES GOVERNMENT WARDS ACT OF 1885.

(1913) 40 I. A. 117 (128-9) = 40 C. 784 (798).

Hindu widow—Estate of, under management.

—Surrender of, by widow to next reversioner during period of management—Sanction for—Necessity. See BENGAL ACTS—COURT OF WARDS ACT OF 1879, S. 60.

(1925) 53 I. A. 11 (21-2) = 5 P. 290.

Lease by predecessor of Ward.

—Security additional from lessee under—Power of Court of Wards to insist upon.

A lease for a term of 10 years granted by the predecessor in interest of the appellant was annulled by the Court of Wards on behalf of the appellant on the ground that the lessee did not provide the security required by the Court of Wards for the performance of the engagements contained in the lease. The question was whether there was any right in the Court of Wards, acting for the minor appellant to require that security.

The original lease, with a surety whom the lessor considered sufficient, had been granted by the ancestors of the minor. That surety was alive, and no change was shown to have taken place in his circumstances.

Held, that it would be singular if the circumstance of the estate devolving on a minor could enable the Court of Wards on his behalf to interfere with, and alter the terms of, a contract made by those through whom he claimed (334-5).

No authority of any kind has been produced to show the existence of so extraordinary a power, and we must therefore assume that no such authority exists. If this be so, the annulment of the lease was clearly wrongful (334-5). (*Mr. Pemberton Leigh.*) *RAJAH BURRODA KANT ROY v. RAM TUNNOO BOSE*.

(1848) 4 M. I. A. 321 = 7 W. R. 51 (P. C.) = 1 Suth. 191 = 1 Sar. 355.

—Validity against award of—Onus of proof on lessee—Ad interim recognition by Court of Wards of title of lessee—What amounts to—Effect of.

The suit was brought by the respondent to impeach as a false and invalid jote the tenure of certain lands which were held by the appellants under several leases, granting perpetual leases at a fixed jumma. The leases were granted by the adoptive mother of *B*, the father of the respondent, posterior to the date of his adoption, and at a time, therefore, when she had no power to make the grant. The appellants relied upon two documents alleged to have been executed by *B*, after he came of age, for showing that the grant in question was confirmed by him after he came of age; but those

COURT OF WARDS—(Contd.)**Lease by predecessor of Ward—(Contd.)**

documents were held not to be genuine. The appellants also relied upon a proceeding of the Court of Wards, in whose custody the estate of the respondent was after the death of B, his father, as relieving them from the duty of proving the validity and binding nature of the grant.

The proceeding was addressed to the tenants of the jote, and it said "you will, until you receive a second order from the Court of Wards, pay the rents to the said permanent jotedar and ijaradar, and will take receipts thereof."

Held, that that proceeding was not more than an *ad interim* recognition of the title of the jotedar because it made the direction to pay the rents subject to any second order of the Court of Wards (116-7).

Held, further that there was no ground for contending that the appellants were relieved by that order, or by the subsequent possession and enjoyment by the jotedars, which certainly continued so long as the Court of Wards was in possession of the estate, from giving that proof against the respondent which otherwise they would be bound to give (117). (*Sir James W. Colville.*) RANI SARAT SUNDARI DEBI v. KUMAR PARESNARAYAN ROY.

(1871) 8 B. L. R. 113 = 16 W. R. (P. C.) 9 = 2 Sar. 681.

Liability incurred by, for protecting whole estate.

———*Binding nature of, on inheritance.*

A liability incurred by the Court of Wards as representing the whole estate, and with the *bona fide* object of protecting the whole estate, is binding on the inheritance. RAJAH DEBENDRO NARAIN ROY v. COOMAR CHUNDERNATH ROY.

(1873) 2 Suth. 863 = 20 W. R. 30.

Management of estate by.

———*Acts done during—Invalidity of, on ground of assumption of management being without jurisdiction—Onus of proof of.*

After the preliminary decree in a suit for sale on a mortgage, the mortgagor was declared a disqualified proprietor, and his estate was by the Local Government placed under the superintendence of the Court of Wards. While the Court of Wards was in superintendence, the decree for sale was made final. Subsequently the estate was released from the superintendence of the Court of Wards by the local Government acting under an order of the Government of India. In execution proceedings the mortgagor contended that the decree absolute was not binding upon him, because the Court of Wards had no jurisdiction to act.

Held, that it was for the mortgagor to prove that the proceedings of the Court of Wards were a nullity, and that he had not done so (498-9). (*Viscount Haldane.*) NARINDRA BAHADUR SINGH v. OUDH COMMERCIAL BANK, LTD.

(1921) 48 I. A. 494 = 43 A. 478 (482) =

26 C. W. N. 326 = L. R. 3 P. C. 25 =

(1922) M. W. N. 61 = A. I. R. 1922 P. C. 1 =

24 O. C. 183 = 64 I. C. 187 = 42 M. L. J. 58.

———*Release of—Order for—Retrospective operation of—Presumption of—Propriety.*

The Local Government put the Court of Wards in charge of the appellants' estate and *prima facie* that was within their powers. It continued to be under their control until the local Government released it. It is not to be presumed, unless it is clearly proved by the appellants, that the release operated retrospectively, so as to invalidate all the multitudinous acts which must have been done while the Court of Wards was in superintendence (498). (*Viscount Haldane.*) NARINDRA BAHADUR SINGH v. THE OUDH COMMERCIAL BANK, LTD.

(1921) 48 I. A. 494 =

43 A. 478 (482) = 26 C. W. N. 326 = L. R. 3 P. C. 25 =

(1922) M. W. N. 61 = A. I. R. 1922 P. C. 1 = 64 I. C. 187 =

24 O. C. 183 = 42 M. L. J. 58.

COURT OF WARDS—(Contd.)**Management of estate by—(Contd.)**

———*Release of—Order for—Validity—Factum valet—Applicability of.* See CHOTA NAGPUR ENCUMBERED ESTATES ACT OF 1876, S. 12—RELEASE OF ESTATE FROM MANAGEMENT.

(1889) 16 I. A. 221 (232) = 17 C. 223 (233).

———*Release of—Order for—Validity—Scheduled debts not paid but only transferred to another creditor.* See CHOTA NAGPUR ENCUMBERED ESTATES ACT OF 1876, S. 12—RELEASE OF ESTATE FROM MANAGEMENT—ORDER FOR—VALIDITY—CONDITIONS.

(1889) 16 I. A. 221 (230) = 17 C. 223 (230, 233).

———*Release of—Order of Government of India directing—Correspondence between it and Local Government regarding—Production in evidence of—Court's power to compel.* See EVIDENCE ACT, S. 162.

(1921) 48 I. A. 494 (498) = 43 A. 478 (482).

Manager under.

———*Fraud of—Admission of Court of Wards based on—Decree against award on basis of—Validity against ward of.* See COURT OF WARDS—DECREE AGAINST WARD BY ADMISSION OF.

(1897) 24 I. A. 107 = 24 C. 853.

———*Pre-emption—Formalities for assertion of right of—Observance of, on behalf of ward—Right of.* See BENGAL ACTS—COURT OF WARDS ACT OF 1879, S. 40.

(1912) 39 I. A. 101 (107-8).

———*Suit instituted under authority of—Prosecution of—Sanction for—Letter of Court of Wards authorising plaintiff to act as next friend if amounts to.* See BENGAL ACTS—COURT OF WARDS ACT OF 1879—S. 55 (2)—SUIT AUTHORISED BY MANAGER UNDER.

(1889) 17 I. A. 5 (7) = 17 C. 688.

Property vested in.

———*Dealings with—Right of—Manager under Court of Wards—Other persons—Right of.* See CHOTA NAGPUR ENCUMBERED ESTATES ACT OF 1876—MANAGER APPOINTED UNDER.

(1924) 51 I. A. 208 (214-5) = 3 P. 625.

———*Lease of—Agreement for, by officials of Lieutenant-Governor, and not by manager under Court of Wards—Specific performance of—Possibility in law of.* See CHOTA NAGPUR ENCUMBERED ESTATES ACT OF 1876—PROPERTY VESTED IN MANAGER UNDER.

(1924) 51 I. A. 208 (217) = 3 Pat. 625.

COVENANT.

———*Agent—Sale-deed by—Covenants in—Binding character of, against principal.* See PRINCIPAL AND AGENT—AGENT—SALE-DEED BY—COVENANTS IN.

(1876) 3 I. A. 194 (199).

———*Benamidar—Contract by—Covenants in—Effect on real owner of.* See BENAMI—BENAMIDAR—CONTRACT BY.

(1876) 3 I. A. 194 (198-9).

———*Benamidar—Sale-deed by—Covenants in—Binding nature of, on real owner.* See BENAMI—BENAMIDAR—SALE-DEED BY.

(1876) 8 I. A. 194 (199).

———*Benamidar—Sale-deed by—Covenants in—Breach of—Damages against real owner—Suit for.* See BENAMI—BENAMIDAR—SALE-DEED BY.

(1876) 3 I. A. 194 (199).

———*Labour contract—Protection—Covenant to afford—"Adequate" protection—Covenant to afford—If implied.* See CONTRACT—LABOUR CONTRACT.

(1918) 8 L. W. 324.

———*Labour contract—Protection—Covenant to afford—Implication of, from plans and sections given to contractor—Propriety.* See CONTRACT—LABOUR CONTRACT.

(1918) 8 L. W. 324.

COVENANT—(Contd.)

——Land—Covenant running with—What amounts to. See LAND—PRESENT ESTATE OR INTEREST IN.

(1920) 48 I.A. 376.

——Mortgage with possession—Covenant for title in—What amounts to. See MORTGAGE—USUFRUCTUARY MORTGAGE—COVENANT FOR TITLE IN.

(1879) 6 I.A. 145 (154) = 5 C. 198 (205).

——Payment of sum of money in future—Money which purchaser covenants to pay—Distinction. See TRANSFER OF PROPERTY ACT, S. 55 (4).

(1903) 30 I.A. 238 (246) = 31 C. 57 (73).

——Payment out of obligor's share of inheritance in particular estate—Covenant for—Liability under—Estate insolvent and obligor inheriting nothing—Effect. See COMPROMISE—CONSTRUCTION—PAYMENT OUT OF OBLIGOR'S SHARE OF INHERITANCE IN PARTICULAR ESTATE.

——Sale-deed—Covenant in. See SALE-DEED—COVENANT IN.

CREDITOR.

——Difficulties of, in India, begin with his obtaining decree. See LITIGANT—DIFFICULTIES OF, IN INDIA.

(1872) 14 M.I.A. 605 (612).

CREDITOR AND DEBTOR.

——See DEBTOR AND CREDITOR.

CRIMINAL CASE.

——Accused—Consideration of case of—Court—Suggestion to executive—Weight due to.

While declining to grant leave to appeal in a criminal matter, their Lordships suggested an application by the petitioner (accused) to the executive authorities for relief, with an intimation of their Lordships' opinion of the hardship and injustice of the case.

Their Lordships doubt not that when it is represented to those authorities that this suggestion emanates from the Judicial Committee, they will not be loth to examine into the circumstances of the case, and to do that which Justice may require. (*Dr. Lushington.*) THE QUEEN v. JOYKISHEN MOOKERJEE.

(1862) 9 M.I.A. 168 (194) = 1 W.R. 13 (P.C.) = 1 Moo. P.C. (N.S.) 272 = 1 Sar. 860 = 1 Suth. 481.

——Conviction—Setting aside of—Application for, founded on affidavits made after trial—When allowed.

An application to set aside a verdict of conviction, founded on affidavits made after the trial is always to be looked upon with very great jealousy. But when the evidence without contradiction is of a slight nature, and the appellant could not be expected to offer evidence in opposition to it, for want of knowledge that it would be adduced against him, an opportunity ought to be afforded to him of laying before a jury such evidence in the defence as he may be able to offer upon another trial. (84-5). (*Mr. Justice Bosanquet.*) JANNOKEE DOSS v. THE KING.

(1836) 1 M.I.A. 67 = 1 Sar. 94.

——Felony—Appeal in cases of—Right of—English law.

Not only in England, but throughout the dominions of the Crown of Great Britain, governed by the law of England, no right of appeal in felonies has ever existed (481). (*Dr. Lushington.*) QUEEN v. EDULJEE BYRAMJEE.

(1846) 3 M.I.A. 468 = 5 Moo. P.C. 276 = 1 Sar. 305.

——Felony—Conviction of—Remedy of prisoner in case of—English Law—Appeal—Right of.

By the law of England, no prisoner convicted of felony can claim a new trial or a right of appeal in a case in which it is not alleged that any error appeared on the face of the record, but the complaint is of the direction of the Judge, the evidence, and the verdict. A writ of error is another

CRIMINAL CASE—(Contd.)

question. The usual practice, where the judgment is not postponed is, if any objection be taken at the trial, which the Judge who tries the prisoners does not admit to be valid, but deems worthy of consideration, to reserve it for the opinion of 15 Judges. If the majority think the objection ought to have been sustained, the Judge who tried the prisoner reports to the Home Secretary, and the prerogative of the Crown is exercised in such a manner as the advisers of the Crown think best. The prisoner has no legal right, in the proper sense of the term, to demand a reconsideration by a Court of Law of the verdict, or of any legal objection raised at the trial. (*Dr. Lushington.*) QUEEN v. EDULJEE BYRAMJEE.

(1846) 3 M. I. A. 468 (478-9) = 5 Moo. P. C. 276 = 1 Sar. 305.

——Felony—Uttering instrument knowing it to be forged—Offence constituted by—Accessories and principals—Distinction between.

Uttering an instrument knowing it to be forged is a misdemeanour, and not a felony. All persons concerned are principals; there can be no accessories (362).

A person who was privy to the forgery of an instrument, knew that it had taken place, and was for his benefit, would undoubtedly be a party to the misdemeanour (362). (*Mr. Justice Bosanquet.*) POONEAKHOTY MOODELIAR v. THE KING.

(1835) 3 Knapp. 348 = 1 Sar. 76.

——Jurisdiction in—Forged receipt—Uttering as true a—Offence of—Receipt forged outside Bombay but transmitted to Bombay to be acted upon there—Jurisdiction of Recorder's Court at Bombay to try offence.

P, a Hindoo merchant employed in the Commissariat Department of the Bombay Army in Camp at Serroor, within the territories of the Peishwa, forged a receipt upon the East India Company for charges incurred in the public service, which receipt was transmitted to Bombay, and there entered in the Commissariat accounts. On an indictment preferred in the Recorder's Court, at Bombay, against P, under the Statute of the 53 Geo. III, c. 155, s. 115, for uttering in Bombay as true, a forged receipt within the jurisdiction of that Court, with intent to defraud the East India Company, *held*, that the indictment was well laid in Bombay.

It is clear that P was employed in the Camp of the British forces then engaged in the Deccan, under the authority of the British Government in the dominions of the Peishwa; he was therefore under the protection of the British laws, and consequently owed obedience to them, and having been guilty of an offence which was committed by his procurement within the local limits of Bombay, he was indictable there as much as if he had been personally within those limits at the time (369). (*Mr. Justice Bosanquet.*) POONEAKHOTY MOODELIAR v. THE KING.

(1835) 3 Knapp. 348 = 1 Sar. 76.

——Jurisdiction in—Misdemeanour—Offence of—Jurisdiction to try—Completion of offence—Place of—If has jurisdiction.

Where a misdemeanour is completed, there the offence may be charged to have been committed. A variety of authorities may be found upon this subject. Several of them are cases where the jurisdictions within which the different parts of the transaction occurred, were of totally different kinds; notwithstanding which the indictment has been supported in the place where the offence has been laid, such being the place in which the misdemeanour was completed (367). (*Mr. Justice Bosanquet.*) POONEAKHOTY MOODELIAR v. THE KING.

(1835) 3 Knapp. 348 = 1 Sar. 76.

——Jurisdiction in—Native State—Railways in—Jurisdiction of British Indian Courts on—Offence in British territory—Offender at a station on a Railway in Nizam's

CRIMINAL CASE—(Contd.)

Dominions—Arrest of—Legality. See NATIVE STATE—RAILWAYS IN—CRIMINAL JURISDICTION, ETC.

(1897) 24 I. A. 137 = 25 C. 20.

———*Jurisdiction in—Plea to—Maintainability—Plea not suggesting other Court competent to try offence.*

An indictment was preferred in the Recorder's Court, at Bombay, against one *P*, under the Statute of the 53 Geo. III, c. 155, s. 115, for uttering in Bombay as true, a forged receipt within the jurisdiction of that Court, with intent to defraud the East India Company.

To that indictment, *P* put in a plea to the jurisdiction, in which he alleged that he was not a subject of His Majesty, or of the East India Company; that he was a native of Arcot, and under the allegiance of the Nabob of Arcot; that he was resident in the State of the Peishwa of Serroor; and that at the time of the commission of the supposed offence, he was commorant and resident at that place.

The Recorder overruled the plea upon the ground that, in substance, it amounted to nothing more than the general issue, because it gave no other court of competent jurisdiction for the trial of the offence.

Held, that the recorder was right in overruling the plea (356). (*Mr. Justice Bosanquet.*) POONEAKHOTY MOODELIAR *v.* THE KING. (1835) 3 Knapp. 348 = 1 Sar. 76.

———*Jurisdiction in—Supreme Court of Calcutta—Misdemeanour committed within jurisdiction—Procurement of, by person living abroad—Jurisdiction to try such person.*

Under the general jurisdiction of the Supreme Court at Calcutta, a person, though resident at Benares, is liable to its jurisdiction if privy to and co-operating in a misdemeanour committed within it.

Where, therefore, a party resident at Benares, was indicted with others before the Supreme Court for a conspiracy, in procuring the prosecutor to be arrested in a fictitious action at law, and the instructions for the arrest were proved to the satisfaction of the jury, to have originated with the appellant, held by the Judicial Committee that the offence being completed within the jurisdiction of the Supreme Court at Calcutta that Court had rightly assumed jurisdiction over the parties privy to it.

Where, a misdemeanour is completed, the offence may be charged to have been committed. (*Mr. Justice Bosanquet.*) JANNOKEE DOSS *v.* THE KING. (1836) 1 M. I. A. 67 = 1 Sar. 94

———*Jurisdiction in—Supreme Court of Calcutta—9th Geo. IV, c. 74—Applicability and effect of.*

Putting a strict construction upon S. 56 of Act 9th Geo. IV, c. 74, we have no doubt that it extends only to persons who were otherwise amenable to the criminal jurisdiction of the Court at Calcutta, who are the persons described in the first section, and that by the language of the section in question, it applies only to cases in which the felony or crime has been committed, by persons who committed that crime, partly within the jurisdiction, and partly without (98).

(*Lord Wensleydale.*) NGA HOONG *v.* THE QUEEN. (1857) 7 M. I. A. 72 = 4 W. R. 109 = 1 Suth. 285 = Boul. 189 = 1 Sar. 598.

———*Jurisdiction in—Supreme Court of Calcutta—9th Geo. IV, c. 74—Object of.*

The object of Act 9th Geo. IV, c. 74, as appears by the recital, was for the purpose of applying and extending to the British territories in India the same provisions as had been recently made for England with respect to offences committed in two different places, or partially committed in one place, and accomplished in another, which provisions had been the subject of a recent enactment in the Statute, 9th Geo. IV, c. 31 (98-9). It was only to apply the law

CRIMINAL CASE—(Contd.)

which had been lately enacted in England, as to an offence partly committed in one part and completed in another, the East Indies, and not to make a new enactment rendering persons liable to punishment for a complete offence, who would not have been liable before (103). (*Lord Wensleydale.*) NGA HOONG *v.* THE QUEEN.

(1857) 7 M.I.A. 72 = 4 W. R. 109 = 1 Suth. 285 = Boul. 189 = 1 Sar. 598.

CRIMINAL LAW.

———*Equivalents—Acceptance of—Danger in.*

It is dangerous in cases of criminal law to accept equivalents (107). (*Lord Phillimore.*) ABDUL RAHMAN *v.* KING EMPEROR. (1926) 54 I. A. 96 =

5 Rang. 53 = 45 C. L. J. 441 = 6 Bur. L. J. 65 =

8 Pat. L. T. 155 = 38 M. L. T. (P. C.) 64 =

100 I. C. 227 = 4 O. W. N. 283 = 28 Cr. L. J. 259 =

7 A. I. C. R. 362 = 29 Bom. L. R. 813 = 25 A.L.J. 117 =

31 C. W. N. 271 = (1927) M. W. N. 103 =

A. I. R. 1927 P.C. 44 = 52 M. L. J. 585.

———*Object and intention—Distinction.* See PENAL CODE, SS 34 and 149. (1924) 52 I. A. 40 (52) =

52 C. 197.

CRIMINAL PROCEDURE.

———*Object of—Offence distinct—Proof definite of—Obtaining of.* See CR. P. C. OF 1898, S. 234—OBJECT OF. (1901) 28 I. A. 257 (263) = 25 M. 61 (97).

CRIMINAL PROCEDURE CODE (ACT V OF 1898).

———*Purpose of—Offences—Definition—Punishment—Procedure for trial—Provision for.* See OFFENCES—DEFINITION. (1883) 10 I. A. 171 (177) = 10 C. 109 (129).

———**S. 4 (k)—Inquiry—Trial—Distinction.**

An inquiry under the Code of Criminal Procedure Code is a proceeding distinct from a trial. There is no definition of the word "inquiry" in the interpretation clause, S. 4. But there is this explanation of the term as used in the Code: "(k) Enquiry includes every enquiry other than a trial conducted under this Code by a Magistrate or Court." (*Lord Macnaghten.*) CLARKE *v.* BROJENDRA KISHORE ROY CHOWDHURY. (1912) 39 I. A. 163 (174) =

39 C. 953 (964) = 16 C.W.N. 865 = 16 C. L. J. 231 =

(1912) M. W. N. 760 = 12 M. L. T. 171 =

10 A. L. J. 193 = 14 Bom. L. R. 717 = 13 Cr. L. J. 693 =

16 I.C. 501 = 23 M. L. J. 32.

———**S. 5—"All offences under any other law"—Meaning—Contempt of High Court by libel published out of Court when Court is not sitting—If included.**

The words "all offences under any other law" in S. 5 of the Code of Criminal Procedure, 1882, cannot be intended to include a contempt of the High Court by a libel published out of Court when the Court is not sitting, for which offence no provision is made by the Code (179). (*Sir Barnes Peacock.*) SURENDRANATH BANERJEA *v.* CHIEF JUSTICE AND JUDGES OF THE HIGH COURT OF BENGAL.

(1883) 10 I. A. 171 = 10 C. 109 (132) = 4 Sar. 474.

———*"Offences under the Indian Penal Code"—Meaning—Contempt of High Court by libel published out of Court when Court is not sitting—If included—Contempt amounting to defamation—Effect.*

A contempt of the High Court by a libel, such as the present, published out of Court when the Court is not sitting, is not included in the words "offences under the Indian Penal Code," in S. 5 of the Code of Criminal Procedure, 1882, although the contempt may include defamation (179.)

CRIM. PRO. CODE (ACT V OF 1898), S. 5—(Contd.)
(Sir Barnes Peacock.) SURENDRANATH BANERJEA v. CHIEF JUSTICE AND JUDGES OF THE HIGH COURT OF BENGAL. (1883) 10 I. A. 171 = 10 C. 109 (131) = 4 Sar. 474.

—S. 96—Court—Meaning of. *See* CR. P. C. OF 1898, SS. 96, 105. (1912) 39 I. A. 163 = 39 C. 953 (966).

—Ss. 96 and 105, Schedule III—Search warrant—Issue of—District Magistrate—Jurisdiction when not sitting as a Court—S. 96—Court—Meaning.

The word "Court" in S. 96 of the Criminal Procedure Code includes a Magistrate; and a Magistrate can under that section authorise a search to be made not merely when sitting as a Court but in view of an inquiry about to be made.

The question was whether a search made by the appellant as Chief Magistrate of the District, accompanied by the District Superintendent of Police, upon the premises of the respondents constituted an actionable trespass, and whether the appellant was liable in damages therefor.

It appeared that a serious offence had been committed against the public tranquillity, which it was the duty of the appellant as District Magistrate to inquire into, and that he accordingly searched the respondents' cutcherries for arms.

Held, that it was clear from Ss. 96 and 105 and Schedule III of the Criminal Procedure Code that he was authorised by the Code to direct a search of the respondent's cutcherry if he considered it advisable to do so. (*Lord Macnaghten.*)

CLAKKE v. BROJENDRA KISHORE ROY CHOWDHURY. (1912) 39 I. A. 163 = 39 C. 953 = 16 C.W.N. 865 = 16 C. L. J. 231 = (1912) M.W.N. 760 = 12 M.L.T. 171 = 10 A. L. J. 193 = 14 Bom. L. R. 717 = 13 Cr. L.J. 693 = 16 I. C. 501 = 23 M. L. J. 32.

—Ss. 105, 96, Sch. III—Search warrant—Issue of District Magistrate—Jurisdiction when not sitting as a Court. *See* CR. P. CODE, SS. 96, 105; SCH. III. (1912) 39 I. A. 163 = 39 C. 953.

—S. 145. (*See also* BENGAL ACTS—AFFRAYS ACT IV OF 1840; AND FOUDARY COURT.)

—Jurisdiction of Magistrate under.

A Magistrate has only jurisdiction to determine the fact of possession (223). (*Lord Justice Turner.*) MAHARAJAH KOOWUR BABOO NITRASUR SINGH v. BABOO NUND LOLL SINGH. (1860) 8 M. I. A. 199 = 1 W. R. 51 = 1 Suth. 420 = 1 Sar. 744.

—A Magistrate has no right whatever to enter into any question of title. He is simply to decide as to who was the person in possession. (*Sir Barnes Peacock.*) SHEIK TORAB ALLY v. SHEIK MOHAMED TUKHEE. (1872) 19 W. R. 1 = 5 Sar. 711 (714).

—Order under—Admissibility in evidence—Purpose and extent of.

These police orders under S. 145 of Cr. P. C. of 1898 are admissible in evidence on general principles as well as under S. 13 of the Evidence Act to show the fact that such orders were made. This necessarily makes them evidence of the following facts, all of which appear from the orders themselves, *viz.*, who the parties to the disputes were, what the land in dispute was; and who was declared entitled to retain possession. For this purpose and to this extent such orders are admissible in evidence for and against every one when the fact of possession at the date of the order has to be ascertained (33-4). (*Lord Lindley.*) DINOMONI CHOWDHURANI v. BROJO MOHINI CHOWDHURANI. (1901) 29 I. A. 24 = 29 C. 187 (198) = 6 C. W. N. 386 = 4 Bom. L. R. 167 = 8 Sar. 224 = 12 M. L. J. 83.

—Order under—Lands referred to in—Description of—Identity—Extrinsic evidence as to—Admissibility of.

If the lands referred to in an order under S. 145 of Cr. P. C. of 1898 are described by metes and bounds, or by refer-

CRIM. PRO. CODE (ACT V OF 1898), S. 145—(Contd.)
 ence to objects or marks physically existing, these must necessarily be ascertained by extrinsic evidence, *i.e.*, the testimony of persons who know the locality. (*Lord Lindley.*) DINOMONI CHOWDHURANI v. BROJO MOHINI CHOWDHURANI. (1901) 29 I. A. 24 (33-4) = 29 C. 187 (198) = 6 C. W. N. 386 = 4 Bom. L. R. 167 = 8 Sar. 224 = 12 M. L. J. 83.

—Order under—Map referred to in—Admissibility in evidence—Purpose of.

If the orders under S. 145 of Cr. P. C. of 1898 refer to a map, that map is admissible in evidence to render the order intelligible; and the actual situation of the objects drawn or otherwise indicated on the map must, as in all cases of this sort, be ascertained by extrinsic evidence. (*Lord Lindley.*)

DINOMONI CHOWDHURANI v. BROJO MOHINI CHOWDHURANI. (1901) 29 I. A. 24 (33-4) = 29 C. 187 (198) = 6 C. W. N. 386 = 4 Bom. L. R. 167 = 8 Sar. 224 = 12 M. L. J. 83.

—Order under—Nature of.

Orders under S. 145 of Cr. P. C. are merely police orders made to prevent breaches of the peace (33). (*Lord Lindley.*)

DINOMONI CHOWDHURANI v. BROJO MOHINI CHOWDHURANI. (1901) 29 I. A. 24 = 29 C. 187 (197) = 6 C. W. N. 386 = 4 Bom. L. R. 167 = 8 Sar. 224 = 12 M. L. J. 83.

—Order under—Party in possession under—Ejectment suit against—Onus on plaintiff in. (*Lord Brougham.*) RAM RUTTON RAE v. FURROOK-ON-NISSA BEGUM. (1847) 4 M. I. A. 233 (244-5) = 1 Sar. 342.

—(*Sir James W. Colville.*) JUGGOMOHUN BUKSHEE v. ROY MOTHORANATH CHOWDRY. (1867) 11 M. I. A. 233 (240) = 7 W. R. P. C. 18 = 1 Suth. 673 = 2 Sar. 246.

—(*Sir James W. Colville.*) BABOO BEER PERTAB SAHEE v. MAHARAJAH RAJENDER PERTAB SAHEE. (1867) 12 M. I. A. 1 (23) = 9 W. R. (P. C.) 15 = 2 Suth. 114 = 2 Sar. 348.

—(*Lord Chelmsford.*) RAJAH BURDACAUNT ROY v. BABOO CHUNDER COOMAR ROY. (1868) 12 M. I. A. 145 (153-4) = 11 W. R. (P. C.) 1 = 2 B. L. R. 1 = 2 Suth. 169 = 2 Sar. 402.

—WISE v. BROJENDRO COOMAR ROY. (1872) 18 W. R. 91 = 2 Suth. 619 = 4 Sar. 788.

Suit to recover certain beghas of land claimed by the plaintiff as part of a khas mehal purchased by her from the Government. The defendants were in possession of the land, and were found by the Magistrate in a proceeding under the Code of Criminal Procedure to be in possession. The plaintiff sought to turn them out.

Held, the suit is in the nature of an ejectment suit, and the plaintiff must recover upon the strength of her own title, and not upon the weakness of that of her adversary. It is immaterial, therefore, in this case to consider whether the land is the property of the defendants, or not, because whether it is their property or not, unless it is proved to be the property of the plaintiff, she is not entitled to turn them out; nor is it necessary to consider whether it was ever the property of Government or not, because, unless the plaintiff can make out that, being the property of the Government, the Government conveyed it to her, she is not entitled to recover (879). RANEE SURNOMOYEE v. WATSON & CO. (1873) 2 Suth. 879 = 20 W. R. 211 = 4 Sar. 820.

—(*Lord Robertson.*) RADHAMONI BEBI v. COLLECTOR OF KHULNA. (1900) 27 I. A. 136 (137) = 27 C. 943 (950) = 4 C.W.N. 597 = 2 Bom. L. R. 592 = 7 Sar. 714.

CRIM. PRO. CODE (ACT V OF 1898), S. 145—(Contd.)

—As regards possession under a Magistrate's order although the order confers no title, the fact of possession remains, and the person in possession can only be evicted by a person who can prove a better title. In a suit by a person against whom an order under S. 145 of Cr. P. C. has been made to recover possession from the party in possession under such an order, the burden is on the plaintiff of proving her title (34). (*Lord Lindley.*) **DINOMONI CHOWDHURANI v. BROJO MOHINI CHOWDHURANI.**

(1901) 29 I. A. 24 = 29 C. 187 (199) = 6 C. W. N. 386 = 4 Bom. L. R. 167 = 8 Sar. 224 = 12 M. L. J. 83.

—(*Mr. Amir Ali.*) **INDRAJIT PRATAP SAHI v. AMAR SINGH.** (1923) 50 I. A. 183 (186) = 2 P. 676 = 21 A. L. J. 554 = A.I.R. 1923 P.C. 128 = 4 Pat. L. T. 447 = 1 Pat. L.R. 345 = 33 M. L. T. 233 = 18 L.W. 728 = 25 Bom. L. R. 1259 = 28 C. W. N. 277 = 39 C.L.J. 318 = 74 I.C. 747 = 45 M. L. J. 578.

—Order under—Person not party to—Effect against.

An order of a Magistrate maintaining one man in the possession of certain lands cannot be made an instrument for turning another man out of the possession of other lands (223).

Where a proceeding of a Magistrate was had between two parties, neither of whom was really in possession, held, that the party in whose favour the Magistrate made an order could not successfully use it to eject the actual possessor of the lands, but who was no party to the proceeding and was not bound by it (223-4). (*Lord Justice Turner.*) **MAHARAJAH KOOWUR BABOO NITRASUR SINGH v. BABOO NUND LOLL SINGH.** (1860) 8 M. I. A. 199 = 1 W.R. 51 = 1 Suth. 420 = 1 Sar. 744.

—Order under—Possession for three years held under—Effect of—Title to property if acquired by. See **BENGAL ACTS—AFFRAVS ACT IV OF 1840—ORDER UNDER—POSSESSION FOR THREE YEARS UNDER.**

(1879) 7 I. A. 73 (81).

—Order under—Reports accompanying, but not referred to in—Admissibility in evidence—Evidence Act, S. 13.

Reports accompanying the orders under S. 145 of Cr.P.C. or the maps referred to therein and not referred to in the orders may be admissible as hearsay evidence of reputed possession. But they are not otherwise admissible, unless they are made so by S. 13 of the Evidence Act. To bring a report within that section the report must be "a transaction in which the right or custom in question was created, claimed modified, recognised, asserted or denied or which was inconsistent with its existence." (*Lord Lindley.*) **DINOMONI CHOWDHURANI v. BROJO MOHINI CHOWDHURANI.**

(1901) 29 I.A. 24 (33-4) = 29 C. 187 (198) = 6 C. W. N. 386 = 4 Bom. L.R. 167 = 8 Sar. 224 = 12 M. L. J. 83.

—Order under—Scope and effect of—Title—Possession.

Orders under S. 145 of Cr. P. C. decide no question of title; but under that section the Magistrate is, if possible, to decide which of the parties is in possession of the land in dispute; and, if he decides that one of the disputants is in possession, the Magistrate is to make an order declaring such party to be entitled to retain possession until evicted in due course of law and forbidding all disturbance of such possession, until such eviction. The Criminal Procedure Acts in force in 1866 and 1876 were to the same effect. (*Lord Lindley.*) **DINOMONI CHOWDHURANI v. BROJO MOHINI CHOWDHURANI.**

(1901) 29 I. A. 24 (33-4) = 29 C. 187 (197-8) = 6 C.W.N. 386 = 4 Bom. L.R. 167 = 8 Sar. 224 = 12 M. L. J. 83.

—Proceedings under—Ordinary prelude to regular suit for decision of disputed title.

CRIM. PRO. CODE (ACT V OF 1898), S. 145—(Contd.)

The contest between the parties was commenced by those summary proceedings touching the fact of the right of possession, which are in India the ordinary prelude to a regular suit for the determination of a disputed title (22). (*Sir James W. Colville.*) **BABOO BEER PERTAB SAHEE v. MAHARAJAH RAJENDER PERTAB SAHEE.**

(1867) 12 M.I.A. 1 = 9 W.R. (P.C.) 15 = 2 Suth. 114 = 2 Sar. 348.

—Proceedings under—Title—Documents of—Non-production of—Presumption against their genuineness from—Propriety. See **TITLE—DOCUMENTS OF—GENUINENESS OF—PRESUMPTION AGAINST.**

(1863-5) 10 M. I. A. 165 (175-6).

—Proceedings under—Title of party—Statement as to—Probability of.

Even in possession proceedings, the persons who have the title will necessarily, or very naturally, when the title is claimed by the opposite party, state their title (424). (*Mr. Pemberton Leigh.*) **KADIR BUKHSH KHAN v. MUSSU-MATAIN FUSSEEH-ON-NISSA.** (1853) 5 M.I.A. 413 = 1 Suth. 241.

—S. 172, Sub-S. (2)—Police diary—Admissibility in evidence—Extent of—Use of entries in diary for purpose of discrediting witnesses for accused—Legality.

A police diary kept under S. 172 of the Code of Criminal Procedure may be used to assist the Court which tries the case by suggesting means of further elucidating points which need clearing up and which are material for the purpose of doing justice between the Crown and the accused, but not as containing entries which can by themselves be taken to be evidence of any date, fact or statement contained in the diary. The police officer who made the entry may be confronted with it, but not any other witness.

Held, that the entries in a police diary purporting to be statements made by persons who were subsequently examined as witnesses for the defence could not be treated as evidence which could be used even for the purpose of discrediting those witnesses. (*Viscount Haldane.*) **DAL SINGH v. KING EMPEROR.** (1917) 44 I. A. 137 (144 6) = 44 C. 876 = 21 C.W.N. 818 = 15 A.L.J. 475 = 1 Pat. L. W. 661 = 19 Bom. L. R. 510 = 6 L. W. 71 = 26 C.L.J. 13 = (1917) M. W. N. 522 = 13 N.L.R. 100 = 9 Cr. L. R. 461 = 39 I. C. 311 = 33 M. L. J. 555.

—S. 191—Applicability—Cases falling under clauses (a) and (c) of sub-S. 1 of S. 190—Distinction.

S. 191 of the Cr. P. C., which provides that the Magistrate should inform the accused that he was entitled to have the case tried by another Court, is inapplicable to a case in which, while trying one person, the Magistrate finds occasion to formulate a charge against some one else, i.e., to a case in which the Magistrate acts under cl. (a) of S. 190, sub-S. 1 of the Code. It applies only to a case in which the Magistrate proceeds under cl. (c) of S. 190, sub-S. 1, i.e., to a case in which he takes cognizance of an offence after receiving a complaint of the facts which constituted the offence (102). (*Lord Phillimore.*) **ABDUL RAHMAN v. KING-EMPEROR.** (1926) 54 I. A. 96 = 5 Rang. 53 = 45 C. L. J. 441 = 6 Bur. L. J. 65 = 8 Pat. L. T. 155 = 38 M.L.T. 64 (P. C.) = 100 I. C. 227 = 4 O.W.N. 283 = 28 Cr. L. J. 259 = 7 A.I.C.R. 362 = 29 Bom. L. R. 813 = 25 A. L. J. 117 = 31 C.W.N. 271 = (1927) M.W.N. 103 = A. I. R. 1927 P.C. 44 = 52 M.L.J. 585.

—S. 195—Procedure under, with reference to offence under S. 228, I.P.C.—Inapplicability of, to case of insult to, or libel upon High Court or one of judges thereof.

It is contended that, by reason of the Code of Criminal Procedure, 1882, the Court could not deal with the offence of a contempt of Court committed by the publication of a

CRIM. PRO. CODE (ACT V OF 1898), S. 195—(Contd.)

libel out of Court when the Court is not sitting as a contempt of Court or punish the offender by commitment in a summary manner.

S. 195 of the Cr. P.C. was referred to which enacts that no Court shall take cognizance of an offence under S. 228 of the Penal Code (*i.e.*, the offering insult to a public servant whilst sitting in any stage of a judicial proceeding) when such offence is committed in or in relation to any proceeding in any Court, except with the previous sanction or on the complaint of such Court or of some other Court to which it is subordinate.

It is scarcely possible to suppose that the procedure above pointed out was intended to apply to the case of an insult to or a libel upon the High Court or a libel upon one of the Judges thereof, imparting corruption or misconduct or incapacity in the discharge of his public duties, or a libel such as that set out in the petition (178). (*Sir Barnes Peacock.*) **SURENDRA NATH BANERJEA v. CHIEF JUSTICE AND JUDGES OF THE HIGH COURT OF BENGAL.**

(1883) 10 I.A. 171 = 10 C. 109 (130-1) = 4 Sar. 474.

—**S. 221—Charge—Evidence not supporting, owing to an error—Effect—Accused entitled to benefit of error.**

Where owing to an error the evidence did not support the indictment, to which it was annexed, *held*, that the accused was entitled to the benefit of the error which had occurred and that his conviction must be set aside (373-4). (*Mr. Justice Bosanquet.*) **POONEAKHOTY MOODELIAR v. THE KING.**

(1835) 3 Knapp. 348 = 1 Sar. 76.

—**Charge—"or" in—Use of, in connection with words which are synonymous—Effect of.**

It is not denied that, when words are synonymous, like the words, "ship or vessel," the use of the disjunctive "or" in an indictment is not objectionable.

Held, that although there might be a receipt which was not an acquittance, and *vice versa*, yet it was clear that, upon the indictment in question, both words, being used with reference to the same instrument, were used synonymously (372). (*Mr. Justice Bosanquet.*) **POONEAKHOTY MOODELIAR v. THE KING.**

(1835) 3 Knapp. 348 = 1 Sar. 76.

—**Forged receipt—Use as true of a—Charge of—Receipt being for money—Averment of—Necessity.**

In an indictment for uttering as true a forged receipt, if the instrument does purport to be a receipt for money, it is not necessary that any special averment to that effect should be made in the indictment (370). (*Mr. Justice Bosanquet.*) **POONEAKHOTY MOODELIAR v. THE KING.**

(1835) 3 Knapp. 348 = 1 Sar. 76.

—**Forged receipt—Uttering of—Charge in respect of, referring to instrument as "receipt or acquittance" for money—Vagueness or ambiguity—Charge if bad for.**

An appeal from a conviction for the offence of uttering as true a forged receipt, it was contended that the offence was not charged with sufficient certainty because it was in the alternative, for it was said to be a "receipt or acquittance" for money; and that as those were two separate offences, that indictment was therefore vague, ambiguous, and insufficient.

The accused was charged with uttering one instrument, and one instrument only, which was set out at the foot of the indictment, according to its tenor, and not only was it set out according to its tenor, but, although in one part of the indictment it was called "a receipt or acquittance for money," the statement of the tenor was introduced by the words, "which said fraudulent and forged receipt and acquittance for money" was so and so. It was clear, therefore, that the accused was indicted for uttering a receipt; for the instrument set out, purported to be both a receipt and acquittance for money received.

CRIM. PRO. CODE (ACT V OF 1898), S. 221—(Contd.)

Held, over-ruling the objection of the accused, that the charge was for one offence only, and that the offence was that of uttering the instrument afterwards set out, which, though described in the first part of the indictment as "a receipt or acquittance for money" was stated to be an acquittance and receipt, and purported to be so (372).

It is not denied that, when words are synonymous, like the other words, "ship or vessel," the use of the disjunctive is not objectionable; and although there may be a receipt which is not an acquittance, and *vice versa*, yet it is clear that upon this indictment, both words, being used with reference to the same instrument, are used synonymously (372). (*Mr. Justice Bosanquet.*) **POONEAKHOTY MOODELIAR v. THE KING.**

(1835) 3 Knapp. 348 = 1 Sar. 76.

—**Intention of accused to defraud—Statement in charge as to—When necessary and when not.**

Where the natural tendency of an act is to defraud or injure another, the actor is taken to contemplate the consequences of his own act, and may be charged with intending so to do, such as the cases of indictments for uttering forged Bank Notes with intent to defraud the Governor and Company of the Bank of England, though the probability may be slight of a forged note being paid by the servants of the Bank.

Where, however, the very scope and object of the whole of the transaction in respect of which the accused was charged was to impose upon the auditors at Bombay, *held*, that the indictment need not state expressly that the accused intended to defraud the East India Company (372). (*Mr. Justice Bosanquet.*) **POONEAKHOTY MOODELIAR v. THE KING.**

(1835) 3 Knapp. 348 = 1 Sar. 76.

—**Offence charged—Clearness as to—Necessity—Ambiguity as to—Effect.**

There is no doubt that an indictment ought to be clear, and ought to declare what the offence is with which the person is charged; and if it is doubtful what the offence is, the indictment must consequently be bad (371). (*Mr. Justice Bosanquet.*) **POONEAKHOTY MOODELIAR v. THE KING.**

(1835) 3 Knapp. 348 = 1 Sar. 76.

—**S. 234—Joint trial—Legality of—Question as to—Privy Council appeal—Special leave for—Grant of, in such case. See PRIVY COUNCIL—CRIMINAL APPEAL—SPECIAL LEAVE FOR—GRANT OF—GROUNDS—CR. P. CODE, S. 234.**

(1926) 54 I. A. 45.

—**Object of—Criminal Procedure—Object of.**

The reason of such a provision (as that contained in S. 234, Cr. P. C.) which is analogous to our own provisions in respect of embezzlement, is obviously in order that the jury may not be prejudiced by the multitude of charges and the inconvenience of hearing together of such a number of instances of culpability, and the consequent embarrassment both to judges and accused. It is likely to cause confusion and interfere with the definite proof of a distinct offence, which is the object of all criminal procedure to obtain. The policy of such a provision is manifest, and the necessity of a system of written accusation specifying a definite criminal offence is of the essence of criminal procedure. (*The Lord Chancellor.*) **N. A. SUBRAHMANYA AIYER v. KING-EMPEROR.**

(1901) 28 I. A. 257 = 25 M. 61 = 5 C. W. N. 866 = 3 Bom. L. R. 540 = 8 Sar. 160 = 11 M. L. J. 233.

—**Trial in contravention of—Illegality of.**

In a case in which the accused was tried on an indictment in which he was charged with no less than forty-one acts, those acts extending over a period of two years, *held*, that the course pursued was plainly in contravention of S. 234 of the Code of Criminal Procedure and was plainly

CRIM. PRO. CODE (ACT V OF 1898), S. 234—(Contd.)

illegal (262-3). (*The Lord Chancellor.*) N. A. SUBRAHMANIA AIYER v. KING EMPEROR. (1901) 28 I. A. 257 = 25 M. 61 (97-8) = 5 C. W. N. 866 = 3 Bom. L. R. 540 = 8 Sar. 160 = 11 M. L. J. 233.

———*Trial in contravention of—Illegal or irregular—Conviction supportable if trial had been proper—Conviction confined to such charges as could have been legally joined—Effect of.*

Where a criminal trial was illegal, because it was in contravention of S. 234 of the Code of Criminal Procedure, held, that the course pursued could not be amended by arranging afterwards what might or might not have been properly submitted to the jury.

Upon the assumption that the trial was illegally conducted, it is idle to suggest that there is enough left upon the indictment upon which a conviction might have been supported if the accused had been properly tried. The mischief sought to be avoided by the statute has been done. The effect of the multitude of charges before the jury has not been averted by dissecting the verdict afterwards and appropriating the finding of guilty only to such parts of the written accusation as ought to have been submitted to the jury. It would in the first place leave to the court the functions of the jury, and the accused would never have really been tried at all upon the charge arranged afterwards by the Court.

Their Lordships cannot regard this as cured by S. 537 of the Code. (*The Lord Chancellor.*) N. A. SUBRAHMANIA AIYER v. KING-EMPEROR. (1901) 28 I. A. 257 (268) = 25 M. 61 (97-8) = 5 C. W. N. 866 = 3 Bom. L. R. 540 = 8 Sar. 160 = 11 M. L. J. 233.

———**Ss 236 and 237—Charge of one offence—Conviction for different offence—Legality of—Commission of latter offence appearing in evidence—Penal Code, S. 302—Charge of offence under—Conviction of offence under S. 201.**

The three appellants were, with two others, jointly charged with murder under S. 302 of the Penal Code. The Sessions Judge held that those two others were guilty of murder and he sentenced them to death. With regard to the three appellants, he was of opinion that the evidence did not sufficiently or definitely prove that they were present at and had taken part in the murder, but, on the other hand, he convicted each of them under S. 201 of the Penal Code, of having removed the body, and he sentenced them each to 7 years' rigorous imprisonment. They were not, however, charged formally with the offence under S. 201 of the Penal Code, but they were tried on evidence which brought the case under S. 237, Cr. P. C.

Held, that the procedure was a proper procedure and one warranted by the Cr. P. C.

Under S. 237, Cr. P. C., a man may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made. (*Viscount Haldane.*) BEGU v. KING-EMPEROR. (1925) 52 I. A. 191 = 6 Lah. 226 = 26 P. L. R. 284 = 41 C. L. J. 437 = 27 Bom. L. R. 707 = 23 A. L. J. 636 = A. I. R. 1925 P. C. 130 = (1925) M. W. N. 418 = 7 L. L. J. 324 = 3 Pat. L. R. 951 (Cr.) = 88 I. C. 3 = 48 M. L. J. 643.

———**S. 297—Jury—Charge to—Misdirection on question of fact—What amounts to. See P. C.—CRIMINAL APPEAL—INTERFERENCE IN—GROUNDS—JURY.**

(1914) 41 I. A. 149 = 41 C. 1023 (1062-3).

———**S. 309—Assessors—Opinion of, given in writing—P. C.'s interference with conviction on ground of. See P. C.—CRIMINAL APPEAL—INTERFERENCE IN—GROUNDS—ASSESSORS.** (1925) 52 I. A. 191 (195-6) = 6 L. 226.

———**S. 360—Depositions—Reading over of, to witnesses—Opportunity to accused or his pleader to attend to—Giving of—Better course,**

CRIM. PRO. CODE (ACT V OF 1898), S. 360—(Contd.)

It would be a better course if depositions other than mere formal ones were read over so that the accused or his pleader could hear them and give their undivided attention to them. Care would, of course, have to be taken that no suggestion should be conveyed to a witness in the form of a correction which would make him alter his evidence, but there might be obvious slips to which, under proper safeguard, attention might be called by the accused or his pleader. (*Lord Phillimore.*) ABDUL RAHMAN v. KING-EMPEROR. (1926) 54 I. A. 96 (107) = 5 Rang. 53 = 45 C. L. J. 441 = 6 Bur. L. J. 65 = 8 Pat. L. T. 155 = 38 M. L. T. (P. C.) 64 = 100 I. C. 227 = 4 O. W. N. 283 = 28 Cr. L. J. 259 = 7 A. I. C. R. 362 = 29 Bom. L. R. 813 = 25 A. L. J. 117 = 31 C. W. N. 271 = (1927) M. W. N. 103 = A. I. R. 1927 P. C. 44 = 52 M. L. J. 585.

———**Depositions—Reading over to witnesses of, in presence of accused—Provision as to—Non-compliance with—P. C.'s interference with conviction on ground of. See P. C.—CRIMINAL APPEAL—INTERFERENCE IN—GROUNDS—CR. P. C., S. 360.** (1926) 54 I. A. 96 (104-5) = 5 R. 53.

———**Compliance with—What amounts to—Giving deposition to witness to read to himself if enough.**

The provision in S. 360 of Cr. P. Code as to the deposition being read over to the witness, is not complied with in terms by giving the witness an opportunity of reading it over to himself. He may do so in a slovenly and imperfect manner. He may not easily decipher the handwriting. He may not feel the responsibility in the same way that he would if it were read over to him. No doubt there are cases in which it would be more likely that accuracy would be obtained if the witness read over the deposition to himself, as, for instance, if the pronunciation of the magistrate or of the interpreter in a language not his own was difficult to follow, or if a witness was partially deaf. But except in cases where reading over to the witness would be absurd, as, for example, with a stone-deaf person, the provision should be complied with (107). (*Lord Phillimore.*) ABDUL RAHMAN v. KING-EMPEROR.

(1926) 54 I. A. 96 = 5 Rang. 53 = 45 C. L. J. 441 = 6 Bur. L. J. 65 = 8 Pat. L. T. 155 = 38 M. L. T. (P. C.) 64 = 100 I. C. 227 = 4 O. W. N. 283 = 28 Cr. L. J. 259 = 7 A. I. C. R. 362 = 29 Bom. L. R. 813 = 25 A. L. J. 117 = 31 C. W. N. 271 = (1927) M. W. N. 103 = A. I. R. 1927 P. C. 44 = 52 M. L. J. 585.

———**Ss. 360 and 361—Depositions—Reading over of, to witnesses—Object of—Opportunity to accused to attend to—Corrections—Accused's right to suggest.**

A careful study of Ss. 360 and 361 of Cr. P. C. will show that the object of reading over the deposition is to obtain an accurate record from the witness of what he really means to say, and to give him an opportunity of correcting the words which the Magistrate or his clerk has taken down. It is not to enable the accused or his advocate to suggest corrections.

The distinction between Ss. 360 and 361 is very marked. Under the latter section, if evidence is given in a language not understood by the accused or his pleader, it is to be interpreted into their language, while under the former section when it is read over, it is to be interpreted to the witness in his own language, but there is no provision for its being interpreted to the accused.

No doubt the evidence has to be read over in the presence of the accused or of his pleader. He is entitled to be sure that it has been read over, and that the witness has had an opportunity of correcting the written word. But he is not necessarily entitled to the opportunity of suggesting corrections (106). (*Lord Phillimore.*) ABDUL RAHMAN v. KING-EMPEROR. (1926) 54 I. A. 96 = 5 Rang. 53 = 45 C. L. J. 441 = 6 Bur. L. J. 65 =

CRIM. PRO. CODE (ACT V OF 1898), Ss. 360 and 361—(Contd.)

8 Pat. L.T. 155 = 38 M.L.T. (P.C.) 64 =
100 I.C. 227 = 4 O.W.N. 283 = 28 Cr. L.J. 259 =
7 A. I.C.R. 362 = 29 Bom. L.R. 813 = 25 A.L.J. 117 =
31 C.W.N. 271 = (1927) M.W.N. 103 =
A.I.R. 1927 P.C. 44 = 52 M.L.J. 585.

—Ss. 360 and 537—Non-compliance with—Setting aside of conviction on ground of—No prejudice to accused—S. 537—Effect.

The bare fact of an omission to comply with the provision in S. 360 of Cr. P. C. as to the reading over of the deposition to a witness, and a bare irregularity in giving it over to him to read to himself, unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction, which may be supported by the curative provisions of Ss. 535 and 537 of the Code (107, 110). (*Lord Phillimore.*) **ABDUL RAHMAN v. KING-EMPEROR.**

(1926) 54 I.A. 96 = 5 Rang. 53 =
45 C.L.J. 441 = 6 Bur. L.J. 65 = 8 Pat. L.T. 155 =
38 M.L.T. (P.C.) 64 = 100 I.C. 227 = 4 O.W.N. 283 =
28 Cr. L.J. 259 = 7 A.I.C.R. 362 = 29 Bom. L.R. 813 =
25 A.L.J. 117 = 31 C.W.N. 271 = (1927) M.W.N. 103 =
A.I.R. 1927 P.C. 44 = 52 M.L.J. 585.

—S. 435—Certiorari—Writ of—Grant of—High Court—Jurisdiction. See CERTIORARI—WRIT OF—GRANT OF—HIGH COURTS. (1919) 46 I.A. 176 = 43 M. 146 (159).

—S. 439—Press Act of 1910, S. 3 (1) Proviso—Security—Dispensation of—Cancellation of—Order of—Revision against. See PRESS ACT OF 1910, S. 3 (1) PROVISOR—SECURITY. (1919) 46 I.A. 176 = 43 M. 146 (159).

—S. 439 (4)—Acquittal—Finding of—Alteration into one of conviction—Revision—Jurisdiction in.

In a case in which the appellant was acquitted of the charge of murder and convicted of the offence punishable under S. 304, I.P.C., by the Sessions Judge, the Local Government preferred a revision to the High Court, praying that the appellant might be convicted of the offence of murder under S. 302, I.P.C., though the Local Government could, under S. 417, Cr. P. C., have appealed against the acquittal. The High Court in revision altered the conviction into one under S. 302, I.P.C.

Held, that, in view of sub-S. (4) of S. 439, Cr. P. C., the High Court had no jurisdiction in revision to convert the trial Judge's finding of acquittal on the charge of murder into one of conviction of murder. (*Sir Lancelot Sanderson.*) **KISHAN SINGH v. KING-EMPEROR.**

(1928) 55 I.A. 390 = 50 A. 722 = 28 L.W. 396 =
(1928) M.W.N. 749 = 5 O.W.N. 911 = 111 I.C. 332 =
29 Cr. L.J. 828 = 29 Punj. L.R. 575 = 26 A.L.J. 1099 =
33 C.W.N. 1 = 30 Bom. L.R. 1572 = 48 C.L.J. 397 =
A.I.R. 1928 P.C. 254 = 55 M.L.J. 786.

—Applicability—Complete acquittal in respect of all charges or offences—Necessity.

S. 439, sub-S. (4) of Cr. P. C. is not confined to cases where the trial has ended in a complete acquittal of the accused in respect of all charges or offences. It applies to a case where the accused has been acquitted of a major offence, though convicted of a minor offence. (*Sir Lancelot Sanderson.*) **KISHAN SINGH v. KING-EMPEROR.**

(1928) 55 I.A. 390 = 50 A. 722 = 28 L.W. 396 =
(1928) M.W.N. 749 = 5 O.W.N. 911 = 111 I.C. 332 =
29 Cr. L.J. 828 = 29 Punj. L.R. 575 = 26 A.L.J. 1099 =
33 C.W.N. 1 = 30 Bom. L.R. 1572 = 48 C.L.J. 397 =
A.I.R. 1928 P.C. 254 = 55 M.L.J. 786.

—Ss. 476 to 478—Applicability—Libel or defamation out of Court whilst court is not sitting—Applicability to case of.

S. 480 and the two following sections of the Code of Cri

CRIM. PRO. CODE (ACT V OF 1898), Ss. 476 to 478—(Contd.)

minal Procedure, 1882, do not apply to a case of libel or defamation out of Court whilst the court is not sitting (178). (*Sir Barnes Peacock.*) **SURENDRANATH BANERJEA v. CHIEF JUSTICE AND JUDGES OF THE HIGH COURT OF BENGAL.**

(1883) 10 I.A. 171 =
10 C. 109 (131) = 4 Sar. 474.

—S. 527—Criminal case—Transfer of, from one Presidency to another—Governor-General of India—Power of.

It is in the power of the Governor-General of India if he thinks that in the state of public feeling a fair trial could not be obtained in the place where the offence would ordinarily be tried to order that the trial be held elsewhere. (*Lord Dunedin.*) **SHAFI AHMAD NABI AHMED v. KING-EMPEROR.**

(1925) 23 L.W. 1 = 43 C.L.J. 67 =
(1926) M.W.N. 62 = 3 O.W.N. 165 =
28 Bom. L.R. 158 = A.I.R. 1925 P.C. 305 =
92 I.C. 212 = 49 M.L.J. 834.

—S. 537—Applicability of—Objection which might have been but was not raised in earlier stages—Effect.

In applying S. 537 of the Code of Criminal Procedure, the Court must have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings (104). (*Lord Phillimore.*) **ABDUL RAHMAN v. KING-EMPEROR.**

(1926) 54 I.A. 96 = 5 Rang. 53 =
45 C.L.J. 441 = 6 Bur. L.J. 65 = 8 Pat. L.T. 155 =
38 M.L.T. (P.C.) 64 = 100 I.C. 227 = 4 O.W.N. 283 =
28 Cr. L.J. 259 = 7 A.I.C.R. 362 = 29 Bom. L.R. 813 =
25 A.L.J. 117 = 31 C.W.N. 271 =
(1927) M. W. N. 103 = A.I.R. (1927) P.C. 44 =
52 M.L.J. 585.

—Construction—Expression “Unless such error”—Applicability of, to all sub clauses.

The passage in S. 537 of Cr. P.C. beginning “unless such error” does not qualify (d) only but also the other letters of the alphabet (108). (*Lord Phillimore.*) **ABDUL RAHMAN v. KING-EMPEROR.**

(1926) 54 I.A. 96 =
5 Rang. 53 = 45 C.L.J. 441 =
6 Bur. L.J. 65 = 8 Pat. L.T. 155 =
38 M.L.T. (P.C.) 64 = 100 I.C. 227 =
4 O.W.N. 283 = 28 Cr. L.J. 259 = 7 A.I.C.R. 362 =
29 Bom. L.R. 813 = 25 A.L.J. 117 = 31 C.W.N. 271 =
(1927) M.W.N. 103 = A.I.R. 1927 P.C. 44 =
52 M.L.J. 585.

—S. 360 of Code—Non-compliance with—Setting aside of conviction on ground of—No prejudice to accused. See CR. P.C. OF 1898, Ss. 360, 537.

(1926) 54 I.A. 96 (107, 110) = 5 Rang. 53.

—Trial—Mode enacted by Code—Contravention of—Irregularity or illegality.

The disobedience to an express provision as to a mode of trial is not a mere irregularity within the meaning of S. 537, Cr. P. Code. The remedying of mere irregularities is familiar in most systems of jurisprudence, but it would be an extraordinary extension of such a branch of administering the criminal law to say that when the Code positively enacts that a mode of trial shall not be permitted that this contravention of the Code comes within the description of error, omission, or irregularity (263). (*The Lord Chancellor.*) **N. A. SUBRAHMANIA AIVER v. KING-EMPEROR.**

(1901) 28 I.A. 257 = 25 M. 61 (97-8) =
5 C. W. N. 866 = 3 Bom. L.R. 540 = 8 Sar. 160 =
11 M. L. J. 233.

CRIMINAL PROCEEDING.

—See WORDS—MEANING OF—CRIMINAL.

(1922) 31 M. L. T. 163 (190-1) P. C.

CRIMINAL TRIAL.

—Conduct of—Mode of—Irregularity serious in Consent if can cure.

CRIMINAL TRIAL—(Contd.)

No serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of the advocate of the accused (104). (*Lord Phillimore.*) **ABDUL RAHMAN v. KING-EMPEROR.**

(1926) 54 I. A. 96 = 5 Rang. 53 = 45 C. L. J. 441 = 6 Bur. L. J. 65 = 8 Pat. L. T. 155 = 38 M. L. T. (P. C.) 64 = 100 I. C. 227 = 4 O. W. N. 283 = 28 Cr. L. J. 259 = 7 A. I. C. R. 362 = 29 Bom. L. R. 813 = 25 A. L. J. 117 = 31 C. W. N. 271 = (1927) M. W. N. 103 = A. I. R. 1927 P. C. 44 = 52 M. L. J. 585.

———**Illegality—Full offence—Conviction for, instead of for attempt at or abetment of offence.** See P. C.—**CRIMINAL APPEAL—SPECIAL LEAVE FOR—GRANT OF—** GROUND—**ATTEMPT OR ABETMENT.**

(1924) 52 I. A. 40 (60-1) = 52 C. 197.

———**Mode prescribed by Code—Contravention of—Irregularity or Illegality.** See CR. P. C. OF 1898, S. 537—**TRIAL.** (1901) 28 I. A. 257 (263) = 25 M. 61 (97).

CROSS-EXAMINATION.

———**Account-Books—Cross-examination of party with reference to his own—Points therein relied upon against him—Examination with reference to—Necessity.** See ACCOUNT-BOOKS—**CROSS-EXAMINATION, ETC.**

(1882) 12 C. L. R. 186 (198).

———**Documents put in by plaintiff as part of his case—Cross-examination by defendant with reference to—Documents if become admissible against defendant merely by reason of.** See EVIDENCE—**DOCUMENTS—PLAINTIFF—DOCUMENTS PUT IN BY, AS PART OF HIS CASE.**

(1925) 52 I. A. 372 (376-7).

———**Legitimacy—Issue as to—Claim to be son of A by woman B—Defence that plaintiff was son of A by woman C—Cross-examination of plaintiff's witnesses in case of—Mode of.**

The plaintiff claimed to be the legitimate son of one Sher Khan by his wife Muna. The plaintiff and his witnesses spoke to his paternity, but the defendants did not, in the cross-examination of plaintiff or his witnesses, directly put the question as to whether one Sundaria, not Muna, was the mother of the plaintiff. The plaintiff and his witnesses were merely asked in their cross-examination whether Sher Khan had a woman named Sundaria in his keeping as a mistress.

Held, that if the defence was really that Sundaria and not Muna was the mother of the plaintiff, the defendants must have directly put that question to the plaintiff and his witnesses in their cross-examination.

In order to lay a foundation for calling evidence to prove that the plaintiff was a son of Sundaria it was not sufficient for the defendants to ask the plaintiff, or a witness or witnesses of his in cross-examination whether Sher Khan had a woman named Sundaria in his keeping as a mistress (5) (*Sir John Edge.*) **MUHAMMAD ABDUL AZIZ v. MIR TASADUQ HUSAIN.**

(1917) 42 I. C. 3 = 21 C. W. N. 873 (876) = (1917) M. W. N. 529 = 7 L. W. 66.

———**Witness—Credit of—Cross examination to—Relevancy of—Credibility of witness—Case depending upon.**

Cross-examination to credit is necessarily irrelevant to any issue in an action; its relevancy consists in being addressed to the credit or discredit of the witness, in the box so as to show that his evidence for or against the relevant issue is untrustworthy; it is most relevant in a case where everything depends on the judge's belief or disbelief in the witness's story, and to excuse the witness and actually accept his story on the ground that he was uncomfortable when he

CROSS EXAMINATION—(Contd.)

was shown to be a fraudulent falsifier of accounts is to adopt a wrong course (114). (*Sir George Farwell.*) **BOMBAY COTTON MANUFACTURING CO., LTD. v. MOTILAL SHIV-LAL.**

(1915) 42 I. A. 110 = 39 B. 386 (398) = 17 M. L. T. 408 = (1915) M. W. N. 788 = 2 L. W. 521 = 17 Bom. L. R. 455 = 21 C. L. J. 528 = 19 C. W. N. 617 = 29 I. C. 229 = 28 M. L. J. 593.

———**Witness—Cross-examination of—Opportunity for—Necessity—Court—Examination of witness by.**

In a case in which the question was whether or not a compromise of a suit purporting to have been made and entered into by the appellant, a purdanashin lady, had in fact been so made and entered into with her full knowledge and consent or the contrary, the appellate court insisted upon the examination of the Vakils engaged on opposite sides in the suit. The vakils were examined by the Court and not by the vakils of parties; and their evidence was used by the appellate court to utterly discredit the appellant and her brothers who had deposed to the fact that she never consented to the compromise.

Held, that it would have been well if the appellant and her brothers had been allowed an opportunity of cross-examining those vakils on the portion of their evidence in conflict with their own. (*Lord Atkinson.*) **SRIMATI SARAT KUMARI DAS v. AMULLYADHAN KUNDU.**

(1922) 17 L. W. 481 (493) = A. I. R. (1923) P. C. 13 = 32 M. L. T. (P. C.) 137 = 37 C. L. J. 501 = 25 Bom. L. R. 548 = (1923) M. W. N. 392 = 72 I. C. 632.

———**Witness—Cross-examination of—Opportunity for—Refusal to allow—Propriety.**

The High Court remarked on the miscarriage of the Judge in refusing to allow the plaintiff to cross-examine the defendant when called, and their Lordships fully concur in the propriety of that censure (393). (*Sir James W. Colville.*) **RADHA JEEBUN MOOSTUFFY v. TARAMONEE DOSSEE.**

(1869) 12 M. I. A. 380.

———**Witness—Cross-examination of—Splitting up—Evils of.**

The cross-examination of witnesses was so unduly prolonged that witnesses had to be recalled two or three times, often at considerable intervals, before their cross-examination was concluded. The cross-examination was thus broken up into several detached portions. If it were specially designed to expose witnesses to the risk of being tampered with, and to promote the fabrication of false evidence, no better system could be devised for that end than this splitting up of the cross-examination of witnesses (236). (*Lord Atkinson.*) **SADIK HUSSAIN KHAN v. HASHIM ALI KHAN.**

(1916) 43 I. A. 212 = 38 A. 627 (663) = (1916) 2 M. W. N. 577 = 21 M. L. T. 40 = 6 L. W. 378 = 21 C. W. N. 133 = 25 C. L. J. 363 = 14 A. L. J. 1248 = 18 Bom. L. R. 1037 = 19 O. C. 192 = 1 Pat. L. W. 157 = 36 I. C. 104 = 31 M. L. J. 607.

———**Witness—Examination-in-chief of—Point which must be raised in—Omission of party responsible to raise—Raising of, by his opponent in cross-examination—Duty as to—Omission to raise—Adverse inference from—Propriety.**

Where a party desires to contradict the case set up by his opponent and calls a witness who is in a position to contradict it, he is under a duty to obtain the contradiction from the witness in his examination in-chief. If he fails to do so, his opponent cannot be expected to raise the question by cross-examination of the witness, and no adverse inference can legitimately be drawn from his omission to do so. (*Lord Atkin.*) **BHAI PANNA SINGH v. FIRM BHAI ARJAN SINGH.**

(1929) 27 A. L. J. 791 = 33 C. W. N. 949 = 31 Bom. L. R. 909 = A. I. R. 1929 P. C. 179 = 57 M. L. J. 323 (329-30).

CROSS-EXAMINATION—(Contd.)

—Witness—Prior statements in writing of—Cross-examination with reference to—Necessity—Use of statements to discredit witness without such cross-examination—Permissibility.

A reclamation lease of jungle lands in the Sunderbans granted by the Government provided for a forfeiture of the lease for non-fulfilment of clearing conditions provided for by the lease-deed. The lease provided that at any time after the expiration of the fifth year the Sunderbans Commissioner or any person authorised by him might enter upon the land and cause it to be measured for the purpose of ascertaining whether that condition had been fulfilled.

After the expiration of the fifth year, the then Settlement Officer, who had taken over the duties of the Commissioner in the Sunderbans, an office which had been abolished, visited and inspected the property leased, and reported to the Government that the clearing conditions had not been fulfilled, and that the lease must be forfeited on that ground. And the Government forfeited the lease in pursuance of his report.

In a suit brought by the lessees for a declaration that the forfeiture was invalid, the Settlement Officer went into the witness-box and stated that he had seen the property and, as the result, had advised that, as he had found that the clearing stipulated for had not been performed, the Government should resume the property leased, as was actually done.

On appeal to the Privy Council it was contended for the lessees that the substance of the evidence of the Settlement Officer was displaced by certain documents put in at the trial by the Government. Those documents were in the nature of a rent-roll proceeding on measurements, and were relied upon as showing that the land must have been made fit for cultivation within the period fixed therefor by the lease-deed. Nothing was, however, put to the Settlement Officer in his cross-examination about the rent-roll or the entries in it. He was not even cross-examined on the alleged perfunctory character of his inspection.

Held that, in the circumstances of the case, the entries in the rent-roll could not be relied upon as evidence which could outweigh the direct testimony of the Settlement Officer.

Even if the rent-roll had been tendered as evidence only after the Settlement Officer had been in the box, an application must have been made to recall him for further cross-examination. (*Viscount Haldane.*) *NABA KUMAR DAS v. RUDRA NARAYAN JANA.* (1923) A.I.R. 1923 P.C. 95 = (1923) M.W.N. 622 = 33 M.L.T. 309 (P.C.) = 10 O. & A.L.R. 521 = 28 C.W.N. 589 = 77 I.C. 141 = 45 M.L.J. 438 (442-3).

—Witness turning hostile—Cross-examination of—Refusal to permit—Effect of, on value of his evidence.

When the above (adverse) evidence by the respondent's own witness was unexpectedly sprung upon him, his counsel asked for leave to cross-examine him; but the Judge refused it. Their Lordships much regret that this course was adopted. Common fairness required that opportunity to test such statements by cross-examination should be given, if the evidence was to be relied on; and that not having been done the evidence is of no value (524). (*Sir Ford North.*) *KALAGURLA SURYANARAYANA v. YARLAGADDA NAIDU.* (1901) 6 C.W.N. 513.

CROWN.

—See also GOVERNMENT.

Assignment of lands by—Cancellation of, on breach of certain conditions by assignee.

—Provision as to—Cancellation on ground of breach of conditions specified—Inquiry judicial or quasi-judicial prior to—Necessity.

CROWN—(Contd.)

Assignment of lands by—Cancellation of, on breach of certain conditions by assignee—(Contd.)

At the conclusion of the War the Government of South Australia was faced with the problem of dealing with numbers of discharged soldiers, and determined, amongst other things, to make provision for the settlement of such men on unoccupied Crown lands and for advances out of public funds to men so settled, and for that purpose obtained the passing of certain Acts. The administration of those Acts was entrusted to the Minister of Registration. The appellant at all material times held the two offices of Commissioner of Crown lands and Minister of Registration.

The respondent, a discharged soldier, applied for a grant of some lands, and was informed by a letter that his application was granted, subject to certain conditions. One of those conditions was that for the first twelve months the respondent's occupancy of the land would be strictly probationary. The other terms were embodied in the formal agreement between the parties. The material term in the agreement on which the question before the Board turned was as follows:—"If at any time within the period of ten years from the date of this agreement the vendor" (that is, the appellant) "is satisfied on such evidence as he deems sufficient that by reason of incompetency or personal disability the purchaser is incapable of managing the said land with advantage to himself or that the purchaser has neglected to work the land satisfactorily or has been guilty of serious misconduct during his occupation thereof the vendor by notice in writing given to the purchaser may determine this agreement upon and subject to such terms and conditions as the vendor thinks fit (and) upon the expiration of three months from the giving of such notice the agreement and the right of the purchaser to complete the purchase and possession of the said land shall cease and determine and be void, anything in the agreement to the contrary notwithstanding."

Held that, on the true construction of the agreement, it was not incumbent upon the appellant, before deciding to determine it, to institute some judicial or quasi-judicial inquiry, or at the least to communicate to the respondent the information he had received and his intention to act thereon and give him an opportunity of stating his case in answer thereto.

Nothing is further from the intendment of the clause than a judicial or quasi-judicial inquiry. The vendor is under the clause exercising a merely administrative function, and is entitled to form an opinion on such materials as he himself thinks sufficient. (*Lord Atkinson.*) *GEORGE RICHARDS LAFFER v. FRANCIS ARNOLD GILLEN.*

(1927) A. I. R. 1927 P. C. 275 = 47 O. L. J. 327 = 107 I.C. 347 (1).

Court's order—Disobedience of.

—Improbability of.

It is highly improbable that any officer of the Government would set the court at defiance. It is impossible to suppose that the Government would countenance such conduct as that, (*Lord Macnaghten.*) *FISCHER v. SECRETARY OF STATE FOR INDIA.*

(1898) 26 I.A. 16 (29) = 22 M. 270 (283) = 3 C.W.N. 161 = 7 Sar. 459.

Debts of—Sale for general.

—Purchaser at—Rights of. See REVENUE SALE—DEBTS OF GOVERNMENT.

(1852) 5 M. I. A. 271 (296).

Declarations on behalf of.

—Court of Directors—Secretary of State for India—Declarations by—Weight of. See COURT OF DIRECTORS.

(1905) 33 I.A. 1 = 33 C. 219 (252).

Escheat.

—Claim by. See ESCHEAT.

CROWN—(Contd.)**Forest tracts and old wastes—Title absolute to.**

—Presumption—Onus of rebutting.

It has been held in I.L.R. 3 B. 452 and I.L.R. 28 M. 257 that the Government had an absolute title to all the forest tracts which belonged absolutely to the Crown. Their Lordships concur in the conclusions arrived at in those two decisions, namely, that there is an undoubted presumption that forest tracts and old wastes belong to the Government unless that presumption is displaced by positive evidence that the right has, in any particular tract or piece of land, been granted by the sovereign power to any individual or bodies of individuals; or rights have been consciously allowed to grow up adversely to the Government. (*Mr. Ameer Ali.*) KODOTH AMBU NAIR v. SECRETARY OF STATE FOR INDIA. (1924) 51 I.A. 257 (264-5) = 47 M. 572 = 26 Bom. L.R. 639 = 20 L.W. 49 = (1924) M.W.N. 572 = 35 M.L.T. 128 = A.I.R. 1924 P.C. 150 = 29 C.W.N. 365 = 80 I.C. 835 = 47 M.L.J. 35.

Grant by.

—Cancellation of, on breach of conditions by grantee—Provision as to—Cancellation of grant pursuant to—Inquiry judicial or quasi-judicial prior to—Necessity. See CROWN—ASSIGNMENT OF LANDS BY.

(1927) A. I. R. 1927 P.C. 275.

—Construction against grantor—Rule as to—Inapplicability of.

A grant in respect of its amplitude is always construed (unless it be a Crown grant) against the grantor (203). (*Lord Phillimore.*) BASIKAM SAHA ROY v. RAM RATAN ROY.

(1927) 54 I.A. 196 = 54 C. 586 =

(1927) M.W.N. 437 = 31 C.W.N. 885 =

39 M.L.T. 170 = 26 L.W. 642 = 101 I.C. 359 (2) =

A. I. R. 1927 P.C. 117 = 53 M.L.J. 117.

—Effect of—Dispute by Government of—Propriety—Possession long in pursuance of grant—Settlement made on foot of it.

Government ought not on insufficient grounds to dispute the effect of former grants, of which the more liberal construction was supported by an undisputed possession of forty years, and had been formerly sanctioned by a settlement (51). (*Sir James Colville.*) SHEIKH ZAHURUDDIN v. COLLECTOR OF GORUKPORE.

(1870) 4 B. L. R. 36 = 13 W. R. 31 = 2 Sar. 454 = 2 Suth. 314.

—Effect or construction of, or intention of Government in making—Opinion of Revenue authorities as to—Not binding on Civil Courts.

In a case in which the question was whether, under a sunnud granting a newly-constituted zemindary, the grantee took an estate which was impartible and the succession to which was limited to a single heir according to the rule of primogeniture, or an estate which was descendible to the heirs of the grantee, according to the rule of Hindu Law, held, that neither the Courts below nor their Lordships were bound by any views of the revenue authorities as to the effect or construction of the grant or the intention of the Government (48). (*Sir Barnes Peacock.*) RAJA VENKATA NARASIMHA APPA RAO BAHADUR v. RAJA NARAYYA APPA RAO BAHADUR. (1879) 7 I.A. 38 = 2 M. 128 (134) = 6 C.L.R. 152 = 4 Sar. 81 = 3 Suth. 725.

—Estate conveyed under—Evidence—Government departments—Correspondence between, just before grant and relative thereto—Admissibility in evidence of.

In 1802, two new zemindaries were carved out of the ancient zemindary of Nuzvid, of which the zemindary of Nuzvid newly constituted was granted under a sunnud,

CROWN—(Contd.)**Grant by—(Contd.)**

dated 8th of December, 1802, to R, and the other, Nidadavolu, was granted to his elder brother, V. The question arose whether, on the proper construction of the sunnud of 8th December, 1802, the newly-constituted zemindary of Nuzvid was subject to the same rule as regards impartibility and inheritance as that to which the entire ancient zemindary was subject.

Held that, in considering the effect of the sunnud, reference might be had to a letter of the then Collector of the District to the Secretary of the Land Revenue Settlement division, dated the 25th of July, 1802, in which he submitted a plan for the division of the ancient zemindary of Nuzvid and offered an opinion as to the respective claims of V & R, preparatory to the introduction of the permanent settlement (49). (*Sir Barnes Peacock*) RAJA VENKATA NARASIMHA APPA RAO BAHADUR v. RAJA NARAYYA APPA RAO BAHADUR. (1879) 7 I. A. 38 = 2 M. 128 (135-6) = 6 C.L.R. 152 = 4 Sar. 81 = 3 Suth. 725.

—Estate conveyed under—Evidence—Government officers—Subsequent records and reports of, inconsistent with terms of grant—Admissibility of.

The question was whether or not the estate of Handwa was a ghatwali. Entries in the record of rights relating to that estate were produced in which at the settlements made in 1874-79 and 1898-1907 the taluqas in question were entered as the istamrari mukarrari property of the Raja of Handwa without any qualifying addition, such as might have been made and in the case of other ghatwali properties was made. The Sub-Judge regarded the record of rights as being "the clearest possible evidence of the fact that Handwa is not a ghatwali at all, whether under the control of the Government or of the Zemindar."

Held that, though, in the absence of the authentic texts of the original grants, the long series of administrative acts, records and reports referred to would have been very important evidence against the contention that the right originally granted consisted of a ghatwali tenure held from the East India Company direct, still, as soon as the texts of original instruments such as the patta and sanad in question, dating from a time anterior to all those matters were produced and put in evidence, the nature of the estate of Handwa rested upon their true construction and import and not upon the notions entertained about them in later generations (46).

The reports of the Government officers are not even *contemporanea expositio*, for the earliest one must have been based on hearsay accounts, already one or two generations old, and presumably not on any inspection of the original grants, since they are not mentioned (45). (*Lord Sumner.*) NARAYAN SINGH v. NIRANJAN CHAKRAVARTI.

(1923) 51 I.A. 37 = 3 Pat. 183 =

A.I.R. 1924 P.C. 5 = 28 C.W.N. 351 =

34 M.L.T. 27 = 5 Pat. L.T. 171 = 79 I.C. 825.

—Estate conveyed under—Land itself or land-revenue only.

Held, that a sanad by which the British Government had confirmed a village to J was not a grant of land-revenue, but of the soil of the village itself.

The sanad declared that the village in question "shall be continued to the grantee and his heirs inclusive of all lands, allowances and rights belonging to others so long as he and his heirs shall continue loyal to the British Government, and shall pay Rs. 800 to Government as a quit rent." The sanad also guaranteed against any further payment by the holder "on account of imperial land-revenue beyond the amount specified." It also declared that the village and its holder "shall be liable for any local taxation which may be

CROWN—(Contd.)**Grant by—(Contd.)**

imposed on the district generally. (*Lord Collins.*) **GANPAT RAO v. ANAND RAO.** (1909) 37 I.A. 39 (45) =

32 A. 148 (151) = 7 M. L. T. 53 = 7 A.L.J. 165 =
12 Bom. L. R. 267 = 11 C. L. J. 281 = 14 C. W. N. 310 =
5 I. C. 689 = 20 M.L.J. 164.

—Estate conveyed under—Land itself or land-revenue only—Pension—Grant in lieu of, of taluka with lands as jagir.

K, the appellant's ancestor, was in 1819 entitled to receive from the Government Rs. 16,000, either by way of pension for his life, or as a lump payment. The Government had recently purchased a pergunnah, comprising the suit villages from a Raja. The pergunnah was granted to *K* by the Government by a sanad, dated 13—8—1819, the operative part of which sanad witnessed that the Government had granted the "Taluka" of the said pergunnah together with all lands cultivable or uncultivated to *K* for his life as "revenue free jagir by way of maintenance", and that "after the death of *K* the said Ilaka will continue to stand in the names of his children and *A* as a permanent zemindari assessed to a light amount of jama." The premises granted were intended to be in lieu of Rs. 10,000 out of the Rs. 16,000 which *K* was entitled to receive.

Held, on a construction of the sanad, that the subject-matter of the grant was land, and not a money payment in the nature of a pension within the meaning of S. 60 (g) of C. P. C. of 1908, and that the suit villages were not therefore exempt from attachment.

It will be observed that what *K* is to enjoy for his life is the usufruct of the ilaka, as well as the zemindari rights. According to the appellant's construction, he is to have only zemindari rights in the sense of a right to collect the revenue, whereas the word "usufruct" appears to point to an actual occupation and user of the soil, subject, of course, to the rights of third parties. (*Lord Parker.*) **SAKINA BAI v. KANIZ FATIMA BEGUM.** (1917) 22 C.W.N. 577 =

47 I.C. 632 = (1918) M.W.N. 384.

—Estate conveyed under—Land itself or land-revenue only—Presumption.

A grant of a village by or on behalf of the Crown under the British rule is in law to be presumed to be subject to such rights of occupancy, if any, as the cultivators at the time of the grant might have had (218). (*Sir John Edge.*) **SURYANARAYANA v. PATANNA.** (1918) 45 I.A. 209 =

41 M. 1012 (1021) = 29 C.L.J. 153 =

(1918) M.W.N. 859 = 25 M.L.T. 30 = 23 C.W.N. 273 =

9 L.W. 126 = 21 Bom. L.R. 547 = 48 I.C. 689 =

36 M. L. J. 585.

—Estate conveyed under—Land itself or land-revenue only. See also CROWN—GRANT BY—POTTAH.

—Estate held under—Surrender of, and acceptance of fresh grant prescribing different mode of descent—Validity of—Effect.

Before the annexation of Oudh and the proclamation of confiscation an Oudh taluqa was held by Gajraj, and with him summary settlement was made. To him was also granted a sanad of October 19, 1859; and that sanad was in the form then in use—that is to say, a sanad to the grantee and his heirs, without indication of the line of inheritance. On the death of Gajraj, his brother Girwar succeeded to the property, and remained in possession until his death in 1865. On or about April 19, 1861, Girwar accepted the invitation of the Government to exchange the sanad in the form in use before 1860, viz., a sanad to the grantee and his heirs, without indication of the line of inheritance, for a sanad in the form in use from and after 1860. The sanad in that new form granted to Girwar said expressly: "It is another condition of this grant that in the event of your dying intestate, or of any of your successors dying intestate, the estate shall

CROWN—(Contd.)**Grant by—(Contd.)**

descend to the nearest male heir according to the rule of primogeniture."

Held, that Girwar had the power to surrender the estate conveyed by the old sanad, and that the Government had power to grant that conveyed by the new, and that the new sanad did in point of law operate to substitute the line of descent prescribed by it for the line prescribed by the earlier sanad (214-5).

When Girwar succeeded as the heir of Gajraj, he became the absolute owner of the taluqa with full power of alienation; and there was nothing to prevent his entering into an arrangement with the Government by which he surrendered the estate held under the first sanad and received it back again under the terms of the sanad, assuming that the Government on its side had the necessary power (214).

The objection that the Government, having granted the estate in 1859 to Gajraj and his heirs, had nothing left to grant to Girwar at a later date, is inapplicable to a transaction by which Girwar, the person absolutely entitled by inheritance to everything that passed under the earlier grant, surrendered it in consideration of a re-grant of the same estate on new terms (214-5). (*Sir Arthur Wilson.*)

THAKUR SHEO SINGH v. RANI RAGHUBANS KUNWAR.

(1905) 32 I.A. 203 = 27 A. 634 (652-3) =

9 C.W.N. 1009 = 2 C.L.J. 194 = 8 O.C. 317 =

8 Sar. 791 = 15 M.L.J. 352.

—By a sanad of 1859 the Government granted taluqa Mahewa to Gajraj and his heirs without other limitation of the line of inheritance. In 1861, Girwar, the then holder of the taluqa, surrendered to the Government the sanad of 1859 and the estate which had been granted by it; and in lieu of that sanad accepted a sanad of that year (1861), which said expressly: "It is another condition of this grant that in the event of your dying intestate, or of any of your successors dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture."

It was contended that Girwar was not competent to surrender to the Government the sanad of 1859; and that the Government, having granted by the sanad of 1859 the estate to Gajraj and his heirs, had nothing left to grant to Girwar in 1861.

Held, overruling the contention, that Girwar, being entitled by inheritance to everything that had passed to Gajraj under the sanad of 1859, was competent to surrender the sanad of 1859 and to accept instead of it the sanad of 1861, and had surrendered the sanad of 1859 and the estate which had passed under it, and that the Government was competent to grant the sanad of 1861 (140-1). (*Sir John Edge.*) **RAJENDRA BAHADUR SINGH v. RANI RAGHUBANS KUNWAR.** (1918) 45 I.A. 134 =

40 A. 470 (478) = 20 Bom. L.R. 1075 = 22 C.W.N. 101 =

28 C.L.J. 456 = 24 M.L.T. 282 = (1918) M.W.N. 331 =

8 L.W. 570 = 48 I.C. 213 = 21 O.C. 106.

—Inheritance—Legal course of—Alteration by grant of—Power of—Crown—Subject—Distinction.

In a case in which a sanad of the year 1861 by which the Government granted an Oudh Estate stated the rule of succession on which the estate was to be held to be that in the event of the grantee dying intestate, or of any of his successors dying intestate the estate should descend to the nearest male heir according to the rule of primogeniture, it was suggested that no executive act of the Government could have created an estate descending by any rule of inheritance other than that laid down by the law applicable to the grantee.

Held, that any such objection was obviated by the Crown Grants Act of 1895, under which the Crown had power to

CROWN—(Contd.)**Grant by—(Contd.)**

impose limitations and restrictions upon grants and other transfers made by it or under its authority (215). (*Sir Arthur Wilson.*) **THAKUR SHEO SINGH v. RANI RAGHUBANS KUNWAR.** (1905) 32 I. A. 203 = 27 A. 634 (653) = 9 C. W. N. 1009 = 2 C.L.J. 194 = 8 O.C. 317 = 8 Sar. 791 = 15 M. L. J. 352.

—By virtue of the Crown Grants Act (XV of 1895) the Crown has in British India power to grant or to transfer lands, and by its grant, or on the transfer, to limit in any way it pleases the descent of such lands. But a subject has no right to impose upon lands or other property any limitation of descent which is at variance with the ordinary law of descent of property applicable in his case (143).

Held, therefore, that while the Government had power to grant to a Hindu, by a sanad, an estate which should descend on an intestacy to the nearest male heir according to the rule of primogeniture (141) the grantee or his heir could not, by express declaration, still less by mere volition, whether actual or presumed, subject property acquired by him to the rule of succession entered in such primogeniture sanad (143). (*Sir John Edge.*) **RAJENDRA BAHADUR SINGH v. RANI RAGHUBANS KUNWAR.**

(1918) 45 I. A. 134 = 40 A. 470 (480) = 20 Bom. L. R. 1075 = 22 C. W. N. 101 = 28 C.L.J. 456 = 24 M.L.T. 282 = (1918) M. W. N. 331 = 8 L.W. 570 = 48 I. C. 213 = 21 O.C. 106.

—*Inheritance rule prescribed by—Custom contrary to—Proof of—Permissibility—Instances of custom prior to grant—Admissibility in evidence of.*

An Oudh Estate, which had been confiscated by the British Government on the annexation of Oudh in 1856, was re-granted under a sanad of 1863, which contained the following clause:—"It is another condition of this grant that in the event of your dying intestate or of any of your successors dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture, but you and all your successors shall have full power to alienate the estate, either in whole or in part by sale, mortgage, gift, bequest, or adoption to whomsoever you please."

On the death of the holder of the estate leaving a widow but no issue, the question arose who was entitled to succeed to it, the nearest male heir of the deceased or his widow. The Court below negatived the claim of the former, holding that there was an established custom in the family that the widow should succeed, and that that custom continued notwithstanding the forfeiture and re-grant of the estate. The instances on which the court below founded its conclusion were, however, instances which had occurred before the forfeiture of the estate in 1856 and the grant of a new title upon the conditions laid down in the sanad.

Held, reversing the Court below, that those instances could not be used to set up a rule of succession directly contrary to the terms of the sanad under which the estate was then held.

The Crown Grants Act of 1895, S. 3. enacts that all provisions, etc., contained in a grant "shall be valid and take effect according to their tenor, any rule of law, statute or enactment of the legislature to the contrary notwithstanding", and full effect was given to this enactment in L.R. 32 I.A. 203. (*Viscount Cave.*) **BADRI NARAIN SINGH v. HARNAM KUAR.** (1922) 49 I. A. 276 (285) = 44 A. 449 (457) = 31 M. L. T. 195 (P. C.) = 9 O.L.J. 428 = A.I.R. 1922 P.C. 289 = 27 C. W. N. 129 = 25 O.C. 313 = 68 I. C. 1000 = 21 A. L. J. 13 = 37 C.L.J. 305 = 9 O. & A.L.R. 49 = 44 M. L.J. 337.

—*Mistake as to extent of property in—Plea by Government of—Maintainability—Possession given and settlement made pursuant to grant.*

CROWN—(Contd.)**Grant by—(Contd.)**

Where the Government by a grant made over an entire talook to a person, and subsequently formally sanctioned his possession by a settlement, *held*, that neither act of Government could be disputed on the ground that Government had acted under a mistake in making over the whole, instead of a part of the talook. (*Sir James Colville.*) **SHEIKH ZAHURUDDIN v. COLLECTOR OF GORUKPORE.**

(1870) 4 B. L. R. 36 (50-1) = 13 W. R. 31 = 2 Sar. 454 = 2 Suth. 314.

—*Mistake in, as to extent of property—Rectification of, in suit for imposition of excess revenue and for declaration of right to entire property covered by grant.*

An alleged mistake of the Government in regard to the extent of property covered by a grant made by it cannot be rectified in a suit asking for the imposition of excess revenue, and for a declaration of proprietary right in the entire property purporting to be conveyed by the grant. (*Sir James Colville.*) **SHEIKH ZAHURUDDIN v. COLLECTOR OF GORUKPORE.** (1870) 4 B.L.R. 36 (50-1) = 13 W.R. 31 = 2 Sar. 454 = 2 Suth. 314.

—*Pottah—Grant by—Estate conveyed—Revenue—Proprietary interest in land.*

The grant by the Government of a document called a patta and the execution by the grantee of a kabuliyat in similar terms, are not conclusive of the question of whether the grantee was a mere lease-holder, *i.e.*, a farmer of revenue, or was a true proprietor paying a jamabandi to the overlord. The term "patta" might quite appropriately be used for the instrument fixing such jamabandi. (*Lord Dunedin.*) **VAJESINGJI JORAVARSINGJI v. SECRETARY OF STATE FOR INDIA.** (1924) 51 I.A. 357 (362) = 48 B. 613 = A.I.R. 1924 P.C. 216 = 22 A. L. J. 951 =

26 Bom. L. R. 1143 = 40 C.L.J. 473 = 29 C. W. N. 317 = 21 L.W. 28 = (1924) M. W. N. 604 = 82 I. C. 779 = 47 M. L. J. 574.

—*Primogeniture in—Meaning of—Succession by primogeniture—Provision in grant for.*

Where a Government sanad by which an estate was granted provided: "It is another condition of this grant that in the event of your" (grantees) "dying intestate, or any of your successors dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture," *held*, that the word "primogeniture" in the sanad was used in the ordinary meaning of the word in the law of England, and that it meant lenial primogeniture. (*Lord Shaw.*) **DEBI BAKHSH SINGH v. CHANDRABHAN SINGH.** (1910) 37 I. A. 168 (178, 181) = 32 A. 599 (607, 610) = 12 C.L.J. 303 = 14 C.W.N. 1010 = 8 M. L. T. 273 = 7 A. L. J. 1122 = 12 Bom. L. R. 1015 = 13 O.C. 316 = 7 I. C. 734 = 20 M. L. J. 917.

Illegal mandates of.

—*Effect of.*

Illegal commands of the Government can have no more effect than the dictates of a lawless mob which the officer in charge has no power to resist. (*Lord Macnaghten.*) **FISCHER v. SECRETARY OF STATE FOR INDIA.**

(1898) 26 I. A. 16 (28) = 22 M. 270 (282) = 3 C. W. N. 161 = 7 Sar. 459.

Land—Soil of—Ownership of—Rent—Right merely to.

—*Transfer of proprietary right in land—Effect of, on right to rent.*

There is no relation of landlord and tenant between the Government and the owner of khas mehals in the 24 Pergunnahs. The latter is the landlord of the ryots, and is not himself a ryot. The Government has a title to the rent

CROWN—(Contd.)**Land—Soil of—Ownership of—Rent—Right merely to—(Contd.)**

or jumma. By whatever name it be called, the right and title is to the rent substantially; it does not include a right to the possession of the lands, though such a right might arise by forfeiture or extinction of the ownership, and the onus is on the Government to prove its claim to the possession of the lands. The title of the Government rather resembles a seignory than that of a lessor with a reversion. The Government's right to its rent is unaffected by transfer simply of proprietary right in the lands. The liability of the lands to jumma is not affected by a transfer of proprietary right, whether such transfer is effected simply by transfer of title or less directly by adverse occupation and law of limitation. (*Lord Romilly.*) **GUNGA GOBIND MUNDAL v. THE COLLECTOR OF THE 24 PERGUNNAHS.**

(1867) 11 M. I. A. 345 (362, 363) = 7 W. R. 21 = 2 Sar. 284 = 1 Suth. 676.

Land of—Canal constructed by private persons on.

—*Proprietary right in canal acquired by them—Right to take possession of and manage canal for as long as they thought necessary—Deed conferring, on Government.*

The question was as to the respective rights of the Government and of the plaintiffs in the Hajiwah canal—a work constructed many years before under the sanction of the Government by the grandfather and the father of the plaintiffs.

The canal was supplied with water from the Sutlej, and extended from its intake on that river to certain lands in tahsil M, which were formerly jungle or waste lands belonging to the Government and known as Barbarini lands. In 1860, the revenue of those lands was in lease to the plaintiff's grandfather for the period of the then current settlement.

In May of that year the plaintiffs' grandfather obtained the sanction of the Government to his making the canal at his own expense. He commenced the work, but died before its completion. On his death, his son, the plaintiffs' father, who succeeded him in holding the lease, continued the work and completed it. With the end of the settlement, the lease of the dues, till then received by the plaintiffs' father came to an end. In 1879 the Punjab Government recommended for the sanction of the Government of India the grant to him of an estate in the Barbarini and within reach of the irrigation. That was sanctioned. Afterwards a deed was executed in March, 1886, relating back to 1879, signed by the Chief Secretary to Government and by the plaintiffs' father, conferring upon the latter 60,000 acres in proprietary right, subject to the payment of Rs. 15,000 a year as revenue, with an inam, a remission of revenue, of Rs. 5,000 a year for at least two lives. The deed contained a clause that the canal should "remain for the present" under the management of the plaintiffs' father, but "in consideration of the premises" the Government should be entitled at any time without his consent to take into their own control the management and distribution of the water without paying any compensation, and to clear the canal, recovering the cost of clearance and management by a canal rate to be levied on the area irrigated. The plaintiffs' father died in 1888, and thereupon dissensions arose among his sons. In December, 1888, the Government, under the powers given to them by the deed of 1886, directed the Deputy Commissioner to take into his own hands the management and control of the canal and the distribution of the water. In February, 1890, orders were passed by the Government declaring the canal to be their property and directing that it should be placed under the canal department.

Held, that though at the date of the deed of March, 1886, the plaintiffs' father had a proprietary interest in the canal,

CROWN—(Contd.)**Land of—Canal constructed by private persons on—(Contd.)**

and a right to take water from the Sutlej so long as the canal should be used for the purposes for which it was designed, the benefit of the tracts which it traversed, the effect of the reservation in that deed was that Government could assume the control of the canal and the irrigation without being in the position of receivers, managers, or trustees, for the proprietors, or accountable to them for the profits. The reservation did not empower Government to confiscate the canal, nor did they acquire any proprietary right in it, but were entitled to possess and manage it for as long as might be necessary. (*Lord Macnaghten.*) **AHMAD YAR KHAN v. SECRETARY OF STATE FOR INDIA.**

(1901) 28 I. A. 211 = 28 C. 693 (707-8) = 5 C. W. N. 634 = 3 Bom. L. R. 799 = 38 P. R. 1902.

—*Rights acquired by—Proprietary right in land and right to have canal irrigated by water from Government river—Conditions—Expectations raised by Government to that effect.*

The question was as to the rights of the Government on the one hand, and of the plaintiffs and their brother, the second respondent, on the other, in the Hajiwah canal—a work constructed many years before under the sanction of the Government by the grandfather and the father of the plaintiffs.

The canal was supplied with water from the Sutlej, and extended from its intake on that river to certain lands in tahsil M, which were formerly jungle or waste lands belonging to the Government and known as Barbarini lands. In 1860 the revenue of those lands was in lease to the grandfather of the plaintiffs for the period of the then current settlement. In May, 1860, the grandfather of the plaintiffs obtained the sanction of the Government to his making the canal at his own expense. He commenced work, but died before its completion. On his death, his son, the plaintiffs' father, who succeeded him in holding the lease, continued the work and completed the canal. The canal was constructed partly on Government land and partly on the land of private owners under arrangements made with them by the plaintiffs' grandfather. The work was said to have cost in all about 9 lakhs of rupees. The annual cost of maintenance and clearance was over Rs. 8,000.

Held that, under the circumstances, the undertakers, plaintiffs' grandfather and father, acquired a proprietary right in so much of the Government lands taken for the purpose of the canal as was required for its construction and maintenance, and also a right to have the waters of the Sutlej admitted into the canal so long as the canal was used for the purpose for which it was originally designed.

Taking all the circumstances into consideration, having regard to the permanent character of the proposed work, the indefinite amount of the probable expense of construction and the fact that the Government encouraged the undertakers to acquire the necessary land where the line of the canal passed through private property in private ownership, and also bearing in mind the view of the Government at the time as appears from Government records that the work might be constructed and maintained more economically by the plaintiffs' ancestors than by Government, and that it would be better to leave the settlement of the country in the hands of Native chiefs, it seems to be pretty clear that the Government must have intended the plaintiffs' ancestors to understand, and in fact must have led them to expect, that all Government land required for the canal would be made over to them in proprietary right. (*Lord Macnaghten.*) **AHMAD YAR KHAN v. SECRETARY OF STATE FOR INDIA.** (1901) 28 I. A. 211 = 28 C. 693 (705-6) = 5 C. W. N. 634 = 3 Bom. L. R. 799 = 38 P. R. 1902.

CROWN—(Contd.)**Law—Obedience of—Duty as to.**

———*Doubtful cases—Resort to Court of law in—Duty to aid.*

It is the duty of the Crown and of every branch of the Executive to abide by and obey the law. If there is any difficulty in ascertaining it the Courts are open to the Crown to sue, and it is the duty of the Executive in cases of doubt to ascertain the law, in order to obey it, not to disregard it. Officers of the Crown ought to throw no difficulty in the way of any proceeding for the purpose of bringing matters before a Court of Justice where any real point of difficulty that requires judicial decision has occurred. (*Sir George Farwell.*) **EASTERN TRUST CO. v. MCKENZIE MANN & CO.** (1915) 20 C. W. N. 457 (461-2) = 35 I. C. 378 = 84 L. J. P. C. 152.

Minerals—Right to.

———*Land Acquisition Act—Proceedings taken under, under misapprehension of its rights—Effect.*

In a case in which the terms of a grant of a village in inam were in evidence and showed that the full right to the quarries and minerals did not pass to the grantee, *held* that the fact that the Madras Government requiring stones acquired part of the village from the grantee under the Land Acquisition Act did not confer title to the quarries and minerals on the grantee or affect the Government's title thereto.

Even without title to the quarries the Government might well have thought it expedient to proceed under the Act for the purpose of acquiring such interest as the grantee might have in the surface. And at most the proceedings under that Act can amount to no more than action taken under a misapprehension of the Government's legal rights, and this could not make the law one way or the other, nor could it affect the Government's title (67). (*Sir Lawrence Jenkins.*) **SECRETARY OF STATE FOR INDIA IN COUNCIL v. SRINIVASA CHARIAR.** (1920) 48 I.A. 56 =

44 M. 421 (431) = (1921) M. W. N. 111 = 29 M.L.T. 181 = 19 A.L.J. 201 = 3 U.P.L.R. (P.C.) 43 = 25 C.W.N. 818 = 13 L.W. 592 = 33 C.L.J. 380 = 60 I.C. 230 = 40 M.L.J. 262.

Officers of.

———*See also* REVENUE OFFICERS.

———*Act of—Acquiescence in—Challenge subsequent of, after lapse of time.*

The action of Government officials in the matter of recognition of certain mining rights cannot, after a lapse of time, be challenged as improper, in a case in which the action of the Government officials has been accepted and acted upon by the contesting party and third party's rights have, without fraud, come into existence (231). (*Lord Shaw.*) **ENGINEER MINING COMPANY v. JAMES ALLEN FRASER.** (1922) 33 M.L.T. 228 (P.C.).

———*Act of—Approval original of—Repudiation of, subsequently—Permissibility.*

The act of the defendant (a Government servant) having originally been done with the approbation of the Government its character cannot be changed by any subsequent change of opinion on the part of the latter (135). (*Dr. Lushington.*) **ROGERS v. RAJENDRO DUTT.**

(1860) 8 M.I.A. 103 = 13 Moo. P.C. 209 = 3 L.T. 160 = 9 W.R. (Eng.) 149 = 2 W.R. 51 = 1 Suth. 413 = 1 Sar. 755.

———*Act of—Binding character against Government of.*

The acts of a Government officer bind the Government only when he is acting in the discharge of a certain duty within the limits of his authority, or, if he exceeds that authority, when the Government in fact, or in law, directly, or by

CROWN—(Contd.)**Officers of—(Contd.)**

implication, ratified the excess (554). (*Lord Justice Turner.*) **COLLECTOR OF MASULIPATAM v. CAVALY VENCATA NARRIANAPAH.** (1861) 8 M.I.A. 529 =

2 W.R. 61 = 1 Suth. 476 = 1 Sar. 820.

———*See* FORFEITURE ACT IX OF 1859—POSSESSION. (1870) 5 B.L.R. 312.

———*Act of—Estoppel against Government by reason of.* *See* (1) FORFEITURE ACT IX OF 1859—POSSESSION. (1870) 5 B.L.R. 312.

(2) CROWN—ESCHEAT—CLAIM BY.

———*Act of, in excess of authority—Ratification of—EFFECT.* *See* PRINCIPAL AND AGENT—AGENT—ACT OF, IN EXCESS OF AUTHORITY. (1859) 7 M.I.A. 476 (539-40).

———*Misconduct gross on part of—Presumption of—Propriety.*

Where the Government directed the Collector to settle disputes as to boundary between two neighbouring zemindars with their consent previously obtained to such arbitration, the Collector must have understood the order in the sense that the consent required was a willing consent. If he used either fraud or force, he disobeyed the Government, and was guilty of a breach of duty. The Court cannot presume such gross misconduct (470-1). (*Dr. Lushington.*) **ZEMINDAR OF RAMNAD v. ZEMINDAR OF YETTIAPOORAM.** (1859) 7 M.I.A. 441 =

1 Suth. 360 = 1 Sar. 701.

———*Natives—Power over—Exaggerated notions of natives as to.*

But here they (the transactions the validity of which was in question) took place in a wild part of India (Ganjam) where exaggerated notions are entertained by the natives of the extent of power possessed over them by the officers of the Government, and no great confidence seems to be felt in the honesty of the subordinate officers, or the vigilance with which they are controlled by their superiors (76). (*Lord Kingsdown.*) **PAKALA BALAKRISHTNAMMA PATRULU v. SREE NARAINA MARDARAZ DEVU.**

(1864) 10 M.I.A. 60 = 2 Sar. 66.

———*Order lawful of—Damage caused by—Liability for—Order made with indirect motive or with direct malice against injured party.*

An order issued by the Superintendent of Marine in his official capacity, to the Bengal Pilot Service, employed by the East India Company on the *Hooghly* river, prohibiting them from allowing a particular steam tug to take any ship in tow of which such pilots should have pilotage charge, made in consequence of what the Superintendent deemed an exorbitant demand on the part of the owner of the steam tug, whereby such owner was deprived for a time of the profits of being employed by the pilots in charge of ships going up or down the river *Hooghly*; in the absence of malice, alleged or to be inferred, is not such a wrong as would sustain an action by the owner of the tug against the Superintendent of Marine, the officer of the Government, issuing such order.

The prohibition issued by the defendant in its whole extent was a lawful act, and did not interfere injuriously with any right of the plaintiffs. *Quære*, as to what would have been the position if the defendant had done the same act towards the plaintiffs from any indirect motive, or with direct malice against them (134-5). (*Dr. Lushington.*) **ROGERS v. RAJENDRO DUTT.**

(1860) 8 M. I. A. 103 = 13 Moo. P. C. 209 = 3 L. T. 160 = 9 W. R. (Eng.) 149 = 2 W. R. 51 = 1 Suth. 413 = 1 Sar. 755.

CROWN—(Contd.)**Officers of—(Contd.)**

—Sale-deed executed by—Area conveyed under—Double the area authorised to be conveyed—Conveyance alleged to be of—Proof of. See SALE DEED—GOVERNMENT—OFFICERS OF—SALE DEED EXECUTED BY. (1873) 2 Suth 873 (880).

—Tort—Damages for—Liability for—Act done in discharge of official duty with perfect good faith.

In a suit for damages brought against a Government servant in respect of a wrongful act of his, the fact that the act complained of is to be considered as the act of the Government, and that in the part which the defendant took in it he acted only as the officer of the Government, intending to discharge his duty as a public servant with perfect good faith, and with an entire absence of any malice, 'particular or general,' against the plaintiff, does not conclude the question of the defendant's liability. For if the act which the defendant did was in itself wrongful, as against the plaintiffs, and produced damage to them, they must have the same remedy by action against the doer, whether the act was his own, spontaneous and unauthorised, or whether it were done by the order of the superior power. The civil irresponsibility of the supreme power for tortuous acts could not be maintained with any show of justice, if its agents were not personally responsible for them; in such cases the Government is morally bound to indemnify its agent, and it is hard on such agent when this obligation is not satisfied; but the right to compensation in the party injured is paramount to this consideration (130-1). (*Dr. Lushington.*) ROGERS v. RAJENDRO DUTT.

(1860) 8 M.I.A. 103 = 13 Moo. P.C. 209 = 3 L. T. 160 = 9 W. R. (Eng.) 140 = 2 W.R. 51 = 1 Suth. 413 = 1 Sar. 755.

Orders in Council—Power to make.

—Deprivation of—Mode of.

The Crown could not, excepting by Statute, deprive itself of freedom to make orders in Council, even when these were inconsistent with previous orders. (*Viscount Haldane.*) SOBHUA II v. MILLER.

(1926) 30 C.W.N. 961 = 99 I.C. 265 = A.I.R. 1926 P.C. 131 (136).

Prerogative of.

—Abandonment of—Power of—Act of Crown acting under authority of Parliament—Abandonment by—Validity.

It may be argued that the Crown could not, even by charter, part with its prerogative. But it must be recollected that this is a case in which the Crown grants a charter by virtue of an Act of Parliament and that charter must be considered as granted in the execution of the powers which were granted by that Act of Parliament. The charter being granted in pursuance of an Act of Parliament, if by the true construction of the charter the prerogative of the Crown is in any way limited, it must be said to be limited, not by the Act of the Crown itself, but by the Act of the Crown acting under the authority of Parliament (486-7). (*Dr. Lushington.*) QUEEN v. EDULJEE BYRAMJEE.

(1846) 3 M.I.A. 468 = 5 Moo. P.C. 276 = 1 Sar. 305

—Abandonment of, authorised by statute—Effect.

The Crown may abandon a prerogative, however high and essential to public justice, and valuable to the subject, if it is authorised by statute to abandon it (495). (*Lord Brougham.*) THE QUEEN v. ALLOO PAROO.

(1847) 3 M.I.A. 488 = 5 Moo. P.C. 296 = 1 Sar. 310 = Per. Or. Ca. 551.

—Condition of—Competition between claims of Crown and claims of "common persons".

CROWN—(Contd.)**Prerogative of—(Contd.)**

It is only when claims of the Crown and claims of "common persons" (to use an old expression) "concur" or come into competition that the Crown is preferred. (*Lord Macnaghten.*) KUNWAR RAGHO PRASAD v. LALA MEWA LAL.

(1912) 39 I.A. 62 (67-8) = 34 A. 223 (233) = 14 Bom. L.R. 212 = 15 C.L.J. 327 = 16 C.W.N. 433 = 9 A.L.J. 401 = 15 I.C. 177 = 22 M.L.J. 457.

—Deprivation by statute of—Express words—Necessity. See P.C.—APPEAL—RIGHT OF—STATUTE TAKING AWAY. (1908) 12 C.W.N. 1081.

—Nature and extent of—England—Crown colonies—Self-governing dominions—India—Distinction—Criminal appeals—Dillet's case—Principles of—Applicability—Distinction.

The prerogative is that remnant of the power of the Crown which remains to the Crown to interfere with Tribunals of Justice which does not exist in this country at all; it has passed away in the historic development of the constitution; it used to exist, and it does exist to some extent in the case of the Crown colonies, because they are managed directly by the Crown through ministers, but when one comes to self-governing dominions I should be very sorry to say that even the principles of Dillet's case could be applied to the constitution of Canada. The constitution of Canada and of Australia, taking those as illustrations, have so developed that they are virtually self-governing dominions, and it is a question as to whether the principles of Dillet's case apply in the case of self-governing dominions. India is not yet in that state, but it has been publicly said that India is recognised by the Imperial Parliament as being on the way to becoming now a self-governing dominion, and, therefore, even with regard to India, it is with the utmost care that it should be pronounced that that disappearing fragment of the prerogative remains. (*Viscount Haldane.*) HANMANT RAO v. EMPEROR. (1924) 49 B. 455 = 27 Bom. L.R. 704 = 26 Cr. L.J. 1419 = (1926) M.W.N. 32 = 89 I.C. 843 = A.I.R. 1925 P.C. 180.

—P.C. appeal—Right of—Taking away of—What amounts to. See P.C.—APPEAL—RIGHT OF—TAKING AWAY OF. (1847) 3 M.I.A. 488 (495-6).

—Seizure of A's property for debt of B—Crown's right of.

The Crown has no more right than a "common person" to seize A's property and apply it in or towards the discharge of a debt due from B. That is not a question of law. It is a matter of common justice, and, it may be added, of common honesty. (*Lord Macnaghten.*) KUNWAR RAGHO PRASAD v. LALA MEWA LAL.

(1912) 39 I.A. 62 (67-8) = 34 A. 223 (233) = 14 Bom. L.R. 212 = 15 C.L.J. 327 = 16 C.W.N. 433 = 9 A.L.J. 401 = 15 I.C. 177 = 22 M.L.J. 457.

Rent paying lands—Right in respect of.

—Rent—Possession—Right to. See LANDLORD AND TENANT—RENT—POSSESSION.

(1867) 11 M.I.A. 345 (359-60, 362).

Resumption by.

—Right of. See RESUMPTION.

Revenue sale by.

—See REVENUE SALE.

Right against—Enforcement of—Mode of.

—Petition of right—Other remedy.

The non-existence of any right to bring the Crown into Court, such as exists in England by petition of right, and in many of the Colonies by the appointment of an officer to sue and be sued on behalf of the Crown, does not give the

CROWN—(Contd.)**Right against—Enforcement of—Mode of—(Contd.)**

Crown immunity from all law, or authorise the interference by the Crown with private rights at its own mere will. There is a well-established practice in England in certain cases where no petition of right will lie, under which the Crown can be sued by the Attorney-General, and a declaratory order obtained. (*Sir George Farwell.*) **EASTERN TRUST CO. v. MCKENZIE MANN & CO., LTD.**

(1915) 20 C.W.N. 457 (461) = 35 I.C. 378 = 84 L.J. P.C. 152.

Salt.

——Right to. See SALT.

Title against—Evidence of.

——Possession for less than statutory period if.

In this case, though the evidence as to possession and enjoyment was insufficient to establish a title by adverse possession for sixty years, their Lordships relied upon it as a proof of title, and, on the strength of that evidence, reversed the judgment of the Courts below. (*Sir Arthur Wilson.*) **MAHOMED ALI HAIDAR KHAN v. SECRETARY OF STATE FOR INDIA IN COUNCIL.** (1908) 35 I.A. 195 (205) =

36 C. 1 (19-20) = 4 M.L.T. 234 = 8 C.L.J. 436 =

12 C.W.N. 1095 = 10 Bom. L.R. 1101 = 1 I.C. 182 =

P.L.R. 1908 p. 110 = 18 M.L.J. 549.

Toda garas huk—Execution sale of—Invalidity of—Plea of.

——Maintainability—Estoppel. See TODA GARAS HUK —EXECUTION SALE OF—INVALIDITY OF.

(1859) 8 M.I.A. 1 (38-9).

CROWN GRANTS ACT XV OF 1895.

——See CROWN—GRANT BY.

CUSTOM.

——See also HINDU LAW—CUSTOM.

Applicability of—Admission in pleadings of.

——What amounts to. See PRACTICE—PLEADINGS—ADMISSION IN—CUSTOM. (1912) 40 C. 288 (294).

Change of.

——Permissibility.

Though race and blood are independent of volition, usage is not (244). (*Lord Kingsdown.*) **ABRAHAM v. ABRAHAM.** (1863) 9 M.I.A. 195 = 1 W.R. 1 (P.C.) = 1 Suth. 501 = 2 Sar. 10.

Dhardhura custom.

——See RIPARIAN OWNERS—RIGHTS OF—DHARDHURA CUSTOM. (1899) 26 I.A. 236 (239) = 27 C. 221 (226).

——AND ALLUVION AND DILUVION—DHARDHURA CUSTOM. (1881) Bald. 411.

Evidence of.

——*Riwaj-i-am* — Statements in — Admissibility and value of.

The *riwaj-i-am* is a public record prepared by a public officer in discharge of his duties, and under Government rules; it is clearly admissible in evidence to prove the facts therein entered subject to rebuttal. Where the custom relied upon by the defendant in the case was mentioned in express terms in the *riwaj-i-am*, held, that the statements contained therein formed a strong piece of evidence in support of the custom and that it lay upon plaintiffs to rebut the same. (*Mr. Ameer Ali.*) **BEG v. ALLAH DITTA.**

(1916) 44 I.A. 89 = 44 C. 749 (758-9) = 45 P.R. 1917 =

12 P.W.R. 1917 = 21 M.L.T. 310 = 19 Bom. L.R. 388 =

21 C.W.N. 842 = 26 C.L.J. 175 = 15 A.L.J. 525 =

38 I.C. 354 = 32 M.L.J. 615.

CUSTOM—(Contd.)**Evidence of—(Contd.)**

——Wajib-ul-arz—Entries in. See WAJIB-UL-ARZ.

——See NORTH-WEST FRONTIER PROVINCE REG. VII OF 1901, S. 27 (a).

(1928) 55 I.A. 407 = 55 M.L.J. 746.

Immemorial custom.

——Evidence of—Hearsay evidence — Admissibility—Conditions. See BENGAL REGULATIONS—ALLUVION AND DILUVION REG. II OF 1822, S. 2—IMMEMORIAL CUSTOM UNDER. (1925) 52 I.A. 279 (285) = 4 P. 788.

——Exemptions immemorial—Proof of, for some years back—Presumption from.

Our (English) law affords an analogy to this in the case of all ancient customs and exemptions, which must have existed from time immemorial; in order to be valid, proof of the customs or exemption for some years back, even twenty, there being no proof to the contrary, would warrant the jury, indeed call upon them, to presume their immemorial existence. But under Lord Tenterden's Prescription Act, requiring usage for twenty, forty, or sixty years, evidence is always required of the usage, as far back as the commencement of those periods, though it need not be proved for each year (499). (*Mr. Baron Parke.*) **MAHA RAJA DHEERAJ RAJA MAHATAB v. THE BENGAL GOVERNMENT.** (1849-50) 4 M. I. A. 466 = 1 Sar. 385.

——Proof of, for some years back—Presumption from. See CUSTOM—IMMEMORIAL CUSTOM—EXEMPTIONS IMMÉMORIAL. (1849-50) 4 M.I.A. 466 (499).

Inheritance.

——Chief—Estate belonging to—Succession to—Estate going with chieftainship—Custom of—Proof of—British settlement with Chief—Effect of, on tenure and its customs.

S, the Nawab of Tank, died leaving him surviving the respondent, a grandson by his predeceased elder son, and a son, the appellant. At the time of the Nawab's death, the respondent was thirteen years of age, and the appellant about 23 years old. Upon their joint application the Nawab's estate was transferred into their two names, as proprietors in equal shares. Subsequently the Government of India sanctioned the appointment of the respondent to be the successor "to the title and position of Nawab and Chief of Tank, and also to the entire jagir and cash assignment enjoyed by the late Nawab", subject to a deduction of certain emoluments "for the maintenance of the son and the two widows left by S."

On attaining majority the respondent instituted the suit out of which the appeal arose against the appellant for the recovery of the half-share of S's property entered in the defendant's name in the mutation proceedings, on the ground that, "according to the custom and the practice of the family," the whole of it belonged to the Chief for the time being as head of the family and by virtue of his chiefship. The decision of the claim depended upon the custom existing in the family—that is to say, whether the estate went with the chiefship, as alleged by the respondent, or devolved according to the custom of the district, under which the appellant asserted, the property would be divided between the son and grandson of the late Nawab in equal shares.

Held, on the evidence affirming the Chief Court, that the estate went with the chiefship.

Held, further, also affirming the Chief Court, that the effect of the settlement made by the British Government with S was not to create a fresh estate subject to the ordinary law of inheritance, but to continue to the Chief for the time being, as it were *jure coronæ*, the proprietorship of the villages which had been founded by his ancestors, and the succession to which had theretofore been regulated by

CUSTOM—(Contd.)**Inheritance—(Contd.)**

the custom of the family (199-200). (*Sir Andrew Scoble.*) SARDAR MUHAMMAD AFZAL KHAN *v.* NAWAB GHULAM KASIM KHAN. (1903) 30 I.A. 190 = 30 C. 843 (863) = 8 C.W.N. 81 = 5 Bom. L.R. 486 = 67 P.R. 1903 = 8 Sar. 455.

——Custom of—Claim to succeed by virtue of—Inquiry proper in case of.

Where it is admitted or proved that custom is followed in matters of inheritance in a family, and the question arises whether a particular person is entitled to succeed, the enquiry is not whether in relation to the particular succession in question the ordinary personal law is superseded by a custom, but what is the customary rule that regulates it (176). (*Sir Lawrence Jenkins.*) HASHMAT ALI *v.* MT. NASIB-UL-NISA. (1924) 52 I.A. 172 = 6 Lah. 117 = 30 C.W.N. 196 = 26 P.L.R. 192 = 88 I.C. 114 = A. I. R. 1925 P. C. 99.

——Daughter's daughter—Representation of, to mother predeceasing her father—Right of—Custom of—Right to share which had devolved on mother if follows from.

Where the customary law of the district stated that, in the event of a daughter dying *vita patris*, her daughter was entitled to succeed by representation, *held*, that it followed *a fortiori* that a daughter's daughter must be entitled to the share which had devolved upon her mother. (*Sir John Wallis.*) MUSST. VAISHNO DITTI *v.* MUSST. RAMESHRI. (1928) 55 I.A. 407 = 29 Punj. L.R. 654 = 28 L.W. 908 = A.I.R. 1928 P.C. 294 = 55 M.L.J. 746.

——Custom of—Evidence of—Decision upholding—Appeal from, ending in compromise—Evidentiary value of decision in case of.

Where a decision of Court deciding in favour of a custom of inheritance was relied upon as proving the custom, *held*, that the fact that there was an appeal from that decision which ended in a compromise deprived it of much of its evidentiary value (125). (*Sir Lawrence Jenkins.*) MUHAMMAD IBRAHIM ROWTHER *v.* SHEIKH IBRAHIM ROWTHER. (1922) 49 I.A. 119 = 45 M. 308 (316) = 30 M.L.T. 85 = 15 L. W. 354 = 26 C.W.N. 793 = (1922) M.W.N. 470 = 36 C.L.J. 64 = 24 Bom. L.R. 944 = A.I.R. 1922 P.C. 59 = 67 I.C. 115 = 43 M.L.J. 69.

——Custom of—Evidence of—Specific instances—Proof of—Necessity—General evidence of existence and exercise of custom by members of family or tribe likely to have knowledge thereof—Sufficiency of.

In a case in which the question was whether among the khattars, one of the agricultural tribes of the Punjab, a custom existed whereby collaterals deprived a daughter or a sister of the right of succession to the self-acquired property of her father or brother.

The Sub-Judge put aside a large body of evidence on the plaintiffs' side merely on the ground that specific instances had not been proved. The High Court, on the other hand, held that a custom of the kind alleged might be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognisant of its existence and its exercise without controversy.

Held, that the High Court acted rightly in so deciding. (*Mr. Ameer Ali.*) AHMAD KHAN *v.* CHANNI BIBI.

(1925) 52 I.A. 379 (383-4) = 6 Lah. 502 = 6 L.R. (P.C.) 190 = 3 O.W.N. 93 = 30 C.W.N. 506 = A.I.R. 1925 P.C. 267 = 91 I.C. 455 = 50 M.L.J. 637.

——Family custom of—Attaching to estate of—Modes of.

A family custom of descent may attach to an estate in one of two ways. There might be a custom applicable to all descendants from some common ancestor in respect of

CUSTOM—(Contd.)**Inheritance—(Contd.)**

all estates, or the custom might be limited to the capital or principal estate, as, for instance, where there is a gaddi. (*Lord Phillimore.*) DEPUTY COMMISSIONER OF BARA BANKI *v.* RECEIVER IN BANKRUPTCY OF THE ESTATE OF CHAUDHRI SHALIQU-UZ-ZAMAN. (1928) 3 Luck. 372 = 5 O. W. N. 565 = 32 C. W. N. 1120 = 48 C. L. J. 418 = A. I. R. 1928 P. C. 202 = 56 M. L. J. 56.

——Family custom of—Breach of—Breach in a particular instance—Effect of, is not to destroy custom for all time. (*Lord Phillimore.*) DEPUTY COMMISSIONER OF BARA BANKI *v.* RECEIVER IN BANKRUPTCY OF ESTATE OF CHAUDHRI SHALIQU-UZ-ZAMAN. (1928) 3 Luck. 372 = 5 O.W.N. 565 = 32 C.W.N. 1120 = 48 C. L. J. 418 = A. I. R. 1928 P.C. 202 = 56 M.L.J. 56.

——Family custom of—Breach of—Cession of immediate heir in favour of next heir does not amount to a. (*Lord Phillimore.*) DEPUTY COMMISSIONER OF BARA BANKI *v.* RECEIVER IN BANKRUPTCY OF ESTATE OF CHAUDHRI SHALIQU-UZ-ZAMAN. (1928) 3 Luck. 372 = 5 O. W. N. 565 = 32 C. W. N. 1120 = 48 C. L. J. 418 = A. I. R. 1928 P. C. 202 = 56 M. L. J. 56.

——Family custom of—Destruction of—Breach of custom in particular instance not amounting to. *See* CUSTOM—INHERITANCE—FAMILY CUSTOM OF—BREACH OF—BREACH IN A PARTICULAR INSTANCE.

(1928) 3 Luck. 372 = 56 M. L. J. 56.

——Representation—Brother's daughter—Right of, to represent her father—Evidence of—Uncle's daughter—Right of, to represent her father—Evidence of—Value of.

In the case of a family in which succession to property was regulated by customary rules, the question was whether a brother's daughter of the deceased was entitled to represent her deceased father. The evidence showed that representation was a part of the rules of succession in the family, that a son represented his father in matters of inheritance, that a widow represented her husband, and that a daughter was recognised as the representative of a deceased uncle. There was, however, no evidence of an actual succession by a brother's daughter.

Held that, if there was a rule that entitled an uncle's daughter to be her father's representative for the purpose of inheritance, it would be anomalous and arbitrary to withhold from a brother's daughter the same right. (*Sir Lawrence Jenkins.*) HASHMAT ALI *v.* MUSST. NASIB-UN-NISSIA. (1924) 6 L. 117 = 26 P. L. R. 192 = 88 I. C. 114 = A. I. R. 1925 P. C. 99.

Local custom.

——Plea of—Particularity—Necessity—Proof of custom—Evidence required—Customs of other localities—Evidence of—Admissibility.

A local custom is one binding on all persons in the local area within which it prevails, and differs entirely from a family custom, binding only on members of the family as to rules of descent and so forth. It is one which must be pleaded with particularity as to the local limits of the area of which it is alleged to be the custom, and the evidence must be evidence as to the prevalence of the custom in that area. Except so far as analogy may serve to explain anything that is in itself obscure, the customs of other localities are not relevant. (*Lord Sumner.*) NARAYAN SINGH *v.* NIRANJAN CHAKRAVARTI.

(1923) 51 I. A. 37 (60-1) = 3 Pat. 183 = A. I. R. 1924 P. C. 5 = 28 C. W. N. 351 = 34 M. L. T. 27 = 79 I. C. 825 = 5 Pat. L. T. 171.

Mercantile custom.

——Essentials of.

In respect to evidence of mercantile usage; to support such a ground there needs not either the antiquity, the

CUSTOM—(Contd.)**Mercantile custom—(Contd.)**

uniformity, or the notoriety of custom which, in respect of all these grounds, becomes a local law. The usage may be still in course of growth; it may require evidence for its support in each case; but in the result it is enough if it appears to be so well known and acquiesced in, that it may be reasonably presumed to have been an ingredient imported by the parties into their contract. (*Sir John Coleridge.*) **JUGGO MOHUN GHOSE v. MANICKCHUND.**

(1859) 7 M. I. A. 263 (282) = 4 W. R. (P. C.) 8 = 1 Suth. 357 = 1 Sar. 681.

Native usages—European's knowledge of.

—Rarely, if ever, intimate. (*Sir James W. Colville.*) **RAMPERSHAD TEWARY v. SHEOCHURN DOSS.**

(1866) 10 M. I. A. 490 (506) = 2 Sar. 177.

Ordinary law.

—Modification of, by custom.

In India custom plays a large part in modifying the ordinary law (124). (*Sir Lawrence Jenkins.*) **MUHAMMAD IBRAHIM ROWTHER v. SHAIKH IBRAHIM ROWTHER.**

(1922) 49 I. A. 119 = 45 M. 308 (314) = 30 M. L. T. 85 = 15 L. W. 354 = 26 C. W. N. 793 =

(1922) M. W. N. 470 = 36 C. L. J. 64 =

24 Bom. L. R. 944 = A. I. R. 1922 P. C. 59 =

67 I. C. 115 = 43 M. L. J. 69.

Plea of.

—Nature of custom set up—Inconsistency in—Fatal when.

It is urged against the appellant (plaintiff) that he alleged the custom on which his case depends in three different forms: first, in the plaint filed on July 12, 1907, in which he asserted his rights as arising from current and immemorial custom of the dynasty of the parties; secondly, in an affidavit sworn by him on July 10, 1907, where he said that the custom was "that a woman after her marriage loses all interest and right of inheritance in the property left by her relations (on the father's side); and finally in the plaint in the present proceedings, where the custom is asserted in these terms: "But according to the custom regulating the inheritance by females in the family of the parties and amongst the respectable Balochis and Sardars, which is ancient and which is invariable, and has been acted upon from time immemorial, and which has obtained amongst Sunnis or Shias alike, a woman is entitled to her proper dowry according to the rank or status of the family, and she has no other rights of inheritance to the property of her paternal relations."

There certainly is a marked difference between these different customs but their Lordships are not prepared to give this fact such weight as to crush the appellant's case, and they will assume that the custom upon which he relies is a custom by which, in the event of intestacy, daughters of the deceased are excluded in favour of their brothers, and sisters in favour of male paternal collaterals (15-6). (*Lord Buckmaster.*) **ABDUL HUSSEIN KHAN v. BIBI SONA DERO.** (1917) 45 I. A. 10 = 45 C. 450 (462-3) = 22 C. W. N. 353 = 23 M. L. T. 117 = 16 A. L. J. 17 = 27 C. L. J. 240 = 20 Bom. L. R. 528 = 4 Pat. L. W. 27 = 43 I. C. 306 = 34 M. L. J. 48.

Proof of.

—Quantum—Ordinary law—Custom a well-recognised adjunct to—Custom having effect of altering—Distinction between cases of.

It is easier to hold established a custom, which only proves a well-recognised adjunct to the ordinary law, than it is where the law is said to be actually altered, as, e.g., in the case of a change in the rule of succession (209). (*Vis-*

CUSTOM—(Concl'd.)**Proof of—(Contd.)**

count *Dunedin.*) **SHEOBARAN SINGH v. KUISUM-UN-NISSA.**

(1927) 54 I. A. 204 = 49 A. 367 = 29 Bom. L. R. 877 =

101 I. C. 368 = A. I. R. 1927 P. C. 113 =

4 O. W. N. 543 = (1927) M. W. N. 444 =

25 A. L. J. 617 = 31 C. W. N. 853 = 39 M. L. T. 166 =

26 L. W. 326 = 52 M. L. J. 658.

Property—Dealing with—Custom and usage as to.

—Change or loss by desuetude of. See PROPERTY—DEALING WITH—CUSTOMS AND USAGES AS TO.

(1863) 9 M. I. A. 195 (243).

Punjab agriculturists.

—Customs among. See PUNJAB AGRICULTURISTS.

Vagueness of—Validity of custom—Effect on.

—Respectable Balochis and Sardars—Custom applicable to.

The attempt to extend the custom (by which, in the event of intestacy, daughters of the deceased are excluded in favour of their brothers, and sisters in favour of male paternal collaterals) to the "respectable Balochis and Sardars" broke down, and it would in their Lordships' opinion, under any circumstance, have been unsafe to assume a custom applicable to a group of people so vaguely defined as those covered by the definition of "respectable Balochis and Sardars" (17). (*Lord Buckmaster.*) **ABDUL HUSEIN KHAN v. BIBI SONA DERO.**

(1917) 45 I. A. 10 = 45 C. 450 (463-4) = 22 C. W. N. 353 =

23 M. L. T. 117 = 16 A. L. J. 17 = 27 C. L. J. 240 =

20 Bom. L. R. 528 = 4 Pat. L. W. 27 = 43 I. C. 306 =

34 M. L. J. 48.

CY-PRES.

—See CHARITY—CY-PRE'S DOCTRINE AND CY-PRE'S SCHEME.

DAKILKAR.

—Meaning and effect of—Gift absolute of beneficial interest if conveyed by use of.

It was contended that the word "dakilkar" applied to one holding by virtue of his own title, and not to a possession held on behalf of another as an executor or trustee. The ordinary meaning of the word is "occupant." In order to find out the meaning of the word when used in a will, the context must be looked at.

Where the will of a Hindu provided: "Afterwards on attaining majority my cousin brother Tarachurn becoming possessor (dakilkar) of my share as well as the share of my elder uncle shall maintain my mother and wife," held, that, having regard to the context in which the word was used, the clause did not operate as a gift of the beneficial interest to Tarachurn (172-3). (*Sir Richard Couch.*) **TARACHURN CHATTERJI v. SURESH CHUNDER MOOKERJI.**

(1889) 16 I. A. 166 = 17 C. 122 (129) = 5 Sar. 379.

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—Agent—Contract on behalf of principal by—Damages for breach of—Principal's right to sue for. See CHAMPERTY AND MAINTENANCE—AGENT'S CONTRACT ON BEHALF OF PRINCIPAL. (1860) 8 M. I. A. 170 (187-8).

—Agent—Contract by, when under duress—Property of principal parted with under—Damages for—Principal's suit for—Property of opposite party got by principal under contract—Restoration. See PRINCIPAL AND AGENT—AGENT—CONTRACT BY, WHEN UNDER DURESS.

(1876) 3 I. A. 161 (167-8) = 1 C. 330 (336-7).

—Agent—Sub-agent employed by, under authority conferred by contract of agency—Termination of, before period fixed—Damages for—Liability of agent for—Measure of—

DAMAGES—(Contd.)

Termination of sub-agency by reason of fresh contract of agency entered into between principal and agent. *See* BROKER—UNDER-BROKER. (1919) 46 I. A. 614 = 47 C. 290 (296-7).

—Agreement to transfer on contingencies—Specific performance of, or damages for breach of—Suit for—Allegations in plaint in—Onus on plaintiff. *See* SALE-DEED—CONSTRUCTION—TRANSFER *in proesenti*.

(1872) 11 B. L. R. 36.

—Arrest wrongful—Wrongful confinement—Damages for—Public servant—Military cantonment—Commanding officer—Liability of—Lunatic dangerous—Arrest and confinement of alleged—Cantonments Act XXII of 1864, S. 11—Bona fide but mistaken act of servant.

The defendant, the then commanding officer of the cantonment at Lucknow, having reason to believe that the appellant was a dangerous lunatic, caused to be arrested, in order that he might be examined by medical officers, and caused him to be detained in his house for that purpose. The medical officers, while reporting him sane, recommended that he should be placed under the observation of the Civil Surgeon of the Station, for which purpose the same officer caused his further detention. The appellant was not, at the time when the acts complained of were committed, a dangerous lunatic. The defendant, however, in detaining him acted *bona fide* in the discharge of a public duty, and under the belief that the appellant was dangerous by reason of lunacy. But he did not proceed, or intend to proceed, under Act XXXVI of 1858.

In a suit by the appellant for recovery of damages from the defendant for his wrongful arrest and wrongful confinement, *held*, that the defendant was liable in damages.

There is no law which authorizes the police or a Magistrate in the exercise of police duties, or an officer in command of a cantonment, in consequence of a *bona fide* belief that a person is dangerous by reason of *actual* lunacy, to put him into confinement in order that he may be visited and examined by medical officers, and to keep him in confinement until such officers can feel themselves justified in reporting whether the person is a dangerous lunatic or not; *a fortiori*, this cannot be done in the case of a *bona fide* belief of danger from impending lunacy. The defendant had no authority for causing the plaintiff to be put under restraint for such a purpose, nor had he, after the report of the medical officers that the plaintiff was perfectly sane, any colour of authority for keeping him under restraint in order that he might be removed from the cantonment and placed under the observation of the Civil Surgeon, even though recommended so to do by the medical officers. Neither the police nor a Magistrate in the exercise of police duties could, under Act XXXVI of 1858, have had any colour for doing that which the defendant caused to be done (172). (*Sir Barnes Peacock*.) SINCLAIR *v.* BROUGHTON.

(1882) 9 I. A. 152 = 9 C. 341 = 13 C. L. R. 185 = 4 Sar. 387 = R. & J.'s No. 69.

—Assessment—Difficulties in—Court's duty to overcome.

Difficulties often occur in determining what is a reasonable price or a reasonable rate, or in fixing the amount of damages which a man has sustained under particular circumstances. These are difficulties which the court is bound to overcome (114). (*Sir Barnes Peacock*.) NEW BEER-BHOOM COAL CO. *v.* BOLORAM MAHATA.

(1880) 7 I. A. 107 = 5 C. 932 (937) = 7 C. L. R. 247 = 4 Sar. 145 = 3 Suth. 737.

—Attachment in execution—Wrongful attachment—Damages for. *See* EXECUTION OF DECREE—ATTACHMENT—WRONGFUL ATTACHMENT—DAMAGES FOR.

—Benamidar—Sale-deed by—Covenants in—Breach of—Damages against real owner for—Suit for. *See* BENAMI—BENAMIDAR—SALE-DEED BY. (1876) 3 I. A. 194 (199).

DAMAGES—(Contd.)

—Bought and sold notes—Contract entered into by telegrams but completed by—Breach by vendor of—Purchaser's suit for damages for—Cause of action—Rectification of the notes—Prayer for—Necessity. *See* CONTRACT—BOUGHT AND SOLD NOTES—CONTRACT ENTERED INTO BY TELEGRAMS, ETC. (1904) 31 I. A. 122 (126) = 31 C. 614 (625-6).

—Broker—Under-broker employed by—Termination of employment of, before period fixed—Damages for—Measure of—Employment of under-broker depending upon broker's own appointment—Termination of broker's employment by consent before period fixed—Termination with a view to defeat under-broker's rights—Distinction between cases of. *See* BROKER—UNDER-BROKER.

(1919) 46 I. A. 314 = 47 C. 290.

—Character—Defamation of—Damages for—Suit for—Examination of plaintiff—Failure—Effect of, on quantum of damages. *See* DEFAMATION—CHARACTER.

(1872) 11 B. L. R. 321 (330-1).

—Civil proceeding—Institution of—Damages caused by—Liability for. *See* MALICIOUS PROSECUTION—CIVIL PROCEEDINGS.

—Contract—Breach of—Damages for. *See* CONTRACT—BREACH OF—DAMAGES FOR.

—Conversion—Timber an ordinary article of commerce—Conversion of—Damages for—Measure of. *See* DAMAGES—TIMBER ORDINARY ARTICLE OF COMMERCE.

(1878) 5 I. A. 130 (133-4) = 4 C. 116 (119-20).

—Corporation—*Vis major*—Rain unusual—Damage caused by—Liability for—Negligence of corporation—Lower Canada—Law in. *See* NEGLIGENCE—*Vis major*. (1922) 32 M. L. T. 36 (P. C.).

—Dangerous articles—Installation of—Duty of contractor in case of—Negligence—Accident due to—Damages for—Liability of contractor for. *See* DANGEROUS ARTICLES. (1909) 14 C. W. N. 158 (163-4).

—Fatal accident—Damages for—Suit for—Maintainability—Common law. *See* WRONGFUL ACT—FATAL ACCIDENT—DAMAGES FOR.

(1922) 33 M. L. T. 219 (221) (P. C.).

—Government—Official of—Order lawful of—Damage caused by—Liability for—Order made with indirect motive or with direct malice against injured party—Effect. *See* CROWN—OFFICER OF—ORDER LAWFUL OF.

(1860) 8 M. I. A. 103 (134-5).

—Government—Official of—Tort—Damages for—Liability for—Act done in discharge of official duty with perfect good faith. *See* CROWN—OFFICER OF—TORT.

(1860) 8 M. I. A. 103 (130-1).

—Indictable offence—Special damage caused by—Suit for—Maintainability.

Where an indictable offence has been committed, and an individual has suffered special loss, a remedy by action is given to him as the party aggrieved (47). (*Sir Montague E. Smith*.) RAM COOMAR COONDOL *v.* CHUNDER CANTO MOOKERJEE. (1876) 4 I. A. 23 =

2 C. 233 (257-8) = 3 Sar. 654 = 3 Suth. 361.

—Lessee—Dispossession wrongful by lessor of—Damages for—Assessment of—Principle. *See* LEASE—LESSEE—DISPOSSESSION WRONGFUL BY LESSOR OF—DAMAGES FOR—ASSESSMENT OF.

(1848) 4 M. I. A. 321 (335-8).

—Lessee—Dispossession wrongful by lessor of—Damages for—Suit for—Surety for lessee—Suit by—Right of. *See* LEASE—LESSEE—DISPOSSESSION WRONGFUL BY LESSOR OF—DAMAGES FOR—SUIT FOR—SURETY FOR LESSEE. (1848) 4 M. I. A. 321 (333).

DAMAGES—(Contd.)

———*Locusts—Driving away of, to avoid damage to one's own land—Damage to neighbour's land by reason of—Liability for—Principles governing.*

The respondents' farm lay to the south of the appellants' farm and was separated from it only by a narrow strip of Veldt belonging to various persons. A swarm of locusts, who had not yet acquired the use of their wings, and who tracked across the country on foot, tracked across the appellants' farm in the direction which made the respondents reasonably apprehensive for safety of their own lands. They went on the appellants' farm at his request or with his approval in order to repel a common danger, and, when they were forbidden to remain on the appellants' land, they, with the consent of the adjacent proprietors, took up positions on the Veldt outside the boundary and drove the locusts back on to the appellants' farm and in various directions away from the direction in which their own farms lay, the result of their so doing being detrimental to the appellants' farm. In a suit brought by the appellants against the respondents for damages for the injury done to his farm by the respondents' wrongful act, *held*, that the respondents were within their rights in driving the locusts away and that they were not liable to the appellants for any damages caused to his farm by their being so driven away.

The principles of law laid down for preserving or regulating the settled course of a river, on which may depend so many of the rights and benefits of adjacent owners, are not necessarily appropriate to the course of an insect pest, which it is the interest of everyone concerned to repel or destroy. The supposed analogy between the two things is wholly fallacious. The pest has no settled course, and whatever its course may be, no one is bound to respect it. The progress of a fire would be a much nearer analogy to the moving horde of locusts than the course of a river.

If an extraordinary flood is seen to be coming, an owner may protect his land from it, and so turn it away without being responsible for the consequences. Visitations of locusts, though no doubt unpleasantly frequent, are in the nature of extraordinary and incalculable events, rather than a normal incident like the rise of a river in a rainy season.

The conduct of the respondents may be justified on a wider and simpler ground. Even if the invasion be regarded as a normal incident of agricultural industry in South Africa, the respondents would be entitled, as an agricultural operation, to drive the locusts away just as they are entitled to scare crows, without regard to the direction they may take in leaving. (*Lord Robson.*) *GREYVENSTEYN v. HATTINGH.* (1911) 15 C. W. N. 569 = 10 M. L. T. 311 = 10 I. C. 460 = 21 M. L. J. 674.

———*Lunatic dangerous—Arrest and confinement wrongful of alleged—Damages for—Public servant—Liability of.* See *DAMAGES—ARREST WRONGFUL—WRONGFUL CONFINEMENT.* (1882) 9 I. A. 152 = 9 C. 341.

———*Malicious prosecution—Action for damages for.* See *MALICIOUS PROSECUTION.*

———*Marriage—Breach of promise of—Damages for—Measure of—Decision of court below as to—Privy Council's interference with.* See *MARRIAGE—BREACH OF PROMISE OF—DAMAGES FOR—MEASURE OF.* (1926) 50 M. L. J. 498 (502-3).

———*Marriage—Breach of promise of—Damages for—Suit for—Rescission of contract—Onus of proof of.* See *MARRIAGE—CONTRACT OF—RESCISSION OF—ONUS OF PROOF OF.* (1925) 22 L. W. 726 (731).

———*Mining lease—Contract to grant—Breach of—Damages for—Measure of—Title to minerals—Warranty of—Absence of.* See *LEASE—MINING LEASE—CONSTRUCTION.* (1926) A. I. R. 1926 P. C. 37.

DAMAGES—(Contd.)

———*Minor—Age—False representation as to—Money obtained on mortgage by—Damages in case of—Liability for.* See *CONTRACT—MINOR—MORTGAGE BY—AGE.* (1916) 43 I. A. 256 (264).

———*Mitigation of—Duty of person entitled to damages as regards—Steps to be taken on date of breach—Benefit of—Right to, of party in breach.*

It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent on the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss *at the date of the breach*. If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it. (*Lord Wrenbury.*) *JAMAL v. MOOLLA DAWOOD SONS & CO.* (1915) 43 I. A. 6 (10-1) =

43 C. 493 (503 4) = 3 L. W. 181 = 8 L. B. R. 343 = (1916) 1 M. W. N. 70 = 19 M. L. T. 80 = 23 C. L. J. 137 = 14 A. L. J. 89 = 18 Bom. L. R. 315 = 9 Bur. L. T. 8 = 20 C. W. N. 105 = 31 I. C. 949 = 30 M. L. J. 73.

———*Mortgage—Usufructuary mortgage for term—Contract for—Possession not given by mortgagor—Portion of mortgage money advanced by mortgagee under contract—Damages to mortgagee in case of.* See *MORTGAGE—USUFRUCTUARY MORTGAGE FOR TERM.* (1889) 17 C. 432.

———*Negligence—Death caused by—Damages for—Legal personal representative of deceased—Right to sue of.* See *NEGLIGENCE—DEATH CAUSED BY.* (1922) 32 M. L. T. 205 (207) (P. C.).

———*Patent—Infringement of—Damages for.* See *PATENT—INFRINGEMENT OF—DAMAGES FOR.*

———*Pledge of goods—Sale of goods pledged by pledgee to himself after determination of pledge—Wrongful conversion—Damages for—Liability of pledgee for—Measure of.* See *PLEDGE—SALE OF GOODS PLEDGED BY PLEDGEE TO HIMSELF.* (1891) 19 I. A. 60 (67-8) = 19 C. 322 (333).

———*Plunder of property in pursuance of common object—Persons joining in—Liability for loss caused by—Basis of—Persons coerced in joining in plunder—Liability of.*

Where it was found as a fact that a number of persons, in pursuance of a common object, plundered the property of A, it was *held*, that all that was necessary in a civil suit by A for damages was to identify the persons present co-operating in that common design, and that each and every person co-operating in any extent in the plunder was responsible to recoup A for the loss he sustained.

“Where parties go with a common purpose to execute a common object, each and every one becomes responsible for the acts of each and every other in execution and furtherance of their common purpose; as the purpose is common, so must be the responsibility. Some of the defendants seem to have imagined that, because, as they allege, they were coerced to join in the transaction, that excuses them from responsibility. If the matter were to be disposed of in a criminal proceeding, where the Judge had to inflict a punishment or a fine, all that might be taken into account; but here, in a civil proceeding to obtain compensation for the loss the plaintiff sustained by a transaction for which all who joined in it are responsible in the eye of the law,—you have nothing to do but simply to see that, in point of fact, the parties accused were part of the common assembly, which had, and executed, a common purpose of plundering this man's house, and are bound, each and all, to make him compensation for the loss sustained. In such a case the law does not allow men to apportion their own wrong, and

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does not apportion it for them. *GUNESH SINGH v. RAM RAJA*. (1869) 3 B.L.R. (P.C.) 44 = 12 W.R. (P.C.) 38 = 2 Sar. 505 = 2 Suth. 263.

—Possession and mesne profits—Suit for—Property subject of—Lessee *pendente lite* of—Profits of property carried away by—Damages for—Decret-holder's suit for—Maintainability. See C. P. C. OF 1908, S. 47; O. 22, R. 10 —MESNE PROFITS. (1922) 49 I. A. 220 (223) = 1 P. 581 (586-7).

—Property—Damage to, caused by negligence—Owner's right to—Contributory negligence on his part—Effect—English Law—Canadian Law.

In an action for damages caused to the plaintiff's property by the defendants' negligence, *held* that, under the law of Lower Canada, which in that respect was different from the law of England, the damage could be apportioned in a case in which the negligence of the plaintiff contributed to the accident (41). (*Lord Dunedin*.) *CITY OF MONTREAL v. WALT AND SCOTT, LTD.* (1922) 32 M.L.T. 36 (P.C.).

—Railway Company—Negligence of—Damages for—Suit for—Onus on plaintiff. See RAILWAY COMPANY—NEGLIGENCE OF—DAMAGES FOR.

—Rain unusual—Damage caused by—Liability of corporation for—Negligence of corporation—Lower Canada—Law in. See NEGLIGENCE—*Vis major*. (1922) 32 M.L.T. 36 (P.C.).

—Religious processions—Carrying on of, along highway—Obstruction to—Suit against persons causing—Special damage—Proof by plaintiff of—Necessity. See RELIGIOUS PROCESSIONS—CARRYING ON OF, ALONG HIGHWAY—OBSTRUCTION TO. (1924) 52 I. A. 61 (66, 68) = 47 A. 151.

—Right—Exercise of—Injury caused by—Damages for—Liability for—*Fletcher v. Rylands*—Principle of—Statutory authority—Acts done under—Applicability of.

The principle of the decision in *Fletcher v. Rylands* that a man, in exercising a right which belongs to him, may be liable, without negligence, for injury done to another person, has been held inapplicable to rights conferred by statute. This distinction was acted upon in *Vaughan v. Taff Vale Railway Company*, where it was held that a railway company was not responsible for damage from fire kindled by sparks from their locomotive engine, in the absence of negligence, because they were authorised to use locomotive engines by statute. On the same principle it was decided that a waterworks company laying down pipes by a statutory power, were not liable for damages occasioned by water escaping in consequence of a fire-plug being forced out of its place by a frost of unusual severity. On the other hand, in *Jones v. Festiniog Railway Company*, it was held that a railway company which had not express statutable power to use locomotive engines, was liable for damage done by fire proceeding from them, though negligence on the part of the company was negatived (384-5). (*Sir Robert P. Collier*.) *MADRAS RAILWAY CO. v. ZEMINDAR OF CARVATENAGARAM*. (1874) 11 I. A. 364 = 14 B. L. R. 209 = 22 W. R. 279 = 3 Sar. 391.

—Right to, of one party to transaction against the other—Collusive transaction intended to cheat infants—Effect. See VENDOR AND PURCHASER—PURCHASER—DEPRIVATION OF PART OF PROPERTY SOLD—DAMAGES FOR. (1872) 18 W. R. 230.

—Riparian owners—Lower owner—Canal running through land of—Blocking up of—Flooding of land of upper owner by—Damages for—Liability for. See RIPARIAN OWNERS—LOWER OWNER. (1925) 52 I. A. 385 = 3 B. 494

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—Riparian owners—Lower owner—Natural water-course—Diverting or stopping of—Flooding of upper owner's lands by—Damages caused by—Liability for. See RIPARIAN OWNERS—LOWER OWNER—NATURAL WATER-COURSE. (1925) 52 I. A. 385 = 3 B. 494.

—Sale of goods—Contract for, between chain of buyers and sellers—Breach of—Damages for—Measure of ascertained between last buyer and seller—If same all along the chain.

As regards the damages recoverable on account of the non-delivery of the cargo, the usual practice in produce markets where there is a chain of sellers and buyers is, that the damages as ascertained between the last buyer and seller would probably without further litigation form the measure of the damages to be recovered all along the chain. (*Lord Phillimore*.) *HOPE PRUDHOMME & CO. v. HAMEL AND HORLEY, LTD.* (1925) 49 M. 1 = 88 I. C. 307 = A. I. R. 1925 P. C. 161 (163) = L. R. 6 A. (P. C.) 129.

—Sale of goods manufactured by third party—Contract for—Damages for non-delivery of goods—Contractor's liability for—Contractor himself seller or only agent of manufacturer. See PRINCIPAL AND AGENT—SALE OF GOODS, ETC. (1919) 13 L. W. 537 (540).

—Ship—Collision by negligence—Damages for—Suit for—Onus of proof in—Ship properly at anchor in proper place—Collision with. See SHIP (SHIPPING)—COLLISION—NEGLIGENCE. (1877) 3 Suth. 409.

—Ship—Loss of goods by fire—Damages for, on ground of alleged negligence—Suit for—Onus of proof in—Duty of shipowner to lay all available materials before court—Effect of. See SHIP (SHIPPING)—LOSS OF GOODS—FIRE. (1917) 8 L. W. 4 (7-8).

—Slander—Damages for—Special damage—Claim for—Failure to prove—Ordinary damages—Plaintiff's right to. See TORT—DAMAGES FOR—SPECIAL DAMAGE. (1866) 10 M. I. A. 563 (574-5).

—Special damage—Proof of—Necessity—Religious processions—Carrying on of, along highway—Obstruction to—Suit against persons causing—Proof in case of. See RELIGIOUS PROCESSIONS—CARRYING ON OF, ALONG HIGHWAY—OBSTRUCTION TO. (1924) 52 I. A. 61 (66, 68) = 47 A. 151.

—Specific performance—Suit for—Damages for breach of contract—Amendment of plaint so as to make suit one only for. See SPECIFIC PERFORMANCE—SUIT FOR—DAMAGES FOR BREACH OF CONTRACT. (1928) 55 I. A. 360 = 52 B. 597.

—Specific performance—Suit for—Damages for breach of contract in—Award of—Power of—Plaintiff debaring himself at hearing from asking for specific decree—Effect. See SPECIFIC PERFORMANCE—SUIT FOR—DAMAGES FOR BREACH OF CONTRACT IN. (1928) 55 I. A. 360 = 52 B. 597.

—Statute—Power conferred by—Acts done in pursuance of—Damage caused by. See STATUTE—POWERS A CONFERRED BY—ACTS ETC.

—Timber ordinary article of commerce—Conversion of—Damages for—Measure of.

The suit was to recover damages for the conversion by the defendants of a large quantity of logs of timber belonging to the plaintiff. The plaintiff was what may be called a middle man between the foresters in the woods of Burmah and the merchants of Rangoon who bought the timber felled. In 1867, he had a right, obtained from the Burmese Government, to fell or otherwise possess himself of timber in a certain forest, and to take the timber by water to Rangoon. The plaintiff's case was that between July and November

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1867, he was possessed of a large quantity of logs of timber, part of which he had felled, part of which he had bought, and that he would have been able to take those logs by water to Rangoon during that interval, in which it was permitted to him to take away his timber, but that he was forcibly prevented from doing this by the agent of the defendants. The plaintiff further showed that in the next year 1868, he actually found in the possession of the defendants, at a place called *T*, an intermediate station between the forest referred to above and Rangoon, a large quantity of logs which belonged to him.

Held, that the right mode of estimating the damages to which the plaintiff was entitled was to take the value of the logs at Rangoon, where the principal if not the only market for them existed, as the basis of the calculation and to deduct from the price at which the plaintiff could have there sold them what it would have cost him to bring them to the market (134).

The court below appears to have treated the case as it were an action of detinue, in which the plaintiff sought to recover a specific chattel which the defendant detained from him, and in which the judgment was that the defendant do deliver the chattel or to pay the value of it. But this is neither in form nor in substance such an action, but more resembles what used to be called an action of trover. The subject-matter of the action is timber, an ordinary article of commerce, which, according to the evidence of the usage of trade is disposed of in the same year in which it arrives at Rangoon, either by sale or by being cut up, or in various ways. This the plaintiff must have perfectly well known, and he could not and indeed he does not, profess to claim four years afterwards the restitution of the particular logs which were found in 1868 at place *T*. His claim is to the damages which he has sustained by the conversion of the logs by the defendants at place *T* at that date (133-4). (*Sir Robert Collier.*) BOMBAY-BURMAH TRADING CORPORATION, LTD. *v.* MIRZA MAHOMED ALLY. (1878) 5 I. A. 130 = 4 C. 116 = 3 Sar. 622 = 3 Suth. 525.

——Tort—Damages for. See TORT—DAMAGES FOR.

——Trade-mark—Infringement of—Passing-off action for—Damages in. See TRADE-MARK—INFRINGEMENT OF.

——Wrong committed in one country—Damages for—Suit for, in another country—Maintainability—Conditions. See TORT—WRONG COMMITTED IN ONE COUNTRY.

(1922) 32 M. L. T. 205 (208) (P. C.).

——Wrongful acts—Damages caused by—Liability for—Proximate and direct consequences of acts—Indirect consequences—Distinction

It is of course conceivable that interests thus indirectly affected might be considered by a legislator to be fit subjects for protection by remedial process; but the difficulty of prescribing limits for the operation of such a method of assigning responsibility is obvious, and the common law, speaking generally, regards the protection of such interests as impracticable. As Blackburn, J., said:—

"It may be said that it is just that all such persons should have compensation for such a loss, and that, if the law does not give them redress, it is imperfect. Perhaps it may be so. But as was pointed out by Coleridge, J., Courts of Justice should not allow themselves in the pursuit of perfectly complete remedies for all wrongful acts to transgress the bounds which our law, in a wise consciousness as I conceive of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts." In this we quite agree (221). (*Mr. Justice Duff.*) AMELIA ME COLL *v.* CANADIAN PACIFIC RAILWAY CO. (1922) 33 M. L. T. 219 (P. C.).

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——Zemindar—Irrigation works maintained by—Damages caused by—Liability for. See ZEMINDAR—IRRIGATION WORKS MAINTAINED BY.

(1874) 1 I. A. 364 (385-6).

——Zemindar—Restraint by, of persons of his officers—Damages for—Nominal damages if enough—Custom of Zemindars to restrain persons of their officers—Restraint under a supposed—Effect.

The appellant was the Zemindar of balastry, and the respondents were persons who had been respectively Dewan and Tahsildar under him but who had been dismissed by him from their offices. They instituted the suit out of which the appeal arose claiming compensation, *inter alia*, for injuries inflicted on their persons by the appellant. The court below awarded to each of the respondents Rs. 300 by way of compensation. The question in appeal was whether the compensation was improper or excessive.

Held, that it was not (512-3).

It is not merely for the inconvenience which the respondents sustained, but probably that sum was awarded by way of letting the Zemindars know that they ought not to exercise any supposed authority which they received in contravention to the law. There seems to have been an impression that the Zemindar had a right to restrain the persons of his officers in case he thought proper to do so; and to do away with that impression it was right that there should be more than merely nominal damages for the restraint, in order that the Zemindars might know henceforth that they could not proceed upon any such supposed custom (513). (*Mr. Baron Parke.*) RAJAH PEDDA VENKAT-APPA NAIDOO *v.* AROVALA ROODRAPPA NAIDOO.

(1841) 2 M. I. A. 504 = 6 W. R. 13 (P. C.) = 1 Suth. 112 = 1 Sar. 224.

DANGEROUS ARTICLES — PERSON INSTALLING OR SENDING FORTH.

——Duty on part of—Accident—Death or injuries due to—Liability for—Proximate cause of accident conscious act of another volition—Effect.

In the case of articles dangerous in themselves, such as loaded fire-arms, poisons, explosives, and other things *eiusdem generis*, there is a peculiar duty to take precaution imposed on those who send forth or instal such articles when it is necessarily the case that other parties will come within their proximity. The duty being to take precaution, it is no excuse to say that the accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter. On the other hand, if the proximate cause of the accident is not the negligence of the defendant, but the conscious act of another volition then he will not be liable. For against such conscious act of volition no precaution can really avail (66-7).

The defendants, the Gas Company, installed a gas supply plant at the premises of a Railway Company. An accident was caused by an explosion as the result of which workmen of the Railway Company having charge of the boilers which were heated by the gas were either killed or injured. In a suit for damages brought against the Gas Company by the injured workmen and by the heirs of the workmen who had been killed, initial negligence on the part of the Gas Company was found on the ground that they had failed to take certain precautions which they were bound to have taken. The Gas Company failed to show that the proximate cause of the accident was the act of a subsequent conscious volition, *viz.*, the tampering with the machines by the Railway Company's workmen. *Held*, affirming the courts below, that the plaintiffs were entitled to recover. DOMINION NATURAL GAS CO., LTD. *v.* COLLINS.

(1909) 5 I. C. 64 = 14 C. W. N. 158 (163-4) = (1909) A. C. 640 = 79 L. J. P. C. 13.

DARKHAST IJARA.

———*Meaning of.*

Darkhast ijara is a contract or lease granted upon application to the Revenue Department. (*Sir Andrew Scoble.*) SEENA PENA REENA SEENA MAYANDI CHETTIAR *v.* CHOCKALINGAM PILLAI. (1904) 31 I. A. 83 = 27 M. 291 (296) = 8 C. W. N. 545 = 8 Sar. 587 = 14 M. L. J. 200.

DATE—NATIVE AND ENGLISH DATES.

———Conflict between, in Patwari's report as to date of death in mutation proceedings—Which prevails. *See EVIDENCE—DEATH—DATE OF—PATWARI'S REPORT, ETC.* (1902) 30 I. A. 27 (31) = 25 A. 143 (151).

DAWANI.

———*Meaning of.* *See WORDS—MEANING OF—DAWANI.* (1899) 26 I. A. 216 (224-5) = 27 C. 156 (165)

DEBT.

(*See also DEBTOR AND CREDITOR.*)

———Acceptance of a sum in full satisfaction of—Claim subsequent inconsistent with—Maintainability. *See CONTRACT ACT, S. 63—DEBT—ACCEPTANCE OF A SUM, ETC.* (1869) 2 B. L. R. 98 (100) (P. C.).

———*Acknowledgment of—Novation—Letter by debt or undertaking to "settle accounts" and to pay amount "which may be due" within two months, though note for debt might be barred—Effect of.*

On 23—4—1877, the plaintiffs advanced in loan to the defendants the sum of Rs. 55,000, in Government bonds bearing 4½ per cent. interest, and received from them, of same date, a promissory note for the amount, payable on demand, with interest at 4½ per cent. per annum. The loan was not called up; and on the 19th of April, 1880, the triennial period of limitation being about to expire, the plaintiffs wrote to the 1st defendant suggesting that, if they had no mind to renew the note, they should send a letter undertaking to pay the principal and interest within two months. The defendant replied by a letter dated the 20th of April, 1880, admitting their liability upon the promissory note, stating that the interest due upon the unpaid principal of Rs. 55,000 until the 22nd of the month was Rs. 7,425, and containing these obligatory words: "With regard to these Rs. 62,425, I will settle the accounts and pay the amount which may be due within two months, though the note might be barred by the Statute of Limitations." After the receipt of that letter, no demand for payment was made by the plaintiffs until they instituted the suit out of which the appeal arose in March, 1881, claiming interest at the rate of 12 per cent. per annum. They maintained that the undertaking given by the defendants operated a complete novation of the debt—that it transmuted the loan of Rs. 55,000 bearing 4½ per cent. interest into a legal claim for the principal sum of Rs. 62,425, upon which, in the absence of any stipulated rate, interest became due *ex lege* from the time of payment.

Held, over-ruling the plaintiffs' contention, that the letter of the 20th April was applied for, and was given solely with the view of eliding the Statute of Limitations; and that it had as little effect in altering the quality of the debt constituted by the promissory note as would have been produced by a notice of the same date from the plaintiffs requiring payment within two months (40).

The construction of the letter of the 20th of April contended for by the plaintiffs appear to their Lordships to ignore the express obligation which it imposes upon the defendants to "settle accounts," and to pay the amount "which may be due" within the two months allowed for payment. These expressions plainly import that the sum specified in the letter merely represented the amount of their liability calculated to the 22nd of April, and did not represent the sum

DEBT—(Contd.)

payable by them at the date of actual settlement; which was to be ascertained by taking accounts, or, in other words, by making a new calculation so as to include interest accruing up to that date (40). (*Lord Watson.*) TANJORE RAMACHANDRA ROW *v.* VELLAYANADAN PONNUSAMI.

(1891) 18 I. A. 37 = 14 M. 258 (261 2) = 6 Sar. 30.

———Acknowledgment of—Promise to pay—Distinction. *See LIMITATION ACT OF 1908, S. 19—DEBT—ACKNOWLEDGMENT OF—PROMISE TO PAY IT.*

(1869) 13 M. I. A. 37 (54-5).

———*Admission unqualified of—Promise to pay in a particular manner—Distinction—Mode and form of payment becoming impossible—Obligation to pay—Effect on.*

A bond executed by the appellants in favour of S, who had acted as their pleader in a suit which resulted in a decree, recited that Rs. 2,000, on account of pleader's fee in the said suit, were due from them to S, and provided that, when the mesne profits were realised, they (appellants) should pay the Rs. 2,000 to S without any objection and without interest, as soon as any amount was realised by them, and that if, when the profits were realised, they should not pay the aforesaid amount, they should pay interest thereon at the rate of 2 per cent. per mensem from the date of realisation.

The decree did not in fact provide for mesne profits, and so the profits contemplated by the bond to be realised could not be realised in execution. A suit for their recovery had also become barred.

Held, on the construction of the bond, that the admission of the debt, by which the obligation was prefaced in the bond, did not import an unqualified or unconditional promise to pay, but was referable to the particular obligation, or (in other words) was introduced for the purpose only of fixing the amount for which the obligation was given, and which the obligor agreed to pay in the stipulated manner and not otherwise, and that the payment was contingent upon there being mesne profits (75). (*Lord Davey.*) KALKA SINGH *v.* PARASRAM.

(1894) 22 I. A. 68 = 22 C. 434 (443-4) =

R & J's No. 137 = 6 Sar. 545 = 5 M. L. J. 14.

———Agreement to take, and to grant lease—Specific performance of—Rights of parties on. *See SPECIFIC PERFORMANCE—LOAN.* (1889) 16 I. A. 221 (232) =

17 C. 223 (233).

———Assignment of—Collection of—Assignee's responsibility for—Negligence—Liability for. *See MORTGAGE—MORTGAGOR AND MORTGAGEE—ACCOUNTS—DEBT ASSIGNED BY MORTGAGOR TO MORTGAGEE, ETC.*

(1904) 31 I. A. 176 (182-3) = 32 C. 27 (35).

———Attachment of—Creditor's right to sue for debt—Effect on. *See C. P. C. OF 1908, O. 21, R. 46 (1) (a).*

(1894) 22 I. A. 31 (43) = 17 A. 198 (210-1).

———*Claim for just—Defeating of, by intricacies of legal procedure*

Their Lordships are anxious that claims for a just debt should not be defeated by the intricacies of legal procedure. (*Lord Buckmaster.*) KISHAN NARAIN *v.* PALA MAL.

(1922) 50 I. A. 115 (120) = 4 Lah. 32 =

25 Bom. L. R. 220 = 32 M. L. T. 41 = 27 C. W. N. 802 =

38 C. L. J. 126 = 18 L. W. 341 = 3 O. & A. L. R. 488 =

A. I. R. 1922 P. C. 412 = 72 I. C. 187 = 44 M. L. J. 123.

———Deceased—Debt of. *See DECEASED—DEBT OF.*

———*Evidence of—Creditor's account books not by themselves sufficient.*

The decrees below can only be supported by holding that one party, by merely producing his own books of account, can bind the other. But such a proposition is utterly untenable. (*Sir L. Shadwell.*) SORABJEE VACHA GANDA *v.* KOONWUR-JEE MANICK-JEE. (1836) 1 M.I.A. 47 (66) = 5 W. R. 29 (P. C.) = 1 Suth. 50 = 1 Sar. 93

DEBT—(Contd.)

—In a suit by a banker against the son of a deceased customer for the recovery of the balance alleged to be due by the deceased at the time of his death, the plaintiff proceeded upon the assumption that his books would be sufficient evidence for him to establish a debt against the deceased's estate.

Held, that the assumption was wholly erroneous, because those books could not, without further proof, be used in evidence as against the deceased debtor (444). (*Lord Justice Turner.*) **RAI SRI KISHEN v. RAI HURI KISHEN.** (1853) 5 M. I. A. 432 = 1 Suth. 245 = 1 Sar. 466.

—*Held*, that the Recorder was right in stating that, in a suit brought on behalf of C. & Co. for the recovery of the balance due under a mutual, open and current account, the accounts of the firm of C. & Co. would, under the Evidence Act, be merely corroborative evidence (360). (*Sir James W. Colvile.*) **WATSON v. AGA MEHEDEE SHERAZEE.** (1874) 1 I. A. 346 = 3 Sar. 384.

—The suit was brought by the appellants against the respondent for the purpose of compelling her to account for Government securities to the amount of Rs. 22,200, which were alleged by the plaintiffs to have been given to her by their grandfather *M* impressed with a trust for certain idols, of removing her from the office of Shebait to those idols, and appointing one of the plaintiffs in her stead. The question for decision was whether the said Government notes, four in number, were given by *M* to the defendant impressed by the trust which was alleged in the plaint. The time of the gift of the notes to the defendant was between the years 1852 and 1853, and *M* died in 1855.

In support of their case the plaintiffs relied upon entries in Khata books, as they were called, kept by *M*, one entry of the 14th April 1850, the other of the 9th of January 1853. In the first of those entries two of those notes, in the second the other two notes were referred to as having been given or as being given to the defendant for the service of the idols. Those khata books it appeared were kept in Calcutta, where *M* had a family house, his ordinary residence, where the defendant lived with him, being in Chin-surah. It was not shown that those books ever came to the knowledge of the defendant.

Held that, assuming the khata books to be genuine, they afforded no evidence against the defendant, unless they could be used, under the Indian Evidence Act, for the purpose of corroborating some other proof (211). **KANAI LALL DUTT v. SREEMUTTY SUDHAMONI DASSYA.**

(1875) 3 Suth. 210.

—In the absence of other evidence, the entries in the account books of the plaintiffs would not be sufficient to sustain their claim (503). (*Sir Richard Couch.*) **JUGAL KISHORE v. GIRDHAR LAL.** (1888) Bald. 502 = 5 Sar. 687.

—Execution sale of—Certified purchaser at—Suit for recovery of debt by—Benami title of third person—Plea by debtor of—Maintainability. See C. P. C. OF 1908, O. 21, R. 79 (3)—DEBT. (1872) 14 M. I. A. 496 (526).

—Interest fixed on—Rate of—Agreement enhancing—Enforceability—Consideration -- Necessity. See DEBTOR AND CREDITOR—INTEREST ON LOAN AGREED UPON. (1871) 8 B. L. R. 110.

—Meaning of. See BOMBAY REGULATIONS—ACKNOWLEDGMENT OF DEBTS ETC.—REG. V OF 1827 S. 3—DEBT. (1837) 2 M. I. A. 23 (35).

—Money debt—Meaning of. See BOMBAY REGULATIONS—ACKNOWLEDGMENT OF DEBTS, ETC. REG. V OF 1827, S. 3—MONEY DEBT. (1838) 2 M. I. A. 37 (53).

—Novation—Acknowledgment of debt—Test. See DEBT—ACKNOWLEDGMENT OF—NOVATION.

DEBT—(Contd.)

—Novation—Bond executed by third party for debt—Intention that debtor should be released only on payment of—No novation in case of.

On the death of the last holder of the estate of Marungapuri, his widows instituted a suit for the recovery of the estate from the respondent, the younger brother of the late Zemindar. Pending the suit a compromise was entered into between the widows and the respondent, one of its terms being the execution of a bond by the respondent in favour of the plaintiff and appellant before their Lordships for Rs. 67,000. The plaintiff and appellant had entered into an agreement with the widows regarding the subject-matter of the suit, and the sum of Rs. 67,000, for which the bond was executed represented the amount which the plaintiff alleged that he had already advanced to the widows under the terms of the said agreement. It appeared, however, that the transaction represented by the bond was not one by which the widows were altogether released from the debt which they had incurred to the plaintiff, and that the plaintiff's position was not altered by reason of his having lost his remedy against them. It appeared on the face of the bond that he was to retain his securities against them until the bond was satisfied; and that the contract on his part was, in fact, rather an agreement to abandon his remedy against them on the payment of the Rs. 67,000, than an actual abandonment at the time of the transaction.

Held, affirming the High Court, that, on the footing that there was a substantial debt due to the appellant from the widows on an agreement to which no objection could have been taken; that there was a *bona fide* arrangement by which the widows were to have their suit dismissed; and that one term of that arrangement was that they should be relieved of the debt due to the plaintiff, the transaction would hardly amount to what was called a "novation" (263-4). (*Sir James W. Colvile.*) **CHEDAMBARA CHETTY v. RENGAKRISHNA MUTHUVIRA PUCHAIYA NAICKER.**

(1874) 1 I. A. 241 = 22 W. R. 148 = 13 B. L. R. 509 = 3 Sar. 373.

—Payment of—Evidence—Debtor's account books not by themselves sufficient.

In a suit brought by the plaintiffs against the defendants (bankers) claiming upwards of Rs. 10,000 as unaccounted for by the defendants, the defendants resisted the plaintiffs' demand, alleging certain payments. The evidence which the Sub-Judge considered sufficient to prove the payments which the defendants were bound to prove, consisted of the mercantile books of the banking firm and of a general statement by one of the defendants that the items in those books were correct.

Held, that the books being, as was admitted, at most corroborative evidence, the mere general statement of the banker, where the fact of the payments was distinctly put in issue, to the effect that his books were correctly kept, was not sufficient to satisfy the burden of proof that lay upon him, particularly as with reference to many of the disputed items he had the means of producing much better evidence (133). **BABOO GUNGA PERSAD v. BABOO INDERJIT SINGH.** (1875) 3 Suth. 132 = 23 W. R. 390 = 3 Sar. 486.

—Payment of—Onus of proof of—Shifting of—Condition. See BOND—PAYMENT OF—ONUS OF PROOF OF. (1887) Bald. 483.

—Payment to third party—Discharge by—Plea of—Authority of third party to receive—Proof of—Onus on debtor.

When a creditor sues the debtor for the payment of a debt and the defence is that the creditor paid the debt to another person, it is for the debtor to prove that the other person had, or had been held out to the debtor by the

DEBT—(Contd.)

creditor as having had the authority of the creditor to receive payment of the debt on behalf of the creditor. (*Sir John Edge.*) **MAHOMED KHALEEF SHIRAZI v. LA TANNERIES LYONNAISES.** (1926) 53 I. A. 84 =

49 M. 435 = 3 O. W. N. 568 =

(1926) M. W. N. 495 = 24 L. W. 115 = 44 C. L. J. 67 =

28 Bom. L. R. 1391 = 31 C. W. N. 1 =

A. I. R. 1926 P. C. 34 = 94 I. C. 767 = 51 M. L. J. 570.

———Promise to pay—Acknowledgment of—Distinction. See DEBT—ACKNOWLEDGMENT OF—PROMISE TO PAY.

———Promise to pay—Implication of—Propriety—Admission of debt unqualified—Promise express to pay it in a particular manner—Cases of—Distinction.

Although an unqualified admission of a debt no doubt implies a promise to pay it, that is not necessarily so when there is an express promise to pay in a particular manner. It must depend upon the construction of the instrument in each case (75). (*Lord Davey.*) **KALKA SINGH v. PARASRAM.** (1894) 22 I. A. 68 = 22 C. 434 (444) =

R. & J.'s No. 137 = 6 Sar. 545 = 5 M. L. J. 14.

———Promise to pay, in a particular manner—Mode and form of payment becoming impossible—Effect of, on obligation to pay. See DEBT—ADMISSION UNQUALIFIED, ETC. (1894) 22 I. A. 68 (75) = 22 C. 434 (443-4).

———Settlement deed for payment of—Trustee under—Charge created by—Validity—Consent of settlor—Payment for—Charge in respect of.

The Rajah of Ramnad, being heavily indebted, executed a deed of voluntary settlement, whereby he settled the Zemindari and certain other properties on his minor son, the respondent before their Lordships, subject to the payment of his debts and to certain allowances payable to himself and certain other members of his family and also subject to the several trusts, provisos, and declarations therein contained. A trustee and a co-adjutor were also appointed by the same settlement deed and it was provided that the trustee should not, without the written permission of the co-adjutor, enter into any agreement with the creditors or mortgage or sell any part of the trust properties. At the time of the said settlement the appellants' father was one of the creditors of the Rajah and subsequently also he lent further sums to the Rajah on the security of certain jewels and furniture and the allowance payable to the Rajah under the deed of settlement. To save the estate from being eaten up by the debts, which bore a very high rate of interest, it became necessary for the trustee to borrow moneys and consequently he negotiated with certain financiers in England who insisted on the Rajah also joining in the deed that was to be executed for the proposed loan and that the interest on their debt should have priority over the allowances payable under the voluntary deed. To meet the wishes of the English financiers the trustee offered to give the Rajah a mortgage for 4 lakhs as a consideration for his agreeing to postpone the payment of his allowances to the interest payable to the proposed lenders and obtained his consent accordingly. Later on and in fulfilment of the above promise, the trustee executed the said mortgage in favour of the appellant. Legally the consent of the Rajah was not required to give priority to the payment of interest for the proposed loan. *Held* that, in the absence of satisfactory evidence that the Rajah would not have executed the English mortgage deed and consented to postpone his allowance without some payment or consideration, or that the intending lenders would have pressed their objection if the legal position had been explained to them, the creation of the charge on the trust estate by the trustee was *ultra vires* of his powers, that the power was not exercised properly and reasonably and in the interest of the estate and that consequently the charge so created could not be enforced as against the estate. (*Lord*

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Parmoor.) **SUBRAMANIAN CHETTIAR v. RAJAH OF RAMNAD.** (1915) 39 M. 115 = 3 L. W. 149 = 29 M. L. J. 856.

———Suit for—Creditor's right of—Attachment of debt—Effect. See C. P. C. OF 1908, O. 21, R. 46 (1) (a)—DEBT. (1894) 22 I. A. 31 (43) = 17 A. 198 (210-1).

———Suit for—Joint creditors—Suit by one of, making others defendants—Maintainability. See LANDLORD AND TENANT—RENT—ARREARS OF—SUIT FOR—PARTIES. (1910) 38 I. A. 1 (6) = 38 C. 270 (277).

———Suit for—Jurisdiction to entertain—Debt contracted at Hyderabad, and debtor and surety and their representatives all resident there—Secunderabad Court—Jurisdiction of, in such a case—No promise to pay at that place.

The suit out of which the appeal arose was instituted in the Court of the Civil Judge, Secunderabad, to recover a debt with interest. The suit was against the representatives of the principal debtor and of his alleged surety. The principal debtor, the alleged surety, and their respective representatives were all resident in Hyderabad, the capital of the Nizam's dominions. The loan was contracted in Hyderabad. The surety re-payment was to be made to the plaintiff or his representative at the office of the Treasury at Hyderabad. There was no promise either by the principal debtor or the surety to make any payment at Secunderabad, where the plaintiff had a place of business.

Held, that no part of the plaintiff's cause of action arose at Secunderabad, and that the court of that place in which the suit was instituted had no jurisdiction to entertain it. (*Lord Blanesburgh.*) **BANSILAL ABIRCHAND v. GHULAM MAHBUB KHAN.**

(1925) 53 I. A. 58 = 53 C. 88 = 23 L. W. 3 = A. I. R. 1925 P. C. 290 = 24 A. L. J. 48 = 43 C. L. J. 1 =

(1926) M. W. N. 108 = 27 Punj. L. R. 1 (P. C.) =

28 Bom. L. R. 211 = 92 I. C. 760 = 49 M. L. J. 806.

———Suit for—Parties to—Transferees of properties of debtor if proper. See DEBTOR AND CREDITOR—DEBTOR—MONEY—BOND BY—SUIT UPON.

(1867) 11 M. I. A. 468 (472-3).

———Suit for recovery of entire, on foot of plaintiff being only a surety—Contribution on foot of plaintiff being only a co-debtor—Relief for—Grant of. See MORTGAGE—MORTGAGOR—CO-MORTGAGORS. (1906) 33 I. A. 81 =

28 A. 482 (487).

———Terms of—Reasonableness and propriety of—Other borrowings by same debtor on similar onerous terms—Evidence of—Admissibility. See EVIDENCE—LOAN—TERMS OF.

———Undertaking to procure—Conditional or unconditional. See BROKER—LOAN. (1912) 39 I. A. 152 = 36 B. 387.

DEBTOR AND CREDITOR.

(See also DEBT.)

———Agreement between—Termination of—Right of—Partnership at will—Principles applicable to case of—Applicability—Construction of agreement.

By an arrangement come to between the plaintiffs and the defendants, part of the balance of account stated as due to the plaintiffs by the defendants was to be carried to what was styled the "block account," and the remainder to what was styled the "interest account," by which was meant an account bearing interest, whereas the "block account" was to carry no interest, and was to be liquidated by returns only on future contracts for produce, calculated according to a stipulated scale. The agreement actually made was extremely loose. It fixed no time for its duration, or for the liquidation of the debt.

The question for decision was whether, as contended for by the plaintiffs, the agreement was revocable at their will, or, as contended for by the defendants, unless

DEBTOR AND CREDITOR—(Contd.)

rescinded by mutual agreement, or upon, a breach of its stipulations by one party justifying its rescission by the other, it was to subsist in full force until the liquidation under it of both the "block" and the "interest" account, or, at all events, of the block account; and assuming, in the events that had happened, the plaintiffs were entitled to sue for and recover the balance due on the "interest account," they could not sue for or recover the balance due on "the block account," as to which they had agreed that it was to be liquidated by "returns only."

Held that, on the true construction of the agreement, either party could determine it when it was found to be working unsatisfactorily (105).

The parties had in this respect the same right as parties under a contract for a partnership at will. Indeed, though they were not strictly partners, their contract was like one between persons engaged in successive joint adventures (105). (*Sir James Colville.*) **PALLIKELAGATHA MARCAR v. SIGG.** (1880) 7 I. A. 83 = 2 M. 239 (262-3) = 3 Suth. 742 = 4 Sar. 131.

—Allowance to creditor's agents—Debtor's undertaking in debt bond to pay—Validity—Consideration—Necessity—Suit to enforce bond—Right to recover allowance in.

Where the executant of a bond undertook to pay, in addition to the usurious interest provided thereby, certain sums as allowance to be paid to the karindahs or agents of the obligees, *held*, that the allowance could not be recovered in a suit to enforce the bond, because (1) it was something *dehors* the contract; and (2) there appeared to be no consideration to support the assurance or promise to make that payment (128). (*Sir James W. Colville.*) **SHAH KOONDUN LALL v. RAJAH AMEER HUSSUN KHAN.**

(1866) 11 M. I. A. 120 = 2 Sar. 239 = R. & J.'s No 6 (Oudh).

—Appropriation of payments. See CONTRACT ACT, SS. 59 AND 60.

—Debt—Composition payment in lieu of—Acceptance by creditor of—Effect—Claim subsequent by him for balance of old debt—Maintainability.

The plaintiff, a creditor of the late Rajah Chatpal Singh, accepted from the Collector in charge of the estate, a composition payment in adjustment of his claims. *Held*, that he could not sue the Ranis or the infant son of the Rajah, on a contract or bond for payment of the balance.

MAHANT JAYARAM GIR v. RANI SHIORAJ KOER. (1869) 2 B. L. R. 98 P. C. (100) = 11 W. R. P. C. 41 = 2 Suth. 216.

—Debtor—Contract by, to convey property in extinguishment of debt—Specific Performance of—Creditor's right of—Acceptance by him of another property in part satisfaction of debt—Effect. See SPECIFIC PERFORMANCE—DEBTOR. (1929) 33 C. W. N. 652.

—Debtor—Deed given to creditor by, undertaking to convey property as agreed to liquidate debt—Construction of—Contract to convey property in complete extinguishment of debt—Charge or property for debt. See DEED—CONSTRUCTION OF—DEBTOR. (1929) 33 C. W. N. 652.

—Debtor—Gift deed by—Nature and operative character of—Decision as to, between him and donee—Effect of, against his own creditors. See C. P. C. OF 1908, S. 11—CASES UNDER—GIFT DEED. (1873) 12 B. L. R. 433.

—Debtor—Heirship to deceased—Decree declaring in one creditor's suit—Effect of, against another creditor. See JUDGMENT—JUDGMENT *in rem*—HEIRSHIP. (1872) 14 M. I. A. 605 (616).

—Debtor—Loan bond fraudulent by—Suit to enforce—Portion of debt justly due—Decree making bond security for—Discretion of court.

DEBTOR AND CREDITOR—(Contd.)

It is not necessary to consider whether in a suit brought to enforce a fraudulent deed against a person from whom something is justly due, a Court of Justice ought to exercise the power of saying that such a deed shall stand as security for what is really due (267). (*Sir James W. Colville.*)

CHEDAMBARA CHETTY v. RENGAKRISHNA MUTHU VIRA PUCHAIYA NAICKER. (1874) 1 I. A. 241 =

22 W. R. 148 = 13 B. L. R. 1509 = 3 Sar. 373.

—Debtor—Money—Bond by—Suit upon—Parties to—Transferees of properties of debtor if proper.

The suit, which was brought by the appellant, was for the recovery of the sum due under a money bond executed by the 1st respondent in his favour. The other respondents were made defendants on the allegation that, in order that the money might be lost to the appellant, those respondents had combined with the 1st respondent, and got the estates belonging to the latter illegally transferred to them. The plaintiff concluded by praying that the amount sued for might be decreed against the defendants and the property aforesaid.

Held, that as to all the respondents, except the 1st, no relevant case was made against them on the face of the plaintiff, and that they must therefore be dismissed from the suit.

The allegation that they have combined with the plaintiff's alleged debtor to get her estates illegally transferred to them, is no ground of suit against them, if, as is the case here, the plaintiff sues upon an instrument which creates no charge upon or estate or interest of any kind in the lands.

If he can obtain judgment on his bond, and is not satisfied, he may possibly be entitled hereafter to raise such a case, as that suggested in the plaintiff, against the land and against these defendants; but any such proceedings before execution on the judgment are premature (472-3). (*Sir James Colville.*) **MOHUMMUD ZAHOR ALI KHAN v. MUSSUMMAT THAKOORANEE RUTTA KOER.**

(1867) 11 M. I. A. 468 = 9 W. R. P. C. 9 = 2 Suth. 107 = 2 Sar. 320.

—Debtor—Mortgage by, in favour of creditors in pursuance of arrangement for payment of debts—Breach of arrangement by some assenting creditors—Enforceability of mortgage—Effect on.

A firm, in difficulties, executed a mortgage in favour of its creditors. The implied agreement between the parties was that the deed should not take effect unless all the creditors should come in and be bound by it. Further, as a consideration for the execution of the deed, the firm was to be allowed a certain time for payment, and the creditors were to refrain from suing the firm before the expiration of that time. In breach of that agreement, two of the creditors named in the deed sued the firm for the recovery of their debts within the time allowed for payment, and obtained decrees.

Held, that the consideration for the mortgage failed in consequence, and that the creditors named in the deed could not enforce the same to the extent of their rights. (*Sir Richard Couch.*) **AJURDHIA PERSHAD v. SIDH GOPAL.** (1886) 14 I. A. 21 = 9 A. 330 = 4 Sar. 469.

—Debtor—Trust deed fraudulent by—Setting aside of—Debt due by debtor to trustee—Lien for—Enforcement of.

In a suit to set aside a deed of trust charging real estate with debts alleged to be due from the executant on the ground that it was void as being executed with intent to defeat and delay creditors of the executant, it was contended for persons claiming under the deed that, even supposing the deed were out of the way, the defendants would be entitled to have a lien or security upon the property for moneys

DEBTOR AND CREDITOR—(Contd.)

due to them from the executant, and that they would be entitled to that security or lien, not by virtue of the contract, but upon a well-known principle of equity in dependent of contract.

Held, that if any such lien could be introduced, or be attempted to be enforced, the attempt to enforce it could only have been made by other proceedings, viz., by a Bill in the nature of a cross-bill filed by the defendants, insisting upon that equity, and undertaking to prove the facts which it would be necessary to prove in order to give effect to the equity, if the equity did exist (335-6). (*Lord Cairns.*)

TARENY CHURU BONNERJEE v. MAITLAND.

(1867) 11 M.I.A. 317 = 2 Suth. 98 = 2 Sar. 299.

———*Debtor—Trust deed fraudulent by — Setting aside of—Purchaser of property in execution of decree against debtor—Right of—Decree before sale declaring transfer void as against creditors.*

In a suit by the purchaser of the property of *A* in execution of a decree obtained against him to set aside a deed of trust executed by *A* charging the property purchased by the plaintiff with debts alleged to be due from *A* on the ground that the deed was void as being executed with intent to defeat and delay creditors, it was contended that, as the plaintiff took a conveyance from the sheriff of all the interest of *A* in the property in question, he must take that interest as *A* held it, and that, because *A* could not set aside the deed which he had executed, therefore, no more could those who claimed by sale from the sheriff. It appeared, however, that, before execution sale, a decree had been made in a suit to which the creditors, *A*, and his assignee were parties, that the deed of trust was fraudulent and void as against creditors, and that it was after that decree that the property was sold.

Held that, under the circumstances, the objection had no force.

The title of the purchaser under the sale is a title which, in consequence of that decree, is in no way affected by any right of *A* (337 8). (*Lord Cairns.*) TARENY CHURN BONNERJEE v. MAITLAND. (1867) 11 M.I.A. 317 = 2 Suth. 98 = 2 Sar. 299.

———*Interest on loan—Agreement enhancing—Enforceability—Consideration—Necessity.*

Where a contract of loan stipulated that the legally demandable rate of interest should be 5 per cent., it was *held*, that a claim, by the creditor, of interest at 8 per cent., founded upon a bare promise of the debtor to pay 8 per cent., or upon the fact that the debtor had in account voluntarily debited himself with 8 per cent., in lieu of 5 per cent., could not be maintained in law for want of consideration, amounting merely to *nudum pactum*; (as the lender had not proved that he forebore to press for the money, after the term of re-payment had expired, in consideration of an augmented rate of interest, or that the original contract was superseded by a new one, which allowed the money to remain for a longer period of time than originally fixed, at any augmented rate of interest.) LUCHMESWAR SINGH BAHADUR v. SYAD LUTF ALI KHAN. (1871) 8 B. L.R. 110 = 2 Suth. 461 = 2 Sar. 700.

DECEASED.

Conversion of goods of—Suit for—Legacies bequeathed by her — Suit subsequent for payment of.

———*Maintainability—Subject—Matter of two suits same.* See CONVERSION—DECEASED.

(1925) 52 I.A. 214 (224) = 48 M. 312.

Debt of.

———*Admission oral of—Suit based on—Onus on plaintiff in.*

DECEASED—(Contd.)**Debt of—(Contd.)**

It is a very dangerous thing to rest a judgment upon verbal admissions of a sum due, without very clear evidence, especially when there are other means of proving the case, if a true one. A plaintiff who chooses to rely upon verbal admissions should give the most clear and cogent proof of such admissions, and should bring into court a case that is not open to reasonable doubt (79). (*Sir Arthur Hobhouse.*) LALLA SHEOPRASHAD v. JAGGERNATH.

(1883) 10 I.A. 74 = 13 C.L.R. 266 = 4 Sar. 446 = Bald. 470 = R. & J's. No. 73 (Oudh).

———*Evidence of—Admission by deceased years before in creditor's account books of a smaller balance due—Value of.*

In a suit brought by a banker against the son of a deceased customer for the recovery of a sum of Rs. 42,416 alleged to have been due by the deceased at the time of his death in 1838, *held* that a *rookah*, or an acknowledgment of a balance of Rs. 20,450, signed by the deceased in the plaintiff's books of account on 3rd July, 1831, was no evidence that the sum claimed in suit was due by the deceased at the time of his death, which was seven years after the period when the *rookah* was signed (443). (*Lord Justice Turner*) RAI SRI KISHEN v. RAI HURI KISHEN.

(1853) 5 M.I.A. 432 = 1 Suth. 245 = 1 Sar. 466.

———*Suit for, against heir-at-law or executor—Onus on plaintiff in.*

Suit brought against the appellant to recover an alleged debt stated to be due from his father. The plaintiff was based on a bond, and, to save the suit from being barred, upon an agreement of a later date, which would bring the demand within time.

Held, reversing the appellate Court, and restoring the trial judge, that the original demand, which could alone sustain the suit, had not been proved. (*Lord Justice Knight Bruce.*) KATCHY KULLYANA RANGAPPA KALACKA TOLA OODIAR v. BALOOSAMY CHETTI.

(1859) 7 M.I.A. 224 = 2 W. R. 50 = 1 Suth. 380 = 1 Sar. 651.

In an action brought to recover money against an executor, or the heir, of a deceased person, it is necessary for the plaintiff to establish as reasonably clear a case as the facts will admit of, to guard against the danger of false claims being brought against a person who is dead and thus is not able to come forward and give an account for himself (9-10). (*Lord Morris.*) LACHMI PARSHAD v. MAHARAJAH NARENDRO KISHORE SINGH BAHADUR.

(1891) 19 I. A. 9 = 14 A. 169 (170-1).

The appeal arose out of a suit brought by the appellant, a banker, or money-lender, against the heir of a deceased Maharajah, for the recovery of a sum of Rs. 12,000, and interest, alleged to have been borrowed from him by the Maharajah shortly before his death. The transaction was said to have occurred on the 28th of November, 1883, and the Maharajah died on the 27th of December following. The transaction, according to the appellant, was embodied in a parwana alleged to have been executed by the deceased. The appellant's counsel argued that the fact of two witnesses called by him having sworn to the signature of the deceased to the parwana established the case so completely as to render it almost unnecessary to corroborate it in any particular.

Held, that the contention was unsound (11).

Held further that the appellant had not discharged the onus of proof which lay upon him of establishing a reasonably clear case (13). (*Lord Morris.*) LACHMI PARSHAD v. MAHARAJAH NARENDRO KISHORE SINGH BAHADUR.

(1891) 19 I. A. 9 = 14 A. 169 (174-5).

DECEASED—(Contd.)**Debt of—(Contd.)**

—*Suit for against heir-at-law based on verbal admission of indebtedness by him and not on proof of indebtedness itself—Onus on plaintiff in.*

The suit was to recover a sum of money from defendant. The plaintiff alleged that the defendant's deceased father was indebted to the plaintiff in a certain sum, that, on the death of his father, the defendant admitted the balance due by his father, asked the plaintiff to remit a portion of the amount, to which the plaintiff agreed, and promised to execute a mortgage bond for the balance, but that, in breach of his undertaking, the defendant neglected to execute the said bond. The plaintiff prayed for the recovery of the amount for which the defendant was alleged to have undertaken to execute the bond, and the cause of action was stated to be the date of such undertaking.

The defendant denied the truth of all the plaintiff allegations and denied that his father was indebted to the plaintiff. Even then the plaintiff did not fall back, at least as an alternative, upon the foundation of the case, *viz.*, that the accounts showed that defendant's father was indebted to the plaintiff. He merely adduced evidence to prove the defendant's admission of the debt alleged in the plaintiff.

Held, affirming the Court below, that the plaintiff had failed to prove the alleged admission, and was not entitled to recover.

It is a very dangerous thing to rest a judgment upon verbal admissions of a sum due, without very clear evidence, especially when there are other means of proving the case, if a true one. A plaintiff choosing to rely, in such a case, upon verbal admissions, should give the most clear and cogent proof of such admissions (79). (*Sir Arthur Hobhouse.*) *LALLA SHEOPARSHAD v. JUGHERNATH.*

(1883) 10 I. A. 74 = 13 C. L. R. 266 = 4 Sar. 446 = Bald. 470 = R. & J.'s No. 73 (Oudh).

Heir-at-law.

—Admission by deceased—Heir-at-law—Admissibility against. See **ADMISSION—PREDECESSOR IN INTEREST.** (1860) 13 M. I. A. 419 (424-5).

—Debt of deceased. See **DECEASED—DEBT OF.**

—Decree against, directing him to account for property of deceased in his possession for purposes of being applied for discharge of debts of deceased—Nature and effect of—Charge on property if created by. See **DECREE—CONSTRUCTION—CHARGE ON PROPERTY.**

(1878) 5 I. A. 211 (224) = 4 C. 402 (410).

—*Deed by deceased—Suit to set aside, and to confirm plaintiff's possession of property covered by—Deed found to be invalid—Decree proper in case of—Setting aside of deed—Decree for.*

The suit was by the heirs of a purdanashin lady for a confirmation of their possession of certain mousahs, after a reversal of a Summary proceeding, and after setting aside a fraudulent and fabricated deed of sale by the deceased set up by the appellant.

The High Court found that the possession was with the appellant and not with the respondents. They held that the deed of sale in question was not genuine, and ought to be set aside. They passed a decree which, while reversing the decree below confirming the plaintiffs in their possession, merely declared that the plaintiffs were the rightful owners of the suit property. The Court below had by its decree also ordered the deed of sale to be cancelled and set aside. The High Court varied this portion of the decree below, thinking that they could not give any substantive relief.

Held, the decree of the Court of first instance ordering the deed of sale to be cancelled and set aside was correct in form as well as in substance, and that it ought not to have been set aside (205).

DECEASED—(Contd.)**Heir-at-law—(Contd.)**

The plaintiff prayed that the deed might be set aside, and that is a prayer for substantive relief (205) (*Sir Montague E. Smith.*) *TACORDEEN TEWARY v. NAWAB SYED ALI HOSSEIN KHAN.* (1874) 1 I. A. 192 = 3 Sar. 368 = 21 W. R. 340 = 13 B. L. R. 427.

—*Deed by deceased—Suit to set aside, and to confirm plaintiff's possession of property covered by—Onus on heir-at-law in—Proof of heirship if enough.*

The suit was brought by the respondents against the appellant for a confirmation of their possession of certain mowzahs; and their plaintiff, which declared that their suit was for that confirmation, also prayed that it might be done after a reversal of a Summary proceeding, and after setting aside a fraudulent and fabricated deed of sale set up by the appellant. The deed was executed by a purdanashin lady in favour of the appellant, and the respondents were the heirs of that lady.

The High Court regarding the suit as if it were an action of ejectment brought by the respondents as the heirs of the deceased lady, held that, on proof by them that they were the heirs of the deceased lady, the burden was thrown upon the appellant to prove a better title.

Held, that the High Court did not quite correctly state the principle of fixing the onus (206). (*Sir Montague E. Smith.*) *TACORDEEN TEWARY v. NAWAB SYED ALI HOSSEIN KHAN.* (1874) 1 I. A. 192 = 3 Sar. 368 = 21 W. R. 340 = 13 B. L. R. 427.

—*E-stoppel against deceased—Heir-at-law if bound by. See BENAMI—BENAMIDAR—SALE BY—VALIDITY OF—RIGHT TO DISPUTE—REAL OWNER'S RIGHT OF.* (1873) 19 W. R. 292.

—*Executor—Sale by—Suit to set aside, and to recover property subject of—Maintainability—Administration summons prior by heir against executor—Order in, directing executor to account for proceeds of same sale—Effect. See EXECUTION—SALE BY—INVALID SALE.* (1874) 2 I. A. 18 (26).

—*Inheritance—Partition of, to the exclusion of one of the heirs—Claim subsequent by heir who was party to the partition on foot of right of excluded member—Maintainability.*

At a partition with his brother the plaintiff received his full half of the whole of the properties of their deceased father upon the footing of the exclusion of their mother and entered into possession of his share. Plaintiff's brother died first, and then the mother. On the death of the latter, plaintiff sued as her sole heir for the recovery from the representatives of his deceased brother of the properties to which the mother was entitled as one of the heirs of her deceased husband.

Held, that the plaintiff was estopped from contending that his mother was entitled to any share at all in the properties of her husband.

Plaintiff cannot be allowed to say he will take as heir to his mother what was by his own act not allotted to her but was divided between himself and his brother. (*Lord Dunsin.*) *MUHAMMAD WALI KHAN v. MUHAMMAD MOHI-UD-DIN KHAN.* (1919) 11 L. W. 421 (424) = 24 C. W. N. 321 = (1920) M. W. N. 189 = 27 M. L. T. 204 = 58 I. C. 843.

—*Inheritance—Right of—Disclaimer for valuable consideration of—Claim by him or his heirs inconsistent with—Maintainability. See MAHOMEDAN LAW—INHERITANCE—RIGHT OF—RENUNCIATION FOR VALUABLE CONSIDERATION OF.* (1875) 3 Suth. 165 (169) = 24 W. R. 28.

DECEASED—(Contd.)**Heir-at-law—(Contd.)**

——Inheritance—Right of—Enforcement of—Bar to—Conveyance by heir during lifetime of propositus of present interest in his estate—Effect. *See* HINDU LAW—WIDOW — INHERITANCE TO SON — RIGHT OF—ENFORCEMENT OF—ESTOPPEL.

(1870) 13 M. I. A. 585 (600).

——Property of deceased—Suit for recovery of—Mortgage in, set up by defendant—Onus of proof of.

The suit was by the son and heir of a deceased Hindoo to recover possession of property of his deceased father from the defendant who claimed title to it under a mortgage bond executed by the mother of the plaintiff during his minority.

Held that, as the only bar to the resumption by the heir of his estate was the alleged mortgage title over it, the onus of proof thereof was on the mortgagee (414). (*Lord Justice Knight Bruce.*) HUNOONMANPRASAUD PANDAY v. MUSST. BABOOEE MUNRAJ KOONWAREE.

(1856) 6 M.I.A. 393 = 18 W. R. 81 = 2 Suth. 29 = 1 Sar. 552 = Sevestri 253 N.

——Property of deceased—Suit for recovery of alleged—Ownership in deceased—Onus of proof of.

The general rule is that he who claims property through some other person must show the property to have been vested in that person. (*Sir Edward Fry.*) DEWAN RAN BIJAI BAHADUR SINGH v. INDRAPAL SINGH.

(1899) 26 I. A. 226 = 26 C. 871 (873) = 4 C. W. N. 1 = 2 Bom. L.R. 1 = 7 Sar. 578.

——Property of deceased—Suit for recovery of, as heir-at-law—Possession of portion of property—Decree for, as provision for food and maintenance—Grant of.

In a suit by one of the daughters of a deceased person to establish her right to her share of her father's estate, the court refused the relief prayed, but passed a decree assigning to the plaintiff for her food and maintenance five villages which fell short of the extent claimed in the plaint.

Held, that it was quite consistent with the plaint, which asked for actual possession of the land, that a decree should be made, falling short of the extent to which the plaint went (214-5). SECRETARY OF STATE FOR INDIA IN COUNCIL v. MUSSAMAT KHAN ZADI.

(1870) 5 B.L.R. 312 = 2 Sar. 570 = 2 Suth. 322.

——Settlement of accounts by deceased—Re-opening of. *See* ACCOUNTS—SETTLED ACCOUNTS—RE-OPENING OF—BOND EXECUTED, ETC.

(1866) 11 M.I.A. 120 (125-6).

——Suit by, to recover portion of inheritance—Limitation for—Suspension of, during period of particular litigation—Issue as to—Decision adverse on, in suit by same plaintiff to recover another portion of same inheritance—Effect.

Suit by *R* to recover possession of nine villages which *R* alleged to be a part of a Zemindary to which he became entitled by right of inheritance and to have been forcibly taken possession of by *B*. The suit was admittedly brought beyond the period allowed therefor by the law of limitation applicable to the case, and the question was whether the bar of limitation was suspended by a litigation in which *R* had been engaged in order to establish his title to the estate.

On the same day as the above suit for the recovery of the nine villages *R* had instituted another suit to recover from the same defendants certain other lands also appertaining to his inheritance. That suit came on before the Board earlier, and in it the Board had held that the operation of the statute of limitations had not been suspended by the litigation in which *R* had been engaged to establish his title to the estate.

DECEASED—(Contd.)**Heir-at-law—(Contd.)**

Held, that the question whether the operation of the statute of limitation had been suspended by the litigation in which the plaintiff had been engaged in order to establish his title to his estate was actually *res judicata* by reason of the decision of the Board in the other suit, and that therefore their Lordships were precluded from considering whether the case was taken out of the statute by the exception in S. 14 of Regulation III of 1793 (29). (*Sir Robert P. Collier.*) MAHARAJAH RAJENDER KISHORE SINGH v. RAJAH SAHEB PERHLAD SEIN.

(1874) 3 Suth. 27 = 22 W.R. 165.

——Will of deceased—Invalidity of—Declaration of—Suit for—Maintainability—Nuncupative will—Will in writing. *See* SPECIFIC RELIEF ACT, S. 42—CASES UNDER—WILL OF DECEASED.

(1878) 5 I.A. 87 (112-3) = 1 A. 687 (706-7).

——Will of deceased—Invalidity of—Suit on foot of—Profits of estate in case of—Decree for—Form of.

The appeal arose out of a suit brought by the respondent, as widow and heiress of her deceased husband to recover the estate movable and immovable which he had inherited from his father, and which consisted, in the event of the father's will the validity of which was in question being held invalid, of a fourth share in the testator's estate. The plaint also asked for an account of the profits of the estate.

On the issue as to the accounts, the Sub-Judge observed as follows:—"It is not denied that no portion of the profits of the estate which have accrued to the estate since the death of the testator, and which have remained in the hands of the manager, the Defendant No. 1, was given to the plaintiff's husband, and that no account was ever rendered to him. Under such a circumstance I am clearly of opinion that the plaintiff, as the heiress of her husband, is entitled to an adjustment of accounts of the profits and proceeds of the estate from the date of her father-in-law's death to that of her husband's death, and from the date of her husband's death to the date of the suit, and to the amount of money which will be found due to her share under this adjustment of accounts."

Their Lordships affirmed the Sub-Judge on this point (111).

The account directed by the Sub-Judge is the same account as was ordered to be taken in a similar case of 9 M.I.A. 123. It is not intended that the different payments by the manager, or moneys taken out by the members of the family, should be inquired into, but it is to ascertain what portion of the savings of the family, or the accumulations which have been made, the plaintiff would be entitled to (111). (*Sir Richard Couch.*) SOOKKHOY CHUNDER DAS v. SRIMATI MONOHURRI DAS.

(1885) 12 I.A. 103 = 11 C. 684 (693-4) = 4 Sar. 639.

——Will of deceased—Trustees under—Account from—Right to. *See* ACCOUNTS—HEIR-AT-LAW—WILL OF DECEASED.

(1872) Sup. I.A. 47 (83).

——Will of deceased—Trustees under—Suit against—Trust—Performance by trustees of—Allegations inconsistent with—What amount to.

In a suit by an heir-at-law he averred upon information and belief that the trustees under the will of the deceased "against the directions contained in the will" sold securities for money, consisting of Government paper, "out of the corpus of the estate of the said testator and have improperly applied the proceeds thereof."

Held, that the statement as to the sale being "against the directions contained in the will," and of the proceeds being "improperly applied," was inconsistent with a due per-

DECEASED—(Contd.)**Heir at law—(Contd.)**

formance of the trust (83). (*Mr. Justice Willes*).
JUTTENDROMOHUN TAGORE v. GANENDROMOHUN TAGORE. (1872) Sup. I.A. 47 = 9 B.L.R. 377 = 18 W.R. 359 = 3 Sar. 82 = 2 Suth. 692.

Heirship to Decree declaring, in suit by one creditor of deceased.

—Effect of, as against another creditor of his. See **JUDGMENT—JUDGMENT in rem—HEIRSHIP.**

(1872) 14 M.I.A. 605 (616).

Informal documents of.

—Evidentiary value of. See **EVIDENCE—DOCUMENT—DECEASED PERSON.** (1885) 13 I.A. 20 (28).

Oral admission of—Evidence of.

—Weight of. See **ADMISSION—DECEASED—ORAL ADMISSION OF.** (1876) 3 I.A. 154 (181) = 1 M. 69.

Release by.

—Onus of proof of. See **DEED—GENUINENESS OF—ONUS OF PROOF OF.** (1858) 7 M.I.A. 148 (155).

Seal of—Use of, by his successor.

—Practice as to—Presumption—Proof. See **SEAL—DECEASED PERSON.** (1872) Sup. I.A. 10 (31).

Suit on behalf of estate of—Limitation—Starting point.

—Will by deceased—Executor appointed under—Administrator—Distinction. See **STRAITS SETTLEMENTS LIMITATION ORDINANCE, S. 17 (1)—LAW ENACTED BY.** (1916) 43 I.A. 113 (120).

DECENNIAL SETTLEMENT.

—Hereditary tenure held at fixed rent from period anterior to—Proof of—Quantum See **ZEMINDARY—REVENUE SALE OF—PURCHASER AT—RENT OF SUB-TENURES—ENHANCEMENT OF.**

(1865) 10 M.I.A. 183 (191).

—*Mocurrery tenures—Policy as regards—Regulation VIII of 1793, S. 49—Effect*

The whole policy of the Decennial Settlement, as appears by Regulation VIII of 1793 was adverse to *Mocurrery tenures*. It made them all subject to re-assessment, unless they fell within the protection of S. 49 of that Regulation (404). (*Sir Richard Kindersley*). **BABOO DHUNPUT SINGH v. GOOMAN SINGH.**

(1867) 11 M.I.A. 433 = 9 W.R. (P.C.) 3 = 2 Suth. 92 = 2 Sar. 309.

—*Policy of—Estate confiscated and re-granted—Settlement in case of—Effect—Presumption.*

The policy of the Decennial Settlement was to form a body of landholders by ascertaining in whom the Zemindary interest in the soil actually was, and making with those persons a permanent settlement of the Government revenue, so as to give them greater fixity of tenure. But the estate of a Zemindar was not merely the right to the possession or enjoyment of certain lands. It involved rights against, and corresponding obligations to, dependent Talookdars, or other under-tenants, ryots of various classes, and others; and the Decennial Settlement, as a reference to the Rules re-enacted by Regulation VIII of 1793 will show, proceeded upon an inquiry into all or many of these particulars. In the absence of all evidence to the contrary, it must be presumed, that the settlement was made precisely as it would have been made had the estate continued in the line of the former Rajah from whom it had been taken by force (35). (*Sir James Colville*). **BABOO BEER PERTAB SAHEE v. MAHARAJAH RAJENDAR PERTAB SINGH.** (1867) 12 M. I. A. 1 = 9 W. R. 15 = 2 Suth. 114 = 2 Sar. 348.

DECENNIAL SETTLEMENT—(Contd.)

—*Soonderbans not included in Settlement of 1792.*

The Soonderbans, whatever were then their precise limits, were neither included, nor intended to be included, in the Decennial Settlement of 1792, but remained the property of Government as the general owners of the soil (230). (*Sir James Colville*). **RAJAH BURODACANT ROY v. THE COMMISSIONER OF THE SOONDERBANS.**

(1868) 12 M.I.A. 226 = 11 W. R. (P.C.) 14 = 2 B. L. R. P. C. 33 = 2 Suth. 184 = 2 Sar. 413.

—*Under-tenures—Mention of—Practice as to—Independent talook—Shikmee Talook—Non-mention of latter—If conclusive of non-existence of Talook at the time.*

In a suit by the purchaser of a Zemindary at a sale held under Regulation XI of 1822 for recovery of possession of certain mauzahs alleged to have formed part of the Zemindary, and to have been held khas by the defaulting Zemindar at the time of the sale, the defendants alleged that the mauzahs formed a Shikmee Talook created before the Decennial Settlement held of the Zemindar by *mocurrery tenure*, i.e., at a fixed rent, not liable to alteration. The plaintiff, in disproof of the defendant's case, relied upon the fact that the Talook was not mentioned in the Decennial or Quinquennial Settlement as such, and that the lands were not included in the Decennial Settlement, as part of the Zemindary for which the Jumma was assessed on the Zemindar.

Held, that the fact relied upon did not afford any strong inference against the existence of the Talook (174-5).

If it had been an independent Talook it would have been liable to direct assessment by the Government, and would have been the subject of assessment on the Talookdar, but being only a *Shikmee Talook*, paying rent to the Zemindar, the Talookdars were not required to mention it, nor was it necessary for the Zemindar to do so (175). (*Lord Justice Turner*). **WISE v. BHOOBUN MOYEE DEBIA CHOWDRAINEE.** (1863-5) 10 M. I. A. 165 = 3 W. R. 5 = 2 Sar. 91 = 1 Suth. 563.

DECISIONS.

—American decisions. See **AMERICAN DECISIONS.**

—Citation of—*Ex parte* hearing of appeal—Citation in—Duty of legal practitioner. See **APPEAL—Ex parte HEARING.** (1916) 44 I. A. 30 (34) = 44 C. 573.

—Effect of—Declaration of law as it had existed—Enacting law for first time—Statute—Effect of—Distinction. See **COURT—DECISION OF—EFFECT.**

(1920) 47 I. A. 213 (221) = 48 C. 30 (42).

—*Eminent men—Decisions of—Respect due to—Setting aside of—Propriety.*

Decisions representing the opinions of eminent and respectable men, arrived at after public and anxious discussion, carrying with them an authority not legally disputable in the provinces under their jurisdiction, and, it may be, affecting many minds and many titles to property or to personal status, are not lightly to be set aside. (*Lord Hobhouse*). **SRI BALUSU GURULINGASWAMI v. SRI BALUSU RAMALAKSHMAMMA.** (1899) 26 I. A. 113 (151-2) = 22 M. 398 (429-30) = 21 A. 460 = 3 C. W. N. 427 = 1 Bom. L. R. 226 = 7 Sar. 330 = 9 M.L. J. 67.

—English decisions. See **ENGLISH DECISIONS.** (1927) A. I. R. 1927 P. C. 66 (69).

—*Foreign decisions—Reference by Indian Courts to—Propriety.*

Their Lordships cannot help deprecating the practice which seems to be growing in some of the Indian Courts of referring largely to foreign decisions. However useful in the scientific study of comparative jurisprudence, reference to judgments of foreign Courts, to which Indian practitioners

DECISIONS—(Contd.)

cannot be expected to have access, based often on considerations and conditions totally differing from those applicable to or prevailing in India, is only likely to confuse the administration of justice (93). (*Mr. Ameer Ali.*)
IMAMBANDI v. MUTSADDI. (1918) 45 I. A. 73 =

45 C. 878 (904) = 28 C. W. N. 50 = 28 C. L. J. 409 =
 20 Bom. L. R. 1022 = 16 A. L. J. 800 =
 (1919) M. W. N. 91 = 24 M. L. T. 330 = 5 P. L. W. 276 =
 42 I. C. 513 = 35 M. L. J. 422.

——Reporting of—Facts of case—Setting out of—Necessity. See LAW—REPORTING.

——Summary decision—Meaning of. See LIMITATION ACT OF 1859, S. 22, SUMMARY DECISION.

(1883) 10 I. A. 119 (125) = 10 C. 196 (203-4).

DECLARATION.

(See mainly under SPECIFIC RELIEF ACT, S. 42.)

——Appeal—Declaration in—Nature and effect of—Duty of court below to give effect to declaration—Failure to do so—Appellate Court's duty in case of. See P. C.—APPEAL—DECLARATION IN. (1872) 18 W. R. 175.

——Ejectment suit—Dismissal of—Declaration of rights of parties in case of. See EJECTMENT SUIT—DISMISSAL OF—DECLARATION OF RIGHTS OF PARTIES IN CASE OF. (1898) 25 I. A. 195 (207) = 21 A. 53 (69).

——Future rights—Declaration as to. See also HINDU LAW—WILL—CONSTRUCTION: (1) FUTURE RIGHTS; (2) PARTIES NOT BEFORE COURT.

——Litigation unnecessary—Declaration of rights with a view to avoid—Propriety—Partition—Suit for—Income of estate—Plaintiff's right to share of annual—Declaration of, with liberty to apply in execution for its ascertainment and recovery—Plaintiff's right to partition found against. See HINDU LAW—JOINT FAMILY—PARTITION—SUIT FOR—PLAINTIFFS HELD NOT ENTITLED, ETC. (1925) 52 I. A. 294 (303-4) = 52 C. 971 = 50 M. L. J. 136 (142-3).

——Parties not before Court—Declaration of rights of. See HINDU LAW—WILL—CONSTRUCTION: (1) FUTURE RIGHTS; (2) PARTIES NOT BEFORE COURT.

——Person in possession—Declaration of title of—Appeal against—Right of—Defendant without title or possession and mere impertinent intervener—Appeal by.

A Hindu widow in possession of an impartible estate as heiress of her husband made, with the consent of the next reversioners, a gift of the estate to C, who applied for mutation but was opposed by B who claimed the estate under an alleged will of P, the last owner, and also set up some other persons as reversionary heirs. C's application for mutation being rejected, he sued B, the next reversioners (with whose consent the gift was made), and the widow for a declaration of title as proprietor. The reversioners, with whose consent the gift in favour of C was made, admitted the validity of the gift and the title of C. The Court of first instance found against all the allegations of B and gave a declaration in favour of C. From its decree B appealed making C and the widow alone respondents to his appeal. Pending the appeal, the widow died, and the reversionary heirs with whose consent she made the gift, filed petitions and affidavits in the appeal admitting the validity of the deed of gift and the title of C thereunder. At the hearing of the appeal, B conceded the correctness of the findings of the Court below as to the will and the non-existence of the reversionary heirs set up by him (B), and as to the execution of the deed of gift in favour of C.

B's attack upon the decree of the Court below was based on the sole ground that the deed of gift did not represent any genuine transaction and was beyond the powers of the widow as a Hindu widow.

DECLARATION—(Contd.)

Held that, on the findings of the Court of first instance the correctness of which was not contested by B, he had no right to contest the declaration made by that Court in favour of C.

B had failed to prove that he was, even remotely concerned in the title to the property, the subject of the gift, and in the right to the proprietary possession thereof. He had therefore no title to protect and no interest which could give him a right to contest the declaration of title which C had obtained. The suit was not a suit for the ejectment of a defendant who was in possession, in which the plaintiff would have to prove a better title in himself to the possession of the property than the title of the defendant. On the contrary, it is a suit for a declaration of title by a plaintiff who was and is in possession, and, in view of the concessions made by B in the appeal to the Court below, he was a mere impertinent intervener in another person's affair. (*Sir John Edge.*) **CHANDRIKA BAKHSH SINGH v. INDAR BIKRAM SINGH.** (1916) 43 I. A. 179 = 38 A. 440 =

14 A. L. J. 1024 = 20 C. W. N. 1149 = 24 C. L. J. 291 =
 18 Bom. L. R. 846 = 19 O. C. 141 =
 (1916) 2 M. W. N. 120 = 20 M. L. T. 164 =
 4 L. W. 288 = 35 I. C. 958 = 31 M. L. J. 505.

——Title—Declaration of—Suit for—Onus on plaintiff in—Defendant's failure to prove his title. See TITLE—DECLARATION OF—SUIT FOR.

(1898) 25 I. A. 225 (230) = 26 C. 11 (18).

——Title—Declaration of, and confirmation of possession—Suit for—Evidence insufficient for declaration of title—Decree in case of—Form of. See TITLE—DECLARATION OF, AND CONFIRMATION OF POSSESSION.

(1872) 19 W. R. 1.

——Title—Declaration of, and confirmation of possession—Suit for—Onus on plaintiff in. See TITLE—DECLARATION OF, AND CONFIRMATION OF POSSESSION.

(1872) 19 W. R. 1.

——Title—Declaration of, and injunction—Suit for, by person with only possessory right against trespasser—Decree in—Form of. See SPECIFIC RELIEF ACT, S. 42—CASES UNDER—TRESPASSER. (1893) 20 I. A. 99 (106-7) =

20 C. 834 (842-3).

——Title of person not party to suit—Declaration of, at instance of party having no title—Propriety See TITLE—SUIT. (1847) 4 M. I. A. 246 (256).

——Turning out of defendants—Plaintiff's right of—Declaration as to—Permissibility—Injunction or prohibitory order appropriate relief in such case.

The appeal arose out of a suit brought by one H, the Imam and Moazzin of a mosque, and the appellants, Mutwalis of the same mosque. The defendants were twelve persons who worshipped at the mosque. The plaint alleged that the defendants, being dissatisfied with certain variations in the ceremonial which the Imam had introduced, interfered with his performance of the service, and claimed to conduct the service in their own way, and otherwise misbehaved themselves. One of the reliefs prayed for in the plaint was "that it be declared by the Court that in case the defendants interfere with the rights of the plaintiffs as Imam and Mutwalis, and do the acts referred to in paragraph 5 of the plaint, the plaintiffs have the authority to turn out all the defendants, or any one who may do such acts, from the musjid."

The Sub-Judge, who came to the conclusion that the plaintiffs were entitled to relief, granted a declaration in the terms of the plaint above set out.

Held, that the Court ought not to make such a declaration, viz., that the plaintiffs had the authority to turn out the

DECLARATION—(Contd.)

defendants when they interfered, and that the plaintiffs must rely on the prohibitory order or injunction for which they also prayed, and must enforce it, as they might be advised, in each case that arose (72). (*Lord Hobhouse.*) **FUZUL KARIM v. HAJI MOWLA BUKSH.**

(1891) 18 I. A. 59 = 18 C. 448 (462) = 6 Sar. 19.

—Unnecessary but embarrassing declarations—Grant of—Propriety. See MORTGAGE—PRIOR AND SUBSEQUENT MORTGAGES—SAME PERSON HOLDING BOTH—SUBSEQUENT MORTGAGE—SALE PRIOR IN EXECUTION OF, ETC. (1882) 9 I. A. 21 (26).

DECLARATORY DECREE.

(See DECLARATION AND SPECIFIC RELIEF ACT, S. 42.)

DECORATIONS, TITLES AND ORDERS.

—Importance attached to, by Western nations. See TITLES, ORDERS AND DECORATIONS.

DECREE.**Account.**

—Balance due on—Suit for—Objections by defendant in—Decree to plaintiff subject to—Validity. See PARTNERSHIP—DISSOLUTION—ACCOUNTS—BALANCE DUE ON. (1834) 5 W. R. 76.

—Decree for an—Meaning and effect of. See DECREE—ACCOUNTS—SUIT FOR—DECREE IN, ESTABLISHING LIABILITY OF, ETC. (1843) 3 M. I. A. 175 (196-7).

—*Suit for—Decree in—Accountability of defendant established—Decree in case of—Taking of accounts—Decree for—Final decree—Passing of, at hearing of suit—Rule—Exception.*

Where, in a suit for an account by a principal against his dewan or agent in which the plaintiff alleges a continued agency in the defendant for the purpose of drawing and expending the plaintiff's money, and prays relief on the ground that the agent had drawn more from his principal than he had expended for him, a relationship between the plaintiff and the defendant under which the latter is accountable for his receipts is established, the regular course would be to order an account to be taken of the defendant's dealings with the plaintiff's money as his dewan or agent (128). Miscarriages are likely to occur if the Court attempts to make a final decree at the hearing of a suit for account, instead of the regular decree for account (130).

Their Lordships are not expressing an opinion that in a suit for account it may not appear at the hearing that the issue is so simple and so clearly raised, and met by evidence, as to be ready for decision at that time. But the general rule is the other way. And this suit is an example of the general rule (133). (*Lord Hobhouse.*) **HURRONATH ROY BAHADOOR v. KRISHNA COOMAR BUKSHI.**

(1886) 13 I. A. 123 = 14 C. 147 (153, 155-6, 158) = 4 Sar. 751.

—*Suit for—Decree in, establishing liability of defendant to account—Decree directing accounts to be taken if a.*

The plaintiff in the suit alleged that the defendant was accountable to him upon several claims. The defendant alleged that he had got legal defences to every one of those claims, and that he was not accountable at all. The Court held that the legal defences put forward were valid as to some of the claims, and as to others of the claims that they were invalid, and therefore that the defendant must account. The decree that was made did not declare in terms the liability of the defendant, but it directed accounts to be taken which he was contending ought not to be taken at all.

Held, that the decree must be considered to contain within itself an assertion that, if a balance was found against the defendant on those accounts, the defendant was bound to pay it (8).

DECREE—(Contd.)**Account—(Contd.)**

The form of the decree is exactly as if it affirmed the liability of the defendant to pay something on each one of those claims, if only the arithmetical result of the account should be worked out against him (8). (*Lord Hobhouse.*) **RAHIMBHOY HIBIBHOY v. TURNER.** (1890) 18 I. A. 6 = 15 B. 155.

—*Suit for—Decree in, establishing liability of defendant to account—Decree for an account if a.*

A decree for an account is not, as appears to have been assumed, a mere direction to inquire and report. It proceeds, and must always proceed, upon the assumption that the party calling for it is entitled to the sum found due. It is a decree affirming his rights, only leaving it to be inquired into, how much is due to him from the party accounting. The Court cannot make a decree ordering a party to account, without first determining that he is liable to pay if anything be found due (196-7). (*Dr. Lushington.*) **BABOO JANOEY DOSS v. BINDABUN DOSS.**

(1843) 3 M. I. A. 175 = 1 Sar. 263.

—*Suit for—Final decree in—Decree declaring liability of defendant and directing accounts to be taken if a.*

The question was whether the decree sought to be appealed against was a "final decree" within the meaning of S. 595 of C.P.C. of 1882.

The plaintiff in the suit alleged that the defendant was accountable to him upon several claims. The defendant alleged that he had got legal defences to everyone of those claims, and that he was not accountable at all. The court held that the legal defences put forward were valid as to some of the claims, and as to others of the claims that they were invalid, and therefore that the defendant must account. The decree that was made did not declare in terms the liability of the defendant, but it directed accounts to be taken which he was contending ought not to be taken to all.

Held, that the decree was a final one within the meaning of S. 595 of C.P.C. (9).

It must be held that the decree contains within itself an assertion that, if a balance is found against the defendant on those accounts, the defendant is bound to pay it. Therefore, the form of the decree is exactly as if it affirmed the liability of the defendant to pay something on each one of these claims, if only the arithmetical result of the account should be worked out against him. Now that question of liability was the sole question in dispute at the hearing of the cause, and it is the cardinal point of the suit. The arithmetical result is only a consequence of the liability. The real question in issue was the liability, and that has been determined by this decree against the defendant in such a way that in this suit it is final. The Court can never go back again upon this decree so as to say that, though the result of the account may be against the defendant, still the defendant is not liable to pay anything. That is finally determined against him, and therefore in their Lordships' view the decree is a final one within the meaning of S. 595 of the Code (8-9). (*Lord Hobhouse.*) **RAHIMBHOY HIBIBHOY v. TURNER.** (1890) 18 I. A. 6 = 15 B. 155.

—The decision of the District Judge in this case resembles in principle a decree for account made at the hearing of a cause, which is final against the party denying liability to account, and is appealable, though it is also in another way interlocutory and may result in the exoneration of the accounting party, or even in the award of a balance in his favour (213). (*Lord Hobhouse.*) **RAJA BHUP INDAR BAHADUR SINGH v. BIJAI BAHADUR SINGH.** (1900) 27 I.A. 209 = 23 A. 152 (156-7) = 5 C.W.N. 52 = 2 Bom. L.R. 978 = 7 Sar. 788 = 10 M. L. J. 290

DECREE—(Contd.)**Account—(Contd.)**

— *Suit for—Final order in—Order directing accounts to be taken to find out whether or not defendant is liable if a.*

Two suits were brought against the defendant, a minor at the date of their institution. One was on a hand note signed by the defendant's adult brothers, and the other on a hath-chitta signed by them. The ground of liability stated in the plaint was that the defendant and his brothers were owners and partners in ancestral businesses, and that the money claimed was borrowed by the brothers for the purposes of the businesses. In each suit a money decree was sought against the defendant. The defence was that a new business was started by the eldest brother and manager of the family, and that the money sued for was borrowed exclusively for the purpose of that business, which was not ancestral.

The Sub-Judge decided in the defendant's favour, and dismissed the suits. The High Court set aside his decrees, and directed certain accounts against the defendant, not because his liability was established but for the purpose of determining whether or not he was liable.

Held, that the order of the High Court was a "final order" within the meaning of S. 109 of C.P.C. of 1908, and was appealable (113). (*Sir Lawrence Jenkins.*) **SAN-YASI CHARAN MANDAL v. KRISHNADHAN BANERJI.**

(1922) 49 I.A. 108 = 49 C. 560 (566) = 30 M.L.T. 228 = 20 A.L.J. 409 = 24 Bom. L.R. 700 = 35 C.L.J. 498 = (1922) M.W.N. 364 = 26 C.W.N. 954 = 16 L.W. 536 = A.I.R. 1922 P.C. 237 = 67 I.C. 124 = 43 M.L.J. 41.

Acquiescence in—What amounts to—Effect of, on right to appeal from decree.

— With reference to the dealing under the decree, it is to be observed, that the mere prosecution of an inquiry, especially under a mistaken impression, would not raise a case of election, or amount to a waiver of a tort. This is all that the facts alleged disclose. They disclose that, at the time of the decree, the estate was supposed to be irrecoverable by the mortgagor, and that the court, in directing the inquiries which it directed, acted on that impression. They do not disclose what has been done in the way of satisfaction under the decree. The case alleged in this suit is one of fraudulent misdealing with property pledged. The case relied upon was not a case of fraud (560-1). (*Sir Edward V. Williams.*) **NAWAB SIDHEE NUZUR ALLY KHAN v. RAJAH OJODHYARAM KHAN.** (1866) 10 M. I. A. 540 =

5 W.R. P.C. 83 = 1 Suth. 635 = 2 Sar. 198.

— In an appeal from the decree in a suit brought before the High Court in the exercise of its original jurisdiction by the owners of ship *A* (the respondents) against the owners of ship *B* (the appellants) for a collision, the High Court in the exercise of its appellate jurisdiction affirmed the decision of the first court so far as it was held that there was negligence on the part of each of the ships; but they amended the decree by declaring that instead of the appellants paying the full sum of £25,000, being one half of the damages sustained by the respondents, they should be allowed to deduct half of the damages which they had sustained by the injury to their ship, and that it should be referred to the Registrar of the Court to assess those damages. The appellants took out the summons to compel the respondents to appear before the Registrar for the purpose of acting under the decree of the High Court in assessing the amount of damages sustained by the appellants; and it appeared from the report of the Registrar that the damages were assessed at a certain sum with the consent of both parties.

DECREE—(Contd.)**Acquiescence in—What amounts to—Effect of, on right to appeal from decree—(Contd.)**

Held, that the fact that the parties appeared before the Registrar for the purpose of carrying out the order of the High Court in assessing the damages which they had sustained by the injury which had been done to the appellants, and acted without protest would, of itself, be a sufficient ground for preventing the parties from appealing to the Privy Council against the decree of the High Court (164).

It is said that the parties were obliged to go before the Registrar; but they might have appealed and got an inhibition, or if not they might have appeared before the Registrar under protest (163). (*Sir Barnes Peacock.*) **THE BRENHILDA v. BRITISH INDIA STEAM NAVIGATION CO.** (1881) 8 I.A. 159 = 7 C. 547 (551-2) = 4 Sar. 236.

— The appeal arose out of a suit brought by the appellant, a purdanashin lady, to set aside the compromise of a suit which she had previously instituted to recover possession of certain lands theretofore purchased by her from one *D*, since deceased. The ground on which she sought to set aside the compromise was that it had been entered into without her authority or consent. By the said compromise, the defendant, *D*, was to deposit into Court a sum of Rs. 13,500 on or before a specified date, and that, on such payment or deposit, the appellant was to convey the suit property to the vendor. The amount was deposited into Court within the specified date, but the appellant refused to accept the payment and instituted the suit out of which the appeal arose. The High Court, on appeal, dismissed her suit, and she preferred the appeal to the Privy Council.

After having obtained leave to appeal to His Majesty in Council, the appellant applied to the High Court for and obtained an order that Rs. 4,000 (portion of the Rs. 13,000 paid into Court) should be held as security for the costs of the respondents in the appeal to the Privy Council. It was contended that this transaction amounted to an adoption by the appellant of the decree while at the same time she was impeaching it, and that she was therefore estopped from doing so.

Held, that the contention was entirely unsustainable.

If the appellant should fail in this appeal, the money lodged in Court will belong to her. If she succeeds in the appeal the money lodged in Court will be returned to the respondents, subject, however, to any claim she may successfully establish to have any costs awarded to her paid out of it. (*Lord Atkinson.*) **SRIMATI SARAT KUMARI DASI v. AMULLYADHAN KUNDU.**

(1922) 17 L. W. 481 (494) = 1923 P.C. 13 = 37 C.L.J. 501 = 25 Bom. L.R. 548 = (1923) M. W. N. 392 = 72 I.C. 632 = 32 M. L. T. 137 (P.C.).

Adjudication amounting to a.

— An adjudication which conclusively determines the rights of the parties in regard to certain, and those essential, matters involved in the suit, is a decree within the meaning of S. 2, sub-S. (2) of C. P. C. of 1908. A decree does not cease to be a decree because a subordinate part of it, if correctly made, might have been made separately as an order (95). (*Lord Sumner.*) **AHMED MUSAJI SALEJI v. HASHIM EBRAHIM SALEJI.** (1915) 42 I. A. 91 = 42 C. 914 (924-5) = 19 C. W. N. 449 = 21 C. L. J. 419 = 17 M. L. T. 312 = 2 L. W. 377 = (1915) M. W. N. 485 = 13 A. L. J. 540 = 17 Bom. L. R. 432 = 28 I. C. 710 = 29 M. L. J. 70.

— The Code of Civil Procedure makes no provision for something which is neither a decree nor an order, nor for anything which is both, neither does it provide that one adjudication by the court can be resolved into divers elements, some of which are decrees and some orders. An

DECREE—(Contd.)**Adjudication amounting to a—(Contd.)**

adjudication does not cease to be a decree because a subordinate part of it, if correctly made, might have been made separately as an order (95). (*Lord Sumner.*) AHMED MUSAJI SALEJI v. HASHIM EBRAHIM SALEJI.

(1915) 42 I. A. 91 = 42 C. 914 (924) = 19 C. W. N. 449 = 21 C. L. J. 419 = 17 M. L. T. 312 = 2 L. W. 377 = (1915) M. W. N. 485 = 13 A. L. J. 540 = 17 Bom. L. R. 432 = 28 I. C. 710 = 29 M. L. J. 70.

Administration suit—Preliminary decree in.

—Form of. See ADMINISTRATION—SUIT FOR—DECREE PRELIMINARY IN.

(1925) 50 M. L. J. 644 (647-8).

Admitted rights—Incorporation in decree of—Necessity.

—Reference to same in judgment merely not sufficient.

The respondents (the Calcutta Corporation) obtained orders for demolition of certain fixtures attached to the building of the appellants on the ground that they were encroachments. The appellants thereupon instituted a suit for a declaration that the structures in dispute had been fixed before June 1, 1863, and that they were entitled to compensation for the loss they would suffer by their compulsory removal. In their written statement and at the trial, the respondents specifically denied that all but a small part of the structures in dispute had been erected before June 1, 1863. In their appeal to the High Court, however, the respondents admitted that all the fixtures in dispute had been erected before June 1, 1863. The High Court referred to that admission in their judgment and, on the basis thereof, dismissed the suit with costs, without, however, incorporating the admission in their decree.

Held, that the decree of the High Court ought to be amended by introducing the admission on the part of the Corporation that all the structures affected were erected before June 1, 1863, and that the appellants were entitled to be paid reasonable compensation for the loss they would suffer by their compulsory removal (248-9). (*Lord Buckmaster L. C.*) JOSEPH v. CALCUTTA CORPORATION.

(1916) 43 I. A. 243 = 44 C. 87 (96) = 20 M. L. T. 383 = (1916) 2 M. W. N. 544 = 21 C. W. N. 194 = 24 C. L. J. 498 = 18 Bom. L. R. 878 = 5 L. W. 199 = 36 I. C. 912 = 32 M. L. J. 631.

Amendment of.

—See C. P. C. OF 1908, S. 152.

Appeal from.

—Affirmance on—Appellate decree in case of—Form of.

Their Lordships may suggest that in all cases it may be expedient expressly to embody in a decree of affirmance so much of the decree below as it is intended to affirm, and thus avoid the necessity of a reference to the superseded decree (492). (*Sir James W. Colville.*) KRISTO KINKUR ROY v. RAJAH BURRODACAUNT ROY.

(1872) 14 M. I. A. 465 = 17 W. R. 292 = 10 B. L. R. 101 = 2 Suth. 564.

—Affirmance on—Operative decree in case of—Appellate decree affirming the decree under appeal.

Is it to be taken to incorporate the latter in itself, so that for the purposes of execution, the decree to be executed is to be taken to be a decree of the appellate court? In the case now before their Lordships, the High Court obviously proceeded on the principle, that a simple decree of affirmance did not so incorporate the mandatory part of the original decree as to make, for all purposes, the decree of the appellate court the sole decree to be executed. And this ruling appears to have been followed in the case reported in 6 B. L. R. p. 52, in which it was ruled that, in order to make the decree of the appel-

DECREE—(Contd.)**Appeal from—(Contd.)**

late court the final decree in the suit for all the purposes of execution, it was necessary that it should have decreed a material modification of the original decree. The rule, so expressed, seems open to the objection of vagueness. The Full Bench of the High Court of Bengal, however, in the decision of 12th June, 1871, already referred to, has ruled that whether the decree of the lower court is reversed, or modified, or affirmed, the decree passed by the appellate court, is the final decree in the suit; and, in the words of Mr. Justice Mitter, "as such the only decree which is capable of being enforced by execution." And that is in accordance with the Madras decision already cited (489-90).

Whether the appellate court affirms, reverses, or varies the decree under appeal, the decree of the appellate court may be regarded either as a direction to the lower court to make and execute a decree of its own accordingly, or as an independent decree, whether it is to be executed by the appellate court or by the lower court. In the latter case a further question arises, *viz.*, whether the original decree, if wholly affirmed (or so much of it as has been affirmed, if it has been partially affirmed), is to be treated as merged or incorporated in the decree of the appellate court as the sole decree capable of execution, or whether both decrees should be treated as standing, execution being had on each in respect of what is enjoined by the one, and not expressly enjoined by the other (490).

Ss. 360 to 362 of the Code of 1859, which prescribe the form of the decree of the appellate court, direct a copy of it to be entered on the register, and treat that decree as a decree to be executed, seem to exclude the notion that it is a mere direction to the lower court to pass and execute a certain decree (491).

If the question were *res integra*, their Lordships would incline to the view that the execution ought to proceed on a decree, of which the mandatory part expressly declares the right sought to be enforced. Considering, however, that the question is not of much practical importance, their Lordships will not expressly dissent from the rulings of the Madras court, and of the Full Bench of the Bengal Court, further than by saying, that there may be cases in which the appellate court, particularly on special appeal, might see good reasons to limit its decision to a simple dismissal of the appeal, and to abstain from confirming a decree erroneous or questionable, yet not open to examination by reason of the special and limited nature of the appeal (492). (*Sir James W. Colville.*) KRISTO KINKUR ROY v. RAJAH BURRODACAUNT ROY.

(1872) 14 M. I. A. 465 = 17 W. R. 292 = 10 B. L. R. 101 = 2 Suth. 564.

—Where a decree for possession was affirmed on appeal, *held*, that the rights of the parties depended upon the former decree, and that it was the former decree which was effective, and which had to be executed (36). (*Sir Robert Collier.*) HURROPERSAUD ROY CHOWDHRY v. SHAMAPERSAUD ROY CHOWDHRY.

(1877) 5 I. A. 31 = 3 C. 654 (658) = 1 C. L. R. 499 = 3 Suth. 495 = 3 Sar. 782 = 2 I. J. 284.

—See MESNE PROFITS—FUTURE PROFITS—DECREE FOR—AFFIRMANCE ON APPEAL OF—OPERATIVE DECREE IN CASE OF.

(1900) 27 I. A. 209 (214-5) = 23 A. 152 (157-8).

—Whatever may be the theory under other systems of law, under the Indian law and procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal. (*Sir Lawrence Jenkins.*) JUSCURN BOID v. PIRTHICHAND LAL.

(1918) 46 I. A. 52 (56) = 46 C. 670 (679) = 21 Bom. L. R. 632 = 23 C. W. N. 721 = (1919) M. W. N. 258 =

DECREE—(Contd.)**Appeal from—(Contd.)**

30 C. L. J. 71 = 26 M. L. T. 131 = 17 A. L. J. 514 =
50 I. C. 444 = 36 M. L. J. 557.

—Compromise pending—Decree not in accordance with
—Validity. See APPEAL—COMPROMISE PENDING,

(1872) Sup. I. A. 135 (146).

—Decree in—Costs of all courts awarded by—Interest
on—Costs of each court—Interest on, as from date of its
decree—Right to—Appellate decree not expressly providing
for same—Executing court—Jurisdiction to award. See
P. C.—APPEAL—DECREE IN—COSTS OF ALL COURTS
AWARDED BY. (1877) 4 I. A. 137 (142) = 3 C. 161 (169).

—Decree in—Declaration in—Effect of—Duty of court
below to give effect to—Mode of doing so. See P. C.—
APPEAL—DECLARATION in—EFFECT.

(1872) 2 Suth. 668 (677).

—Decree in—Nature of—Only that which Court below
ought to have passed. See APPEAL—APPELLATE COURT
—FUNCTION OF.

—Decree in—Nature of, in England.

In this country (England) the nature and effect of a decree
on appeal would seem to vary according to the nature of the
decree under appeal, the constitution of the appellate tribu-
nal, the proceedings in appeal, and the fact whether the
record or merely a transcript is brought up (490-1). (*Sir*
James W. Colville.) KRISTO KINKUR ROY v. RAJAH
BURRODACAUNT ROY. (1872) 14 M. I. A. 465 =

17 W. R. 292 = 10 B. L. R. 101 = 2 Suth. 564.

—Devolution of interest subsequent to decree—Cogni-
zance of. See DECREE—EVENTS SUBSEQUENT TO.

—Events subsequent to decree—Cognizance of. See
DECREE—EVENTS SUBSEQUENT TO.

—Finding favourable—Decree on foot of—Right to—
Appellant not willing to accept finding. See APPEAL—
FINDING FAVOURABLE. (1875) 3 Suth. 157 (158-9).

—Hearing of—Jurisdiction—Decree under appeal dead
before hearing—Effect. See LIMITATION ACT OF 1908,
ART. 181—MORTGAGE SUIT—FINAL DECREE.

(1926) 54 I. A. 52 = 8 Lah. 253.

—Limitation law between dates of—Change of—Effect
of, on decision in appeal. See LIMITATION—APPEAL—
LAW APPLICABLE TO. (1835) 5 W. R. 95.

—Procedure of—Rules regulating—Right of appeal—
Rules taking away—Distinction. See DECREE—APPEAL
FROM—RIGHT OF—TAKING AWAY OF—RULES HAVING
EFFECT OF. (1921) 48 I. A. 76 (84) =

48 C. 481 (490).

—Reversal on—Amount recovered under decree—
Interest on—Liability of unsuccessful party for. See C. P. C.
OF 1908, S. 144—DECREE REVERSED ON APPEAL—
AMOUNT RECOVERED UNDER.

(1877) 4 I. A. 137 (146) = 3 C. 161 (173).

—Reversal on—Amount recovered under decree—Inter-
est on—Rate of, to be allowed—Discretion as to—Inter-
ference in appeal with. See C. P. C. OF 1908, S. 144—
DECREE REVERSED ON APPEAL—AMOUNT RECOVERED
UNDER. (1921) 48 I. A. 150 (154) = 44 M. 570 (574).

—Reversal on—Costs recovered under decree—Resti-
tution of—Power of—Appellate decree not expressly provid-
ing for it. See C. P. C. OF 1908, S. 144—DECREE
REVERSED ON APPEAL—COSTS RECOVERED UNDER.

(1877) 4 I. A. 137 (146) = 3 C. 161 (173).

—Reversal on—Grounds—Commission to examine
purdanishin lady party to suit—Omission to issue—If and
when a ground. See C. P. C. OF 1908, S. 99—COMMIS-
SION TO EXAMINE PARTY. (1898) 25 I. A. 117 =

25 C. 807.

DECREE—(Contd.)**Appeal from—(Contd.)**

—Reversal on—Grounds—Events or devolution of
interest subsequent to decree if proper. See DECREE—
EVENTS SUBSEQUENT TO—DEVOLUTION OF INTEREST
SUBSEQUENT TO. (1862) 9 M. I. A. 287 (299-300).

—Reversal on—Grounds—Issues—Failure to frame, if
a ground. See PRACTICE—ISSUES—FRAMING OF—
FAILURE—REVERSAL OF DECREE ON GROUND OF.

—Reversal on—Grounds—Issues—Form of—Defect in
—Reversal on ground of—Parties and Courts below treat-
ing issue as properly raised. See PRACTICE—ISSUES—
FORM OF—DEFECT IN. (1872) 18 W. R. 230.

—Reversal on—Grounds—Plaintiff-appellant—Death
of—Substitution of defendant as his legal representative—
Reversal of decree at instance of legal representative on
ground of—Substitution on his own application. See
PRACTICE—PARTIES—PLAINTIFF-APPELLANT—DEATH
OF. (1862) 9 M. I. A. 287 (302).

—Reversal on—Grounds—Pleadings—Defects in—
Reversal on ground of—No prejudice to appellant—Decree
right on merits. See PRACTICE—PLEADINGS—DEFECTS
IN—REVERSAL OF DECREE ON GROUND OF.

(1884) 12 I. A. 47 (51) = 11 C. 379 (385).

—Reversal on—Grounds—Pleadings—Issues—Decision
inconsistent with. See PRACTICE—PLEADINGS—ISSUES—
DECISION INCONSISTENT WITH—REVERSAL IN APPEAL
OF. (1899) 27 I. A. 17 (28-9) = 23 M. 227 (234-5).

—Reversal on—Grounds—Pleadings—Issues—Evi-
dence—Decision inconsistent with—Reversal on ground of.
See PRACTICE—PLEADINGS—ISSUES—EVIDENCE—
DECISION INCONSISTENT WITH.

(1899) 27 I. A. 17 (28-9) = 23 M. 227 (234-5).

—Reversal on—Grounds—Suspicion mere not one.

To reverse the decree of a Court upon the ground of sus-
picion merely would be going much too far (495). (*Lord*
Justice Turner.) BENGAL GOVERNMENT v. NAWAB
JAFUR HOSSEIN KHAN. (1854) 5 M. I. A. 467 =

1 Sar. 472.

—Reversal on—Status quo—Restoration of—Duty and
power of Court. See C. P. C. OF 1908, S. 144—DECREE
REVERSED ON APPEAL—Status quo.

(1922) 49 I. A. 351 (355-6) = 2 Pat. 10 (16).

—Right of—Acquiescence in decree—Effect. See
DECREE—ACQUIESCENCE IN.

—Right of—Agreement restraining. See DECREE—
APPEAL FROM—RIGHT OF—UNDERTAKING TO COURT
BELOW, ETC.

—Right of—Civil Court—Decision of—Appeal from
—Deprivation of right of—Statutory provision—Necessity.

Under C. P. C. of 1859, the general rule is that an appeal
lies to the High Court from a decision of a Civil or Subordi-
nate Judge, and a defendant ought not to be deprived of the
right of appeal, except by express words or necessary impli-
cation (237). (*Sir Barnes Peacock.*) SAHIBZADA ZEINU-
LABDIN KHAN v. SAHIBZADA AHMED RAZA KHAN.

(1878) 5 I. A. 233 = 2 A. 67 = 3 Sar. 879.

—The claim was the assertion of a legal right to
possession of and property in land; and if the ordinary
Courts of the country are seized of a dispute of that charac-
ter, it would require, in the opinion of the Board, a specific
limitation to exclude the ordinary incidents of litigation
(198). (*Lord Shaw.*) SECRETARY OF STATE FOR INDIA
v. CHELIKANI RAMA RAO. (1916) 43 I. A. 192 =

39 M. 617 (624-5) = 20 C. W. N. 1311 =

20 M. L. T. 435 = (1916) 2 M. W. N. 224 =

4 L. W. 486 = 14 A. L. J. 1114 = 18 Bom. L. R. 1007 =

35 I. C. 902 = 31 M. L. J. 324.

DECREE—(Contd.)**Appeal from—(Contd.)**

——Right of—Consent order or decree. *See* SPECIFIC RELIEF ACT, SS. 42 AND 56—DECLARATORY SUIT.
(1922) 49 I.A. 366 (373) = 50 C. 1 (10).

——*See* DECREE—CONSENT DECREE—BARRED CLAIM—DECREE IN RESPECT OF. (1920) 47 I. A. 200.

——Right of—Costs—Appeal as regards mere. *See* COSTS—APPEAL AS REGARDS MERE—RIGHT OF.

——Right of—Costs—Terms as to—Imposition of—Inherent power as to—Rule limiting exercise of power to applications contemporaneous with institution of appeal—Validity.

It was argued that a court of appeal as such, unless restricted by the express language of the instrument which creates it, must possess inherent power over the terms as to costs, on which litigants are allowed to proceed before it, and this in order that complete justice may be done. *Quære*, whether this contention is sound and whether a rule limiting the exercise of such power to applications contemporaneous with the institution of the appeal would be a valid exercise of a power to make rules regulating procedure. (Lord Sumner.) SABITRI THAKURAIN *v.* SAVI.

(1921) 48 I. A. 76 = 48 C. 481 (486) =

(1921) M. W. N. 159 = 33 C. L. J. 307 =

19 A. L. J. 281 = 23 Bom. L. R. 681 = 14 L.W. 362 =

60 I. C. 274 = 40 M.L.J. 308.

——Right of—Declaration—Decree granting—Appeal from—Impertinent intervenor—Right of. *See* DECLARATION—PERSON IN POSSESSION. (1916) 43 I. A. 179 = 38 A. 440.

——Right of—Denial of—What amounts to—Manner and form of right—Provision as to—Delegation to Court below of right to grant or refuse appeal in its discretion—Effect. *See* PRIVY COUNCIL—APPEAL—RIGHT OF—TAKING AWAY OF—WHAT AMOUNTS TO.

(1847) 3 M.I.A. 488 (495-6).

——Right of—Favourable decree—Appeal from.

In a case in which the Munsif dismissed the suit with costs, on the ground of adverse possession by the defendant, the latter appealed to the Subordinate Judge from the Munsif's decree.

Held, that the appeal was entirely misconceived, and was rightly dismissed with costs (52-3). (Lord Hobhouse.) MAHARAJAH SIR LUCHMESWAR SINGH BAHADOOR *v.* SHEIK MANOWAR HOSSEIN. (1891) 19 I.A. 48 =

19 C. 253 (259) = 6 Sar. 133.

——Favourable decree—Appeal from—Finding adverse in decree—Effect.

Plaintiff, the survivor of two brothers, sued the widow of his deceased brother for the recovery of possession of the property held by the deceased on the ground that the brothers were joint in estate, and that the plaintiff was entitled to the property by survivorship. The widow maintained that the brothers were separate, and claimed a widow's estate in the property of her husband. She further maintained that the question had been conclusively determined in her favour in a former suit between her and the plaintiff. The High Court determined the plea of *res judicata* in her favour and dismissed the plaintiff's suit. They also enquired into the question of fact and held that the brothers were joint in estate.

Held, that the widow could not appeal against the decree because it was in her favour (34). (Sir Robert P. Collier.) RUN BAHADOOR SINGH *v.* LACHOO KOER.

(1884) 12 I.A. 23 = 11 C. 301 (306) = 4 Sar. 602.

——Right of—Impertinent intervenor—Person in possession—Declaration of title of—Appeal from. *See* DECLARATION—PERSON IN POSSESSION.

(1916) 43 I. A. 179 = 38 A. 440.

DECREE—(Contd.)**Appeal from—(Contd.)**

——Right of—Jurisdiction—Usurpation of—Order made in—Appeal from. *See* JURISDICTION—USURPATION OF. (1882) 10 I. A. 4 (17) = 9 C. 482 (493-4).

——Right of—Legal Practitioner—Agreement by, restraining right—Effect on party of. *See* LEGAL PRACTITIONER—APPEAL. (1871) 14 M.I.A. 203 (206-7).

——Right of—Legal practitioner—Fees allowed to—Appeal as regards. *See* LEGAL PRACTITIONER—FEES ALLOWED TO.

——Right of—Limiting or taking away of—Order requiring appellant to furnish security for costs if amounts to.

An order requiring the appellant to furnish security for costs is not a limit on the right to appeal, nor does it take the right to appeal away, but it is a rule of procedure (83-4). (Lord Sumner.) SABITRI THAKURAIN *v.* SAVI.

(1921) 48 I.A. 76 = 48 C. 481 (489) =

(1921) M. W. N. 159 = 33 C.L.J. 307 = 19 A.L.J. 281 =

23 Bom. L.R. 681 = 14 L.W. 362 = 60 I. C. 274 =

40 M. L. J. 308.

——Right of—Nature of—Procedure or substantive right. *See* STATUTE—INTERPRETATION—RIGHT SUBSTANTIVE, ETC. (1927) 54 I.A. 421 (425).

——Right of—Non-appealable section—Decision purporting to be, but not made under—Effect of. *See* C.P.C. OF 1908, O. 9, R. 8. (1910) 14 C.W.N. 594.

——Right of—Ordinary terms and without special indulgence—Appeal on—Appeal freed from burden of ordinary terms—Rights of—Distinction.

There is a marked difference between a right to appeal on ordinary terms and without special indulgence, and a power to relieve the appellant in the exercise of that right from the burden of the ordinary terms (83-4). (Lord Sumner.) SABITRI THAKURAIN *v.* SAVI.

(1921) 48 I. A. 76 = 48 C. 481 (489) =

(1921) M.W.N. 159 = 33 C. L. J. 307 =

19 A.L.J. 281 = 23 Bom. L.R. 681 = 14 L.W. 362 =

60 I.C. 274 = 40 M. L. J. 308.

——Right of—Practice long-standing allowing—Interference by Privy Council with. *See* STATUTE—INTERPRETATION—INDIAN STATUTE—PRACTICE LONG-STANDING AS TO. (1914) 41 I.A. 258 (264 5) = 37 M. 443 (453).

——Right of—Question as to—Precedence—Absence of any—Weight due to. *See* PRECEDENCE—ABSENCE OF. (1862) 9 M.I.A. 168 (192-3).

——Right of—Security for costs—Order requiring appellant to furnish—Right of appeal if limited or taken away by. *See* DECREE—APPEAL FROM—RIGHT OF—LIMITING OR TAKING AWAY OF. (1921) 48 I.A. 76 (83-4) = 48 C. 481 (489).

——Right of—Statute or other equivalent giving—Necessity.

It cannot be assumed that there is a right of appeal in every matter which comes under the consideration of a Judge; such right must be given by Statute, or by some authority equivalent to a Statute (165). (Sir Richard Baggalay.) MEENAKSHI NAIDOO *v.* SUBRAMANYA SASTRI. (1887) 14 I. A. 160 = 11 M. 26 (34).

——An appeal does not exist in the nature of things. A right of appeal from any decision of any tribunal must be given by express enactment (200). (Lord Macnaghten.) RANGOON BOTATOUNG CO. *v.* THE COLLECTOR OF RANGOON. (1912) 39 I.A. 197 = 40 C. 21 (27) = 16 C.W.N. 961 = 16 C.L.J. 245 = (1912) M. W.N. 781 = 12 M. L. T. 195 = 14 Bom. L. R. 833 = 10 A.L.J. 271 = 16 I. C. 188 = 23 M.L.J. 276.

DECREE—(Contd.)**Appeal from—(Contd.)**

——Right of—Substantive right if a. *See* STATUTE—INTERPRETATION—RIGHT SUBSTANTIVE DEALT WITH BY STATUTE—APPEAL. (1927) 54 I.A. 421 (425).

——Right of—Suit—Compromise of, by some of parties only—Decree in terms of, against all—Appeal from, by persons not parties to compromise—Right of. *See* MORTGAGE—SUIT TO ENFORCE—COMPROMISE OF, ETC. (1926) 52 M.L.J. 407.

——Right of—Suit—Person not party to—Right of, to appeal from final decree therein.

Quere, whether an appeal from the final decree in a mortgage suit at the instance of a person who was not a party to the suit would be entertained (195). (*Lord Salvesen*.) KALA CHAND BANERJEE *v.* JAGANNATH MARWARI. (1927) 54 I.A. 190 = 54 C. 595 =

29 Bom. L.R. 882 = 101 I.C. 442 = 31 C.W.N. 741 =

25 A.L.J. 621 = 45 C.L.J. 544 = 39 M.L.T. 5 =

26 L.W. 268 = A.I.R. 1927 P.C. 108 = 52 M.L.J. 734.

——Right of—Taking away of—Manner and form of right—Provision as to—Delegation to court below of right of granting or refusing appeal as it sees fit—Effect. *See* PRIVY COUNCIL—APPEAL—RIGHT OF—TAKING AWAY OF—MANNER AND, ETC. (1847) 3 M. I. A. 488 (495-6).

——Right of—Taking away of—Rules having effect of—Procedure of appeal—Rules regulating—Distinction.

There is a clear distinction between rules which take away existing rights of appeal and rules which recognise these rights but regulate the procedure of the court in which such appeals are pending (84). (*Lord Sumner*.) SABITRI THAKURAIN *v.* SAVI. (1921) 48 I.A. 76 =

48 C. 481 (490) = (1921) M.W.N. 159 =

33 C.L.J. 307 = 19 A.L.J. 281 = 23 Bom. L.R. 681 =

14 L.W. 362 = 60 I.C. 274 = 40 M.L.J. 308.

——Right of—Taking away of—What amounts to. *See* DECREE—APPEAL FROM—RIGHT OF—LIMITING OR TAKING AWAY OF.

——Right of—Taking away of—What amounts to. *See* DECREE—APPEAL FROM—RIGHT OF—ORDINARY TERMS, ETC. (1921) 48 I.A. 76 (83-4) =

48 C. 481 (489).

——Right of—Undertaking to court below not to appeal in certain events—Appeal in breach of.

Where the appellant undertook not to appeal, in the event of the court below confining its decision to one point only, held, that an appeal filed in violation of that undertaking was not maintainable, because by reason of such undertaking the real merits of the case were withdrawn. (*Lord Justice James*.) MOONSHEE AMEER ALI *v.* MAHARANEE INDERJIT SINGH. (1871) 14 M.I.A. 203 (206-7) = 9 B. L. R. 490 =

2 Suth. 479 = 2 Sar. 731.

——Variation of decree in, to avoid misconception by other tribunals—Permissibility.

It would be objectionable to disturb or vary decrees properly made by the courts below in this suit, for the mere purpose of guarding against the possible error of some other tribunal in some future suit (302). (*Lord Kingsdown*.) MUSSUMAT ANUNDMOYEE CHOWDHORAYAN *v.* SHEEB CHUNDER ROY. (1862) 9 M.I.A. 287 =

2 W.R. P.C. 19 = Marsh. 455 = 1 Suth. 485 = 1 Sar. 854.

Assignment of.

——Agreement for—Keeping alive of decree—Duty of, after agreement and before transfer by assignment in writing. *See* DECREE—KEEPING ALIVE OF.

(1916) 45 I. A. 108 (112) = 43 C. 990 (1000).

DECREE—(Contd.)**Assignment of—(Contd.)**

——Agreement for—Specific performance of—Suit by assignor for—Maintainability—Decree barred in interval—Effect. *See* SPECIFIC RELIEF ACT, S. 24 (b)—DECREE. (1916) 43 I.A. 108 = 43 C. 990.

Benamidar—Hypothecation of property held by—Suit on, against real owner and benamidar—Decree in.

——Form of—Hypothecation induced by real owner. *See* BENAMI—BENAMIDAR—HYPOTHECATION OF PROPERTY HELD BY. (1893) 20 I.A. 108 (110-1). 15 A. 304.

Boundary—Decree fixing.

——Hard and fast line or line variable according to action of river. *See* BOUNDARY—DECREE FIXING. (1881) Bald. 411.

Boundary dispute—Decree in case of.

——Map—Annexing to decree of—Practice of—Desirability of. *See* BOUNDARY DISPUTE—DECREE IN CASE OF. (1880) 10 C.L.R. 169 (173).

Compromise—Appeal—Compromise pending.

——Decree not in accordance with—Validity—Remedy of aggrieved party. *See* APPEAL—COMPROMISE PENDING. (1872) Sup. I. A. 135 (146).

Compromise of suit—Decree on foot of—Setting aside of.

——Rights of parties on. *See* C. P. CODE OF 1908, O. 32, R. 7—COMPROMISE AFFECTING MINOR.

Compromise of suit by some parties only—Decree in terms of, against all.

——Appeal from, by persons not parties to compromise—Right of. *See* MORTGAGE—SUIT TO ENFORCE—COMPROMISE OF, ETC. (1926) 52 M.L.J. 407.

Compromise subsequent to, between some of parties.

——Procedure on—Amendment of decree—Propriety.

When, after a decree, some of the parties thereto enter into a compromise in respect of the subject-matter of the decree, the proper procedure is not to amend the decree, but to make an order making the razi nama a rule of court, and to stay all further proceedings on the decree against the parties to the razi except for the purpose of enforcing the compromise (206). (*Lord Davey*.) RAJA KOTAGIRI VENKATA SUBBAMMA RAO *v.* RAJA VELLANKI VENKATARAMA RAO. (1900) 27 I.A. 197 = 24 M. 1 (11) = 4 C.W.N. 725 = 2 Bom. L.R. 771 = 7 Sar. 678 = 10 M.L.J. 221.

Condition imposed by—Payment into Court of specified amount—Condition of.

——Deposit into Court by one of persons interested so as to comply with—Withdrawal subsequent of, by him fraudulently to defeat rights of another interested—Permissibility—Deposit subsequent by latter—Validity. *See* DECREE—PAYMENT DIRECTED TO BE MADE, ETC. (1924) 51 I. A. 236 (240-1) = 48 B. 404.

Consent decree.

——Barred claim—Consent decree in respect of.

The respondents brought a suit against the appellant upon an account stated, which was, however, found to be a deliberate fabrication and fraud on the respondents' part. The respondents thereupon relied entirely upon the items of claims contained in a general account against the appellant. Each one of those items was, however, found to be barred by limitation. The appellant, however, consented to a decree being passed in respondents' favour for the items which they were in a position to prove, irrespective of any bar of limitation. The case proceeded upon that footing,

DECREE—(Contd.)**Consent decree**

and the trial Judge passed a decree for a particular sum. On appeal by the respondents, the High Court re-investigated the items of the account and made certain further allowances in their favour, though they affirmed the finding of the trial Judge that the account stated was fraudulent and fabricated.

Held, that the decree of the trial Judge was a consent decree and the High Court had no power to alter it.

The original decree was, and could only have been, a decree by consent. If it were regarded as a consent judgment there could be no appeal; if it were not regarded as a consent judgment it then became necessary once more to examine into the conditions associated with the Limitation Act, and it would have followed that the plaintiff's action would have been dismissed with costs. (*Lord Buckmaster.*)

RAJA OF KILLIKOTA *v.* CHAITANA SAHU.

(1920) 47 I. A. 200 = 18 A. L. J. 625 = 28 M. L. T. 97 =

(1920) M. W. N. 366 = 12 L. W. 260 = 56 I. C. 539 =

22 Bom. L. R. 1313 = 24 C. W. N. 1055 =

39 M. L. J. 68.

—Construction—Law governing parties—Rights under—Regard for—Necessity. See MAHOMEDAN LAW—RELIGIOUS ENDOWMENT—MUTTAWALLI—APPOINTMENT TO OFFICE OF—CONSENT DECREE.

(1906) 34 I. A. 46 (54) = 34 C. 118 (127).

—Estoppel by. See EVIDENCE ACT—S. 115—CASES UNDER—CONSENT DECREE.

—Invalidity of, on ground of its being contrary to statute—Plea by judgment debtor of—Estoppel. See CENTRAL PROVINCES TENANCY ACT OF 1883, S. 42.

(1921) 48 I. A. 220 = 48 C. 591.

Construction of.

—Ambiguity—Pleadings, issues, etc.—Reference to—Permissibility.

Held, notwithstanding the imperfect form of the decree in a prior suit for partition, that a separation of the joint family of the parties must be held to have been established by it. In coming to the above conclusion as to the effect of the decree, their Lordships had reference to (1) the pleadings in the earlier suit and the case presented therein, (2) the issues in that suit, (3) the statements made by the pleaders of the parties when those issues were framed, and (4) the light in which the decree was regarded by the parties as shown by subsequent proceedings (9). (*Sir Andrew Scoble.*) RAM PERSHAD SINGH *v.* LAKHPATI KOER.

(1902) 30 I. A. 1 = 30 C. 231 = 7 C. W. N. 162 =

5 Bom. L. R. 103 = 8 Sar. 380.

—Area and boundary of land decreed—Conflict between—Which prevails. See DEED—AREA—BOUNDARY.

—Boundary and area of land decreed—Conflict between—Which prevails. See DEED—AREA—BOUNDARY.

—Charge on property—Decree creating—Heir-at-law in possession of property of deceased—Decree directing, to account for property for purposes of being applied for discharge of debts of deceased—Nature and effect of.

A decree directing the son of a deceased Mahomedan in whose hands the property of the deceased was to account for it in order that it might be applied for the purpose of discharging the debts due from the deceased, is a decree against that property, and operative to bind it in the hands of the son, and therefore of any other person who took from the son with notice of the decree, or under such circumstances as to make him affected by the doctrine of *lis pendens* (224). (*Sir Barnes Peacock.*) SYED BAZAYET HOSSEIN *v.* DOOLI CHUND.

(1878) 5 I. A. 211 =

4 C. 402 (410) = 3 Sar. 853.

DECREE—(Contd.)**Construction of—(Contd.)**

—Decree-holder—Construction put by—Admission or settlement by him on foot of—Binding character of—Ambiguous clause—Clause clear and explicit—Distinction.

In the case of a consent decree for payment by instalments which provided for different contingencies, *held*, that the decree-holder was bound by the construction put by him upon a clause therein which was ambiguous, and by the voluntary settlement made by him upon the basis of that construction; but that he was not bound by the construction put by him upon another clause which was clear and explicit, or by any admission or settlement made by him on the basis of that construction (168). (*Sir Barnes Peacock.*)

RAI BALKISHEN DASS *v.* RAJA RUN BAHADUR SINGH.

(1883) 10 I. A. 162 = 10 C. 305 (313) =

13 C. L. R. 392 = 4 Sar. 465.

—Evidence of—Acts of parties immediately subsequent—Admissibility of, to explain indefinite terms in decree.

Where a decree gave the defendants the lands they claimed in the suit, and then in the possession of the appellants, but it did not contain specific boundaries, *held*, that the acts of the parties immediately after the decree were very important to fix the meaning of indefinite terms in the decree (74). (*Lord Shand.*) SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* DURJIBHOY SINGH.

(1892) 19 I. A. 69 = 19 C. 312 (321-2) = 6 Sar. 113.

—Evidence of—Correspondence subsequent between one of parties and his agents or orders subsequent issued by them—Admissibility of.

Such extrinsic evidence as correspondence and orders issued by officers of the Government (a party to the decree), of dates subsequent to the decree cannot be received as aids to its construction. (*Lord Watson.*) AMRITESWARI DEBI *v.* SECRETARY OF STATE FOR INDIA.

(1897) 24 I. A. 33 (47-8) = 24 C. 504 (519-20) =

1 C. W. N. 249 = 7 Sar. 101.

—Evidence of—Government—Land decreed against—Ambiguity as to, in decree and execution order—Possession in fact taken in execution and acquiesced in by Revenue Officials whose duty it was to fix boundaries—Value of.

In a suit brought by the Government of India in 1883, claiming possession, as their property of certain bighas of land, described by boundaries and delineated on a plan produced with the plaint, the defendants contended, *inter alia*, that the suit lands had been recovered by them against the Government in a prior suit brought in 1862, and that therefore the claim on behalf of the Secretary of State wholly failed. The case of the Government was that the suit lands remained the property of the Government, being part of the mauzah of B, which admittedly belonged to them.

The decree, dated 13-6-1865, in the suit of 1862, ordered "that the suit of the plaintiffs be decreed," "and that the plaintiffs be put in possession of the lands in suit." The plaint itself described the lands of mouzah I (of which a share of 15 annas 5 dams formed the subject-matter of the suit) by general boundaries only, and not by boundaries stated with so much detail, or so delineated on a detailed plan, as to admit of the lands being identified and taken possession of in the same way as if they had been demarcated or described in detail. The execution proceedings did not define the lands in suit more exactly than they were defined in the plaint. The evidence, however, clearly showed that immediately after the delivery of possession in execution on 26-4-1868, bullas were put into the ground to mark off the land described in the decree—it did not clearly appear by whom—and the evidence showed that the possession since that time, or immediately after it, of the land enclosed by those bullas had been with the defendants. On

DECREE—(Contd.)**Construction of—(Contd.)**

the 29th of April, 1868, G and others had obtained a renewed lease and settlement of lands of mauzah B, and on the 13th of May, 1868, they complained to the settlement officer that the defendants had, in execution of the decree of 1865 through the Nazir of the court, taken possession of the suit lands by posting bullas. The Collector, in 1870, ultimately supported the action of the defendants, and from that time till 1883, when the suit out of which the appeal arose was instituted, the lands in question had been treated alike by the Government authorities and by the defendants as part of the defendants' mauzah of I, and not as belonging to the Government mauzah at B.

Held, that the possession given to and taken by the defendants under the decree of 1865, and retained by them for so long a period, and in the circumstances stated, could be used by them not to make a title, but to define the land which the decree in the action of 1862, followed by the execution order, gave them (74).

Held further, that the fact that the Collector supported the action of the defendants was very strong reason to infer that the possession taken was rightfully taken in execution of the decree (74).

It is true that the proceedings were not those of a Civil Court. Had they been so, it would not have been possible to maintain the present suit. But the proceedings were taken before the revenue authorities, whose duty it was to fix the right boundaries for revenue purposes. It is not suggested that these officials acted otherwise than honestly (74). (*Lord Shand.*) SECRETARY OF STATE FOR INDIA IN COUNCIL v. DURJIBHOY SINGH. (1891) 19 I. A. 69 = 19 C. 312 (321-2) = 6 Sar. 113.

—Evidence of—Judgment, pleadings, and records of suit—Reference to—Permissibility. See C. P. C. OF 1908 S. 11—EVIDENCE OF *res judicata*.

—Expressions in deed—Giving meaning to all—Principle of—Limitations to.

The principle of giving a meaning to all expressions is a sound one; but it does not justify the importation of a meaning which the expression does not of itself suggest, for which another expression equally short and simple would more readily be used, and which materially affects the rights of the parties. (*Lord Hobhouse.*) GRENON v. LUCHMEENARAIN AUGURWALLAH.

(1896) 23 I. A. 119 (125) = 24 C. 8 (18) = 7 Sar. 66.

—Heir-at-law in possession of property of deceased—Decree directing, to account for property for purposes of being applied for discharge of debts of deceased—Nature and effect of—Charge on property if created by. See DECREE—CONSTRUCTION—CHARGE ON PROPERTY.

(1878) 5 I. A. 211 (214) = 4 C. 402 (410).

—Hindu Law—Joint family estate—Decree declaring estate to be ordinary partible—Decree declaring estate to be indivisible estate subject to rights on part of junior members to profits of estate according to their shares—Test. See OUDH ESTATE—JOINT FAMILY ESTATE—DECREE DECLARING, ETC.

(1887) 14 I. A. 37 (60-2) = 14 C. 493 (511-2).

—Instalment decree providing for contingencies—Decree-holder accepting payment under, on particular construction of one of contingencies—Claim subsequent by him inconsistent with that construction in regard to that and other contingencies—Maintainability.

A decree passed, in pursuance of a solenamah or compromise between the parties to the suit, for payment of money by instalments with interest at 6 per cent. provided for three contingencies, *viz.*, non-payment at due date, (a) of the first instalment, two consecutive instalments being in arrear at the same time; (b) of instalments, other than the

DECREE—(Contd.)**Construction of—(Contd.)**

first; and (c) of the first instalment simply. Upon the occurrence of (a), or of (b), execution might issue for the whole decretal money with interest thereon at 12 per cent. Upon the occurrence of (c) execution might issue for that instalment, with interest at 12 per cent. from the date of the decree.

The decree-holder having accepted payment of the first instalment on the footing of contingency (c), *held*, that he was bound by such acceptance, and could not, in the settlement of accounts, recover interest at 12 per cent. in respect of the default in payment of the first instalment from the date of the solenamah to the date of realisation of that instalment except upon the amount of the instalment, interest upon the remaining portion of the debt during that period being calculated at 6 per cent. per annum (168).

Held further, that the parties, by putting that construction on the words of the third contingency, were clearly not bound to have the same construction put upon the words used with reference to the second contingency (170). (*Sir Barnes Peacock.*) RAI BALKISHEN DASS v. RAJA RUN BAHADUR SINGH. (1883) 10 I. A. 162 = 10 C. 305 (313, 314) = 13 C. L. R. 392 = 4 Sar. 465.

—Instalment payment—Provision for—Default to comply with—Provisions in different contingencies in event of.

A decree for Rs. 2,38,000, obtained in pursuance of a compromise between the parties to the suit provided, by its 2nd clause, that,—

“The plaintiff shall get interest on the decretal money at the rate of eight annas per cent. per mensem from defendants. That the defendants shall pay annually Rs. 30,000 out of the principal and interest year after year by instalments to the plaintiff; and the plaintiff, after granting a receipt and filing a petition in the court, shall take the said sum from defendants. Out of the annual amount of Rs. 30,000, whatever may be found due on account of interest, the decree-holder shall deduct the same on account of interest, and credit the balance to the principal. The first instalment shall be in one lump, on the 30th Bhadon 1281 Fusli. In future, year after year, each instalment shall be so paid in a lump sum on the last day of Bhadon of each year. The money covered by the instalment shall be sent to the decree-holder at Benares, and defendant shall pay the expenses incurred in sending the same.”

The 3rd article, which was the important one, was as follows:—

“If the first instalment be not paid on the 30th Bhadon 1281 Fusli, and two consecutive instalments be not paid, then the plaintiff shall have the power to take out execution of the decree, and realise his entire decretal money, with interest at the rate of one rupee per cent. per mensem, from defendants, and their properties. In case of default, the decree-holder shall be entitled to take out execution, and realise interest on the entire decretal money from the date of such default to that of realization, at the rate of one rupee per cent. If the first instalment be not paid on the 30th Bhadon 1281 Fusli, then the decree-holder shall have the power to realise the principal with interest at the rate of one rupee per cent. per mensem from the date of this solenamah (compromise) to which your petitioners, defendants, shall have no objection. If at any time within the term defendants desire to pay any sum over and above Rs. 30,000, the plaintiff shall have no objection to receive the same.”

Held that according to article 3 of the decree three contingencies were contemplated by the parties:—

(1) If the first instalment be not paid on the 30th Bhadon 1281 Fusli, and two consecutive instalments be not paid;

DECREE—(Contd.)**Construction of—(Contd.)**

(2) "in case of default"; (3) if the first instalment be not paid on the 30th Bhadon 1281 Fusli.

The decree-holder could not, under the first paragraph of the 3rd clause of the solenamah, issue execution for the full amount of the judgment, with 12 per cent. interest, unless both the first instalment should not be paid on the 30th Bhadon 1281 Fusli, and two consecutive instalments should be in default and unpaid, at the same time. The non-payment of the 1st instalment on the due date was a material part of the contingency contemplated by the first clause, and the allowing of two instalments to be in arrear at the same time the other portion of that contingency (166).

In determining upon what amount interest at 12 per cent. per annum is to be allowed in consequence of a default in payment on the due date of the second or any subsequent instalment, the decree-holder is not bound by the construction put by him upon the 3rd clause, nor by any admission or settlement in respect of the default made in payment of the first instalment (168).

By the words, "in case of default," in the second contingency, a default in payment on due date of any instalment, except the first, was provided for. They had no reference to the first contingency (169).

The word "principal" in the third contingency referred to the principal of the first instalment, and not to the entire decretal money, as specified in the first and second contingencies. The parties, by putting that construction on the words of the third contingency, are clearly not bound to have the same construction put upon the clear words used with reference to the 2nd contingency, *viz.*, "to realise interest on the entire decretal money," (169-170).

Upon the third contingency the parties have put their own construction, and have voluntarily settled upon the basis of that construction. The decree-holder is bound by it (168). (*Sir Barnes Peacock*.) **RAI BALKISHEN DASS v. RAJA RUN BAHADUR SINGH.** (1883) 10 I. A. 162 = 10 C. 305 = 13 C. L. R. 392 = 4 Sar. 465.

—Land decreed—Area and boundary of—Conflict between. See **DEED—AREA—BOUNDARY**.

—Landlord and tenant—Relation of, between Zemindars and Jotedars—Decree establishing—What amounts to. See **LANDLORD AND TENANT—RELATION OF, BETWEEN ZEMINDAR AND JOTEDARS.** (1929) 56 M. L. J. 562

—Office—Nomination to, by an individual—Appointment by Court—Decree directing. See **OFFICE—NOMINATION TO—APPOINTMENT TO.**

(1894) 21 I. A. 71 (81) = 17 M. 343 (355).

—Partition—Decree for—Encumbrances created by each party to—Indemnity to the other against—Provision in decree for—Effect of—Rights of parties on. See **PARTITION—DECREE FOR—ENCUMBRANCES, ETC.**

(1926) 24 L. W. 139.

—Partition—Decree final for—Ryots and other tenants—Possession of—Clause protecting—Benami putni granted by judgment-debtor *pendente lite*—Putnidar under—Protection if extends to. See **PARTITION—DECREE FINAL FOR—CONSTRUCTION.** (1876) 3 Suth. 340 = 26 W. R. 93.

—Possession—Decree for. See **POSSESSION—DECREE FOR.**

—Settlement Officer—Decree of, conferring proprietary rights on Hindu widow in her husband's estate—Effect—Estate conferred upon widow. See **HINDU LAW—WIDOW—SETTLEMENT OFFICER.** (1889) 17 C. 246 (250).

—Thakbust map and proceedings of 1839—Lands demarcated by—Decree for—Effect—Survey map of same

DECREE—(Contd.)**Construction of—(Contd.)**

year inconsistent with thakbust map—Lands shown by—If pass to decree-holder. See **PRIVY COUNCIL—APPEAL—DECREE IN—CONSTRUCTION—THAKBUST MAP AND ETC.** (1890) 18 C. 108.

—What Court actually orders—What it refuses to order—Which prevails.

The true construction of a decree depends on what the court actually ordered, not on what it refused to order (103).

While their father was still alive, his two sons mortgaged the family estate including their share in mauza N. A portion of the said mauza had been reserved to the father as "Zirat" land for his personal use and maintenance. After the father's death the mortgagees took proceedings to enforce the mortgage. In due course a decree was obtained and upon the application for a sale in execution, it was asked that the order should apply to the mortgaged properties "with the Zirat lands." On objection taken to the addition of those words, it was held that the court was bound to sell the mortgaged property as described in the mortgage bond without addition. At the sale in execution the mortgagees became the purchasers, and the sale certificate issued to them declared them entitled to "all the zemindari rights in 8 annas pucca of mauza N." On a question arising as to whether the sale included the portion reserved to the father as "zirat" land, the court below held that it did not, relying upon the exclusion of the words "with the zirat lands." *Held*, that the court below erred in so deciding.

The order for possession applied to the portion reserved to the father because, following the description of the mortgaged lands, it extended to the lands in which the mortgagors, as Zemindars and members of the undivided family, had a reversionary zemindary right, albeit subject to the interest reserved to their father for his life, that is, the portion reserved to him as "Zirat" lands (102-3). (*Lord Sumner*.) **THAKUR SRI RADHAKRISHNA v. RAM BAHADUR.** (1917) 23 M. L. T. 26 = 16 A. L. J. 33 = 7 L. W. 149 = 27 C. L. J. 191 = 22 C. W. N. 330 = (1918) M. W. N. 163 = 20 Bom. L. R. 502 = 4 P. L. W. 9 = 43 I. C. 268 = 34 M. L. J. 97.

Contract—Decree in accordance with—Rights of parties after.

—Basis of—Decree or contract. See **COMPROMISE—DECREE IN ACCORDANCE WITH—RIGHTS OF PARTIES THEREAFTER.** (1904) 31 I. A. 116 = 26 A. 299 (309).

Co-plaintiffs—Suit by—Decree in.

—One plaintiff with title and others claiming under him—Decree in favour of former—Reservation of rights of latter—Necessity.

In a case in which it was alleged that the plaintiff-appellant had entered into an arrangement with certain others, who were also appellants, regarding the subject-matter of the suit and appeal, their Lordships, while deciding that the decree was to be in favour of the plaintiff-appellant alone, added that their judgment was to be without prejudice to the appellants, other than the plaintiff, to recover, in respect of any conveyance or assignment made, or of any contract to convey or assign, such share of the property recovered under the judgment as might appertain to them in respect of such assignment, conveyance or contract (306).

Their Lordships wish to do justice and not to allow any one to take advantage of a slip, in order to appropriate to himself property, that is not fairly his (306). (*Lord Dunedin*.) **MUSSUMAT LAJWANTI v. SAFA CHAND.**

(1925) 52 I. A. 211 = 6 Lah. 388 = 22 L. W. 304 = 30 C. W. N. 56 = 22 A. L. J. 643 = (1925) M. W. N. 534 = A. I. R. 1925 P. C. 168 = 6 Pat. L. T. 1 = 26 P. L. R. 524 = 88 I. C. 198 = 54 M. L. J. 118.

DECREE—(Contd.)**Co-plaintiffs—Suit by—Decree in—(Contd.)**

—One plaintiff with title and others claiming under him—Joint decree in favour of all—Latters' right to insist upon—No assignment or legal conveyance in their favour.

It is out of the question that persons, who assert that they have a derivative interest in the stake of a suit, can by getting added as plaintiffs, be associated in a decree in favour of the person who has the only real title.

There were four appellants in an appeal to the P. C. One of them was the plaintiff in the suit; the others were persons who claimed under her. It was alleged that the plaintiff herself, in her original pleading, had set forth that by arrangement between her and those others, she was to take only three-fifths of all she recovered, the other two-fifths going to them. It was contended that, by reason of that arrangement, if the plaintiff was entitled to relief, the decree granting the same should be a joint decree in favour of her and of those others.

Held, that no decree would be granted in favour of all the appellants jointly, unless there had either been a consent signified by the respondents, or a legal conveyance or assignment, produced by the real plaintiff of a share of the subjects of the suit (305-6). (*Lord Dunedin.*) **LAJWANTI v. SAFA CHAND.** (1925) 52 I. A. 211 = 6 Lah. 388 = 22 L. W. 304 = 30 C. W. N. 56 = 22 A. L. J. 643 = A. I. R. 1925 P. C. 168 = (1925) M. W. N. 534 = 6 Pat. L. T. 1 = 26 P. L. R. 524 = 88 I. C. 198 = 6 L. R. P. C. 125 = 50 M. L. J. 118.

—One of the plaintiffs alone entitled to suit property—Declaration of rights of co-plaintiffs in alternative—Propriety. *See* DECREE—HINDU LAW—WIDOW AND ADOPTED SON.

Costs awarded by—Interest on.

—Appellate decree—Costs of all courts awarded by—Interest on costs of each court as from date of its decree—Right to—Appellate decree not expressly providing for same—Executing court—Jurisdiction to award. *See* PRIVY COUNCIL—APPEAL—DECREE IN—COSTS OF ALL COURTS AWARDED BY. (1877) 4 I. A. 137 (142) = 3 C. 161 (169).

Deceased—Heir-at-law.

—*See* DECEASED.

Declaration of title and confirmation of possession—Suit for.

—Evidence insufficient for declaration of title—Decree in case of—Form of. *See* TITLE—DECLARATION OF, AND CONFIRMATION OF POSSESSION.

(1872) 19 W. R. 1.

Declaration of title of person in possession—Decree granting—Appeal from.

—Person without title or possession—Right of. *See* DECLARATION—PERSON IN POSSESSION.

Declaratory decree.

—*See* DECLARATION AND SPECIFIC RELIEF ACT, S. 42.

Deed—Setting aside of—Declaration of its invalidity as against party.

—Distinction—Decree proper. *See* DEED—SETTING ASIDE OF—DECLARATION OF ITS INVALIDITY, ETC.

Dependent decree—Money paid under—Recovery of.

—Right of—Mode of. *See* DECREE—MONEY PAID UNDER.

Devolution of interest subsequent to.

—Reversal of decree on ground of. *See* DECREE—EVENTS SUBSEQUENT TO.

(1862) 9 M. I. A. 287 (299-300).

DECREE—(Contd.)**Discharge of.**

—Imprisonment of judgment-debtor in execution—Change of place of, by agreement between him and creditor—Effect.

The creditor may, under certain circumstances, or if he feels it to be really material and important to the debtor, change the place of imprisonment, and relax somewhat the rigour of imprisonment, without discharging the debtor from his debt, it clearly not being the meaning of either party that any such discharge should take place (488). (*Sir John Patteson.*) **HAINES v. EAST INDIA COMPANY.**

(1856) 6 M. I. A. 467 = 4 W. R. 99 = 11 Moo. P. C. 39 = 1 Suth. 274

—Payment of smaller amount within day fixed—Discharge by—Provision for—Decree-holder's obstruction to compliance with—Effect of, on his right to take advantage of default.

A suit upon a mortgage was terminated by a compromise which provided that the plaintiff should have a decree for the whole amount claimed, but that on payment of a smaller sum by a day named the whole claim should be considered as satisfied; that in the meanwhile the defendant should have power to enter into agreements for the sale of the mortgaged properties; that the mortgagee, on being informed of such agreements, should have the properties appraised and, if satisfied that the price for which the properties were agreed to be sold was fair and proper, should agree to the sale of the properties. The defendants arranged to sell some of the items of property, but the plaintiff refused to appraise the same or assent to the sale thereof without being paid the whole amount of the decree, and the defendants were not therefore able to pay the smaller sum by the day named.

On an application by the decree-holder for the recovery in execution of the full amount of the decree, it appeared that, if the plaintiff had assented to the sale, the smaller amount would have been paid within the day named and that it was owing to the obstructive behaviour of the plaintiff that the debt was not discharged in time.

Held, that the decree-holder having himself been responsible for the non-payment of the money within the time specified, he was not entitled to recover anything more than the amount payable by the day fixed. (*Lord Davey.*) **HARENDRA LAL ROY CHOWDHRY v. MAHARANI DAS.** (1901) 28 I. A. 89 = 28 C. 557 = 5 C. W. N. 536 = 6 Sar. 48 = 11 M. L. J. 171.

—*See also* DECREE—PAYMENT OF AMOUNT OF—WHAT AMOUNTS TO.

Document not filed with plaint and not relied upon as basis of claim but treated merely as a piece of evidence.

—Decree on foot of—Validity. *See* C. P. CODE OF 1908, O. 7, R. 14 (1).

(1916) 32 M. L. J. 137 (143).

Earlier and later decrees in same suit.

—Merger of former in latter. *See* MORTGAGE—SUIT TO ENFORCE—DECREE IN—*Ex parte* DECREE, ETC.

(1915) 42 I. A. 171 (175-6) = 37 A. 485 (494).

Events subsequent to.

—Cognizance of, in appeal.

Quære, whether an appellate court can pay any regard to matters arising subsequent to the filing of the appeal (416).

In this case reference was made at the hearing of the appeal before their Lordships to documents which went to show that subsequent to the decision of the High Court the respondent set up a case in one respect contradictory to

DECREE—(Contd.)**Events subsequent to—(Contd.)**

that set up before their Lordships. (*Lord Phillimore.*)
SETH MANIKLAL MANSUK BHAI v. RAJA BIJOY SINGH DUDHORIA.

(1920) 25 C.W.N. 409 =
 (1921) M.W.N. 80 = 62 I.C. 356.

—Devolution of interest subsequent to—Reversal of decree on ground of.

In an appeal the question to be considered is whether the court below pronounced a correct decision of the issues then pending before it between the then parties to the suit. No subsequent event, or devolution of interest can affect this question; because to give effect to these, should justice require it, would be the office not of an appeal, but of some supplemental proceeding (299-300). (*Lord Kingsdown.*)
MUSSUMAT ANUNDMOYEE CHOWDHORAYAN v. SHEEB CHUNDER ROY.

(1862) 9 M.I.A. 287 =
 2 W. R. (P.C.) 19 = Marsh. 455 = 1 Suth. 485 =
 1 Sar. 854.

Evidence.

—Litigation different—Evidence in, admitted by consent of parties—Decree on basis of—Validity. *See EVIDENCE—LITIGATIONS—EVIDENCE IN ONE OF.*

(1892) 14 A. 366.

—Party—Evidence given by, and on behalf of, fatal to his case—Decision in his favour ignoring—Validity. *See EVIDENCE—PARTY—EVIDENCE GIVEN BY, AND ON BEHALF OF, ETC.*

(1925) 53 I. A. 24 (35) = 5 Pat. 312.

Execution of.

—See EXECUTION OF DECREE.

Favourable decree.

—Appeal from—Right of. *See DECREE—APPEAL FROM—RIGHT OF—FAVOURABLE DECREE.*

—Finding adverse in—Appeal from. *See APPEAL—FAVOURABLE DECREE.*

—Finding adverse in—*Res judicata* if. *See C.P. CODE OF 1908, S. 11—CASES UNDER—FINDING—ADVERSE FINDING.*

—Right of party to a—Deprivation of, on light grounds—*Impropriety.*

The right of a party to a decree in his favour is a substantive right of a very valuable kind and he should not lightly be deprived of it. (*Sir John Wallis.*) **CHOCKALINGAM CHETTI v. SEETHAI ACHE.**

(1927) 55 I. A. 7 = 6 R. 29 = 27 L. W. 1 =
 (1928) M. W. N. 20 = 4 O. W. N. 1231 =

32 C. W. N. 281 = 47 C. L. J. 136 =

I. L. T. 40 R. 18 = 30 Bom. L. R. 220 = 107 I.C. 237 =

26 A. L. J. 371 = A I.R. 1927 P. C. 252 =
 54 M. L. J. 88.

—Right of party to a—Deprivation of, on light grounds. *See also LIMITATION ACT OF 1908—S. 5.*

Final decree.

—Appeal from—Interlocutory order if may be questioned in—No appeal from such order. *See APPEAL—INTERLOCUTORY ORDER.*

—Interlocutory order—Distinction—Test. *See DECREE—MESNE PROFITS.*

(1900) 27 I. A. 209 (212-3) = 23 A. 152 (156-7).

Finding.

—Decree on one part of—Right to—Inconsistency of that finding with another part—Effect.

A finding of a Civil Court must be taken altogether; a party is not entitled to a decree upon one part of it where the decree would be inconsistent with another part of the same finding unless he can show that such other part is incorrect (158). **KOER PORESH NARAIN ROY v. ROBERT WATSON & CO.**

(1875) 3 Suth. 157 = 23 W.R. 451 = 3 Sar. 504.

DECREE—(Contd.)**Finding—(Contd.)**

—Favourable finding—Decree on foot of—Right of party to—Finding not accepted by him—Effect. *See APPEAL—DECREE IN—FAVOURABLE FINDING.*

(1875) 3 Suth. 157 (158-9) = 23 W. R. 451.

Fraud in obtaining.

—Effect of—Appeal—Compromise not to prosecute—Decree obtained in breach of.

Assuming (though their Lordships do not decide) that the decree of 1843 amounted to an adjudication against the appellant's title, we think, that it was an adjudication obtained not only with great impropriety, but, in effect, by fraud; for it was plainly the duty, in every sense the duty of the present respondent after the compromise (a compromise insisted upon by him) not to prosecute that appeal. Doing so, he did it at his own peril, for success could by no possibility benefit him, if his title, by reason of that success, should be properly impeached. (*Lord Justice Knight Bruce.*) **RAJMOHUN GOSSAIN v. GOURMOHUN GOSSAIN.**

(1859) 8 M. I. A. 91 (101-2) =
 4 W. R. (P. C.) 46 = 1 Suth. 378 = 1 Sar. 723.

—Plea of—Allegations necessary for.

It is said that the fraudulent nature of the decree of 1843 has not been put in issue, and that it has not been in a proper manner sought to be set aside. Their Lordships are not of that opinion. They are of opinion, that the fraudulent nature of the Respondent's conduct in obtaining that adjudication is sufficiently put in issue by the original plaint in the case, and by the replication, in both of which it is impeached for fraud (102). (*Lord Justice Knight Bruce.*) **RAJMOHUN GOSSAIN v. GOURMOHUN GOSSAIN.**

(1859) 8 M. I. A. 91 =
 4 W. R. (P. C.) 46 = 1 Suth. 378 = 1 Sar. 723.

—Proof of—Quantum. *See DECREE—FRAUD IN OBTAINING—SETTING ASIDE OF DECREE ON GROUND OF.*

(1883) Bald. 462.

—Setting aside of decree on ground of—Suit for—Maintainability—C. P. C. of 1908, O. 9, R. 13—Application under—Dismissal of—Effect. *See EXECUTION SALE—SETTING ASIDE OF, AND OF DECREE—SUIT FOR.*

(1902) 29 I. A. 99 = 29 C. 395.

—Setting aside of decree on ground of—Suit for—Maintainability—Jurisdiction of Court different from that by which decree was passed. *See ADMINISTRATION SUIT—HIGH COURT—JURISDICTION ON ORIGINAL.*

(1905) 32 I. A. 193 (201) = 33 C. 180 (191-2).

—Setting aside of decree on ground of—Suit for—Proof of fraud—Onus of—Quantum of.

The appeal arose out of a suit brought by the appellants for the recovery of possession of 7/16 ths of the Ilaka B, and for cancelment of orders dated 15-12-1875 and 16-3-1876, as being fraudulently obtained by the defendants, who were the respondents in the appeal. The two orders in question were those which gave to the respondents the 7/16 ths of the Ilaka of which they were in possession, and of which the appellants sought to deprive them. The order of 15-12-1875 was passed by the Commissioner of Sitapur, and the order of 16-3-1876 was passed by the Judicial Commissioner on appeal, affirming the order of the Commissioner.

Held, affirming the Court below, that the case of fraud alleged by the plaintiff had not been made out.

It is alleged that the Judicial Commissioner did not go into the question upon the appeal; but if that were so, the grounds of appeal were all before the appellant, and the proper course would have been, if he erred in making the decree of 16-3-1876, to appeal to the Privy Council. That course was not taken, and the decree of the Judicial Commissioner

DECREE—(Contd.)**Fraud in obtaining—(Contd.)**

has become a final decree; and now it is sought, in an entirely different proceeding, to set aside that decree for fraud. Their Lordships are unable to see that there is the least ground for alleging fraud in obtaining that decree. If there was any ground for alleging fraud in obtaining the decree of 15-12-1875, then that ought to have been alleged either in those proceedings or by some proceeding taken immediately afterwards. The course which the present litigation took ended by the Judicial Commissioner dismissing the suit; and their Lordships think he was right in so doing.

Upon every ground,—that the suit was not brought until the 25th of March, 1879, that there is no reason to suspect any fraud whatever or any surprise or any concealment, and that if there were, this is not the proper mode or the proper time to challenge it,—their Lordships think that the appeal fails. (*Sir Arthur Hobhouse.*) **THAKUR DEBI SINGH v. KALKA SINGH.** (1883) **Bald.** 462 = **R. & J.'s No. 71 (Oudh).**

Heir-at-law.

——Suits by—Decrees in. *See* **DECEASED—HEIR-AT-LAW.**

Hindu Law—Widow and Adopted son (minor)—Suit by.

——Decree declaring right of widow as widow or as guardian of adopted son—*Propriety.*

A Jain widow sued to be maintained in possession by establishment of her exclusive right of inheritance to the estate of her husband, and to uphold the adoption of *M*, as well as his right permanently to succeed her after her death by voiding the defendant's pretensions. The suit was originally instituted by the widow as sole plaintiff; but *M*, the alleged adopted son, was afterwards added as a co-plaintiff. The Sub-Judge made a decree in favour of the plaintiff in the following terms:—"That the plaintiff is entitled to a decree to be maintained in possession of the property in question, on the ground of her exclusive and absolute right thereto as heir of her husband, and for a declaration of the validity of the adoption made by her, and of the right of her adopted son." The High Court on appeal varied that decree by substituting the declaration that the widow was entitled to retain possession of the estate, either as proprietor or as manager thereof on behalf of her adopted son, *M*.

Held, that the decree of the High Court could not be objected to on the ground of uncertainty.

The declaration of the High Court, being in the alternative, is, no doubt, in one sense uncertain; but it is independent of the other declarations which decide the rights of the parties as between the plaintiffs on the one side, and the defendant, on the other, and repel the defendant's pretensions. The court, indeed, could not properly make a binding declaration as between the adoptive mother and the adopted son, both being plaintiffs. It is, no doubt, on this account that the decree, whilst it declares the right of the widow to present possession as against the defendant, is framed in a form which avoids prejudice to the rights of the plaintiffs *inter se* (115.) (*Sir Montague Smith.*) **SHEO SINGH RAI v. MUSSUMUT DAKHO.** (1878) 5 **I. A.** 87 = 1 **A.** 688 (708-9) = 2 **C. L. R.** 193 = 3 **Sar.** 807 = 3 **Suth.** 529

Ijmali Mahal—Share in—Possession of—Decree for.

——Partition of mahal prior to—Recovery of substituted share allotted at—Right of—Mode of—Execution—Separate suit.

An order of His Majesty in Council of 1915 restored a decree of a Sub-Judge of the year 1904 whereby a revenue sale of an ijmali mahal was set aside and possession was given to the respondent and other holders according to the

DECREE—(Contd.)**Ijmali Mahal—Share in—Possession of—Decree for—(Contd.)**

shares which they respectively held. Prior to the decree of 1904 the mahal had been partitioned under the Bengal Estates Partition Act of 1897, but that fact was not brought to the notice of the Board.

On an application made for execution of the order in Council and the decree of 1904, and for possession of the lands which had been substituted by the partition for the shares which the respondents had been entitled to before the partition, *held*, affirming the High Court, that the decree of 1904 could be executed by giving the respondents respectively possession of the substituted shares and that an application to the Judicial Committee to get the decree varied was not necessary, nor was a separate suit to establish their titles necessary.

The questions as to what were such substituted shares were questions which arose within the meaning of S. 47 of the C.P.C. of 1908 between the parties and related to the execution and satisfaction of the decree of 1904. (*Sir John Edge.*) **RAI BAIJNATH GOENKA v. MAHARAJA SIR RAVANESHWAR PRASAD SINGH.** (1922) 49 **I. A.** 139 = 1 **P.** 378 = 20 **A. L. J.** 650 = (1922) **M. W. N.** 415 = 16 **L. W.** 128 = 31 **M. L. T.** 43 = 36 **C. L. J.** 1 = 26 **C. W. N.** 906 = 24 **Bom. L. R.** 974 = **A. I. R.** 1922 **P. C.** 54 = 69 **I. C.** 180 = 43 **M. L. J.** 124.

Interest.

——Decree—Interest not awarded by—Mortgage for—Validity—Executing Court—Interest allowed by—Interest not so allowed—Validity of mortgage as regards—Distinction. *See* **MORTGAGE—INTEREST NOT ALLOWED BY DECREE—MORTGAGE FOR.** (1878) 5 **I. A.** 78 (85) = 3 **C.** 602 (609-10).

——Decree—Interest not awarded by—Recovery of—Right of—Mode of.

In a case in which a decree is silent as to subsequent interest upon the amount decreed, the decree-holder is, no doubt, not strictly entitled to an execution for interest calculated for a period subsequent to the date of the decree; but there is no reason why he should not recover interest as damages in an action upon the decree (85).

It is not necessary to refer to the English decisions bearing upon the subject of recovering by action interest upon a judgment which cannot be levied by execution (85). (*Sir Barnes Peacock.*) **SETH GOKULDAS GOPALDAS v. MURLI.** (1878) 5 **I. A.** 78 = 3 **C.** 602 (609) = 2 **C. L. R.** 156 = 3 **Sar.** 802 = 3 **Suth.** 515.

——Future interest—Decree silent as to—Recovery of—Mode of. *See* **MESNE PROFITS—FUTURE PROFITS—DECREE SILENT AS TO.** (1875) 2 **I. A.** 219 (228)

——Rate of—Reduction by decree of—Benefit of—Right to—Strangers to decree claiming relief inconsistent with it—Right of. *See* **INTEREST—DECREE—REDUCTION OF RATE BY—BENEFIT OF.** (1890) 17 **I. A.** 201 (213-4) = 18 **C.** 164 (180).

——Rate of, up to date of decree. *See* **INTEREST—DECREE—DATE OF.** (1880) 7 **I. A.** 196 (211) = 3 **A.** 91 (107).

Issues—Point not recorded in.

——Declaration in decree as to—Power of Court. *See* **PRACTICE—ISSUES—POINT NOT RECORDED IN.** (1861) 9 **M. I. A.** 39.

Joint decree-holders—Difference in rights of.

——Decree providing for—Propriety. *See* **MORTGAGE—SUIT TO ENFORCE—DECREE IN—JOINT DECREE-HOLDERS.** (1910) 37 **I. A.** 70 = 32 **A.** 295.

DECREE—(Contd.)**Joint Property—Share in—Possession of—
Decree for.**

—Partition of property prior to—Recovery of substituted share allotted at—Right of—Mode of—Execution—Separate suit. *See* DECREE—IJMALI MAHAL.

(1922) 49 I. A. 139 = 1 Pat. 378.

Judgment—Conformity between.

—Necessity—Absence of—Effect on validity of decree.

Where the decree, which was drawn up in conformity with the judgment, embraced the whole of the property included in the plaint, although the Court held that the plaintiff was entitled only to a share in that property, *held*, that the decree could not be maintained (355). (*Sir James W. Colville*). CHOWDRY PUDUM SINGH *v.* KOER OODEY SINGH. (1869) 12 M. I. A. 350 = 12 W. R. P. C. 1 =

2 B. L. R. P. C. 101 = 2 Suth. 219 = 2 Sar. 447.

Keeping alive of—Duty of.

—Assignment of decree—Agreement for—Duty after, and before transfer by assignment in writing.

After an agreement to assign a decree and before the transfer of the decree by an assignment in writing, the duty of keeping the decree alive is that of the assignor and not of the assignee (112). (*Sir John Edge*). JATINDRA NATH BASU *v.* PEYER DEYE DEBI. (1916) 43 I. A. 108 =

43 C. 990 (1000) = 24 C. L. J. 67 = 20 C. W. N. 866 =

20 M. L. T. 25 = (1916, 1 M. W. N. 403 = 3 L. W. 553 =

18 Bom. L. R. 509 = 14 A. L. J. 527 = 34 I. C. 69 =

31 M. L. J. 248.

Later and earlier decrees in same suit.

—Merger of latter in former—Doctrine of. *See* MORTGAGE—SUIT TO ENFORCE—DECREE IN—*Ex parte* DECREE, ETC.

(1915) 42 I. A. 171 (175-6) =

37 A. 485 (494).

Legal Representative.

—Decree against. *See* LEGAL REPRESENTATIVE.

Merger—Doctrine of—Applicability.

—Earlier and later decrees in same suit—Merger of former in later. *See* MORTGAGE—SUIT TO ENFORCE—DECREE IN—*Ex parte* DECREE, ETC.

(1915) 42 I. A. 171 (175-6) = 37 A. 485 (494).

Mesne Profits.

—Claim to—Plaint—Body of, and schedule to—Descriptions of claim in—Conflict between—Period for which plaintiff entitled to a decree in case of. *See* MESNE PROFITS—PAST PROFITS—PERIOD FOR WHICH, RECOVERABLE.

(1881) 8 I. A. 197 (202, 206) = 8 C. 178 (185, 189).

—Decree—Profits not awarded by. *See* MESNE PROFITS—DECREE—PROFITS NOT AWARDED BY.

—Future profits—Decree silent as to—Recovery of—Mode of. *See* MESNE PROFITS—FUTURE PROFITS.

(1875) 2 I. A. 219 (228).

—Liability under decree for—Execution order deciding—Nature of—Account—Liability for—Decree declaring—Final decree or interlocutory order.

In execution of a decree awarding future mesne profits, a question was raised as to the period for which the decree-holder was entitled to such profits, whether it was three years from the date of the original decree, or three years from the date of the decree on appeal affirming such decree. An issue was framed on this point, and it was arranged that the issue should be treated as preliminary to taking accounts. The District Judge accordingly tried that issue separately, and decided that the decree-holder was entitled to profits only for three years from the date of the original decree. *Held*, that his decision was a final one in its essence, that the order embodying such decision was a decree

DECREE—(Contd.)**Mesne Profits—(Contd.)**

within the meaning of S. 2 (2) of the Code of 1908, and that it was appealable under S. 96 thereof (212-3).

There is not any need to rely, as the High Court did, upon the accident that the District Judge took the convenient course of trying the liability to account in a separate issue and deciding it in a separate judgment. His decision is a final one in its essence, and would be so equally whether it stood alone or was combined with decisions on other points. It resembles in principle a decree for account made at the hearing of a cause, which is final against the party denying liability to account, and is appealable, though it is also in another way interlocutory and may result in the exoneration of the accounting party, or even in the award of a balance in his favour. And it can make no difference in point of principle whether the decision be in favour of or against the liability to account. It is equally final in its effect, and as such equally open to appeal (213). (*Lord Hobhouse*). RAJA BHUP INDAR BAHADUR SINGH *v.* BIJAI BAHADUR SINGH. (1900) 27 I. A. 209 =

23 A. 152 (156-7) = 5 C. W. N. 52 =

2 Bom. L. R. 978 = 7 Sar. 788 = 10 M. L. J. 290.

Minor.

—Decree against—Sale in execution of—Suit for declaration of invalidity of—Maintainability—Guardian *ad litem* duly appointed—Non-representation by—Suit based on. *See* HINDU LAW—MINOR—DECREE AND EXECUTION SALE AGAINST. (1909) 36 I. A. 168 (175) =

31 A. 572 (582).

Money—Decree for—Decree-holder under.

—Property of judgment-debtor if vested in, by virtue of such decree.

A decree for money does not vest in a judgment-creditor any portion of the property of his judgment-debtor. It gives him a right to have the judgment executed, but until execution the property of the judgment-debtor does not vest in the judgment-creditor simply by virtue of the judgment. That is so according to the law of this country, and it is also the case under the C. P. C. of 1859, which is the law in force in India (248). (*Sir Barnes Peacock*). MIRZA MAHOMED AGA ALI KHAN BAHADOOR *v.* THE WIDOW OF BALMAKUND. (1876) 3 I. A. 241 = 26 W. R. P. C. 82 =

3 Sar. 648 = 3 Suth. 330 = Bald. 64 =

R. & J's No. 42 (Oudh).

—Suit by, to recover property of judgment-debtor from persons in possession of it—Maintainability.

The proper mode of enforcing a money decree is that pointed out by the Code of Civil Procedure, namely, by execution and attachment and sale, or by execution and attachment, and the appointment of a Receiver under S. 243 of C. P. C. of 1859 to collect the property, and not by bringing an action against the debtors of the judgment-debtor, or those who hold his property (251-2). A judgment creditor has not by virtue of the judgment, without execution, a right to the property of the judgment-debtor, whether it consists in lands, in moveable property, or in debts. He does not by virtue of his Judgment become entitled to the property of his judgment-debtor, and a suit by him for its recovery from the persons in whose hands it is not maintainable (248). (*Sir Barnes Peacock*). MIRZA MAHOMED AGA ALI KHAN BAHADOOR *v.* THE WIDOW OF BALMAKUND. (1876) 3 I. A. 241 = 26 W. R. P. C. 82 =

3 Sar. 648 = 3 Suth. 330 = Bald. 64 =

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**Money paid under—Recovery of—Right of—
Mode of.**

—Decree prior subsequently reversed on appeal—Decree made on basis of—Money paid under—Appellate decree not reversing or superseding that decree—Effect.

DECREE—(Contd.)**Money paid under—Recovery of—Right of—Mode of—(Contd.)**

A Zamindar instituted a suit against his tenants to enforce the acceptance of pattas tendered by him for Fuslis 1314 and 1315 fixing rent on the produce sharing system. That suit was dismissed by the Revenue Court on the ground that there had been a conversion of the asara rates (produce-sharing system) into cash payment in Fusli 1283, which was confirmed in Fusli 1292, and had been acted upon ever since, that that conversion was a permanent arrangement, and that the Zamindar was not therefore entitled to impose on the tenants pattas on the asara basis. Its decree was affirmed on appeal by the District Court, but was reversed by the High Court, the High Court holding that the pattas tendered by the Zamindar were proper pattas and that the tenants must accept them. The High Court decreed the suit. On further appeal, the Privy Council set aside the judgment and decree of the High Court on the ground that the High Court was precluded in second appeal, from interfering with the finding of fact of the Courts below as to the nature of the arrangement in Fusli 1282, and remitted the case to the Revenue Court for the drawing up of a proper decree and dealing with any other questions that might be outstanding between the parties.

Pending the appeal to the Privy Council aforesaid, the Zemindar instituted similar suits for arrears of rent in respect of Fuslis 1316 to 1322, and decrees were made in all of them against the tenants upon the basis of the decree of the High Court in the prior suit. No application was made by the tenants for stay of trial of any of the suits pending the disposal of the appeal to the Privy Council.

In suits instituted by the tenants after the disposal of the Privy Council to recover back the excess amounts realized from them in execution of the decrees in the suits brought by the Zemindar for the rents of Fuslis 1316 to 1322, the High Court held, on the authority of the decision in 10 M. I. A. 203, as interpreted by I. L. R. 3 C. 30 F. B., that, on reversal of the decree of the High Court by the Privy Council in the first suit by the Zamindar, the tenants became entitled to recover the excess amount recovered from them in execution of the decrees in respect of Fuslis 1316 to 1322.

Held, reversing the High Court, that the tenants' suits ought to have been dismissed.

The decrees or judgments executed against the tenants were neither reversed nor superseded by the judgment of the Board in the first suit by the Zemindar. That judgment did not deal with anything but the actual subject-matter of the case before their Lordships. In fact, the only point decided was that the High Court, under the circumstances, had no power to reverse the decisions of the Subordinate Courts. The facts in the case of 10 Moore were entirely different. (*Lord Carson.*) **BOMMADEVARA NAGANNA NAIDU v. RANI VENKATAPPAYYA.**

(1923) 50 I. A. 301 = 46 M. 895 = 21 A. L. J. 726 =

A. I. R. 1923 P. C. 167 = 18 L. W. 913 =

25 Bom. L. R. 1290 = (1923) M. W. N. 554 =

33 M. L. T. 262 = 28 C. W. N. 568 = 39 C. L. J. 312 =

76 I. C. 594 = 45 M. L. J. 657.

———*Rule—Exception in cases of dependent and subordinate decrees subsequently reversed in ulterior proceedings—Mode of recovery in such cases.*

D, claiming to be entitled to the estate of his uncle, instituted a suit in 1821 against *S*, a debtor to the uncle's estate, to recover a bond-debt. Pending that suit, and in 1827, one *T*, (the original respondent to the appeal before their Lordships) sued *D* for recovering one-half of the estate of the uncle to which he (*T*) claimed to be entitled, and compromised the suit, thereby becoming entitled to a six-anna share of the debt due from *S*. Subsequently in 1829 the

DECREE—(Contd.)**Money paid under—Recovery of—Right of—Mode of—(Contd.)**

suit against *S* was also compromised, but without the privity of *T*, to the effect that *S* should pay a certain sum at the end of three years without interest and that, in default of payment, *D* should be at liberty to proceed and realise the amount. In that state of circumstances, *T*, in 1835, instituted another suit against *D* seeking to recover from him the six-anna share of *S*'s bond-debt, and of the interest upon it up to 1821, and reserving the right to bring another suit for his share of subsequent interest. By its decree the Sudder Court ordered, in 1842, *D* to pay *T* the entire amount of that suit. From that decree *D* appealed to Her Majesty, and in 1849 obtained a reversal of that decree, the case being remanded to India with the direction that *D* was liable to *T* for a six-anna share of what he, *D*, had received or might thereafter receive, without his wilful default, from *S*. Pending that appeal to England, *T* instituted a fresh suit against *D* to recover the interest which he had reserved the right to himself to sue for in his above suit, and obtained a decree under which *D* was compelled to make payments. Application for review of this last decree, made after the receipt in India of Her Majesty's order, having been refused, *D* instituted the suit out of which the appeal arose to recover the moneys he had been compelled to pay in execution.

Held, that the decree obtained by *T* against *D* was superseded by the order of Her Majesty in Council pronounced in the year 1849, and that *D* was, therefore, entitled to recover the amount paid under that decree (212).

It was plainly intended by the order of Her Majesty in Council that all the rights and liabilities of the parties should be dealt with under it, and it would be in contravention of the order to permit the decrees obtained by *T* pending the appeal on which it was made to interfere with this purpose. Moreover, the decrees now under appeal rest on precisely the same cause of suit as the original decree which was reversed by the order of Her Majesty in Council. The plaint in the case on which the original decree was recovered describes the interest recovered by the decrees under appeal as part of the same cause of suit, separated only for the convenience of *T*, and the decrees under appeal, therefore, were mere subordinate and dependant decrees, and their Lordships do not think that these decrees can be held to have remained in force when the decree on which it was dependent had been reversed (212). (*Lord Justice Turner.*) **SHAMA PURSHAD ROY v. HURRO PURSHAD ROY.**

(1865) 10 M. I. A. 203 = 3 W. R. P. C. 11 = 2 Suth. 103.

———There is no doubt that, according to the law of this country,—and their Lordships see no reason for holding that it is otherwise in India—money recovered under a decree or judgment cannot be recovered back in a fresh suit or action whilst the decree or judgment under which it was recovered remains in force; but this rule of law rests upon this ground, that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceeding. If it has been so reversed or superseded, the money recovered under it ought certainly to be refunded and is recoverable either by summary process, or by a new suit or action. The true question, therefore, in such cases is, whether the decree or judgment under which the money was originally recovered has been reversed or superseded (211-2). (*Lord Justice Turner.*) **SHAMA PURSHAD ROY v. HURRO PURSHAD ROY.**

(1865) 10 M. I. A. 203 = 3 W. R. P. C. 11 = 2 Suth. 103.

———Money recovered under a decree or judgment cannot be recovered back in a fresh suit or action whilst the decree or judgment under which it was recovered remains in force; but this rule of law rests upon the ground, that the original

DECREE—(Contd.)**Money paid under—Recovery of—Right of—Mode of—(Contd.)**

decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceeding. If it has been reversed or superseded the money recovered under it ought ordinarily to be refunded, and is recoverable either by summary process or by a new suit or action. The true question, therefore, in such cases is, whether the decree or judgment under which the money was originally recovered has been reversed or superseded? (*Lord Carson.*) **BOMMADEVARA NAGANNA NAIDU v. RANI VENKATAPPAYYA.** (1923) 50 I. A. 301 = 46 M. 895 =

21 A. L. J. 726 = A. I. R. 1923 P. C. 167 =

18 L. W. 913 = 25 Bom. L. R. 1290 =

(1923) M.W.N. 554 = 33 M.L.T. 262 = 28 C.W.N. 568 =

39 C. L. J. 312 = 76 I. C. 594 = 45 M. L. J. 657.

Operation of—Effect on.

———Appeal from decree—Dismissal of. *See* DECREE—APPEAL FROM—AFFIRMANCE ON.

Part of—Appeal only from.

———Scope of appeal in case of.

An appeal from part of the decree only does not open to the respondents the whole decree (421). (*Lord Kingsdown.*) **MYNA BOYEE v. OOTARAM.**

(1861) 8 M. I. A. 400 = 2 W. R. 4 = 2 M. H. C. R. 196 =

1 Suth. 452 = 1 Sar. 797.

Party to.

———Declaration that decree is not binding on—Suit by him for—Maintainability.

A mortgage suit was decreed *ex parte* against the mortgagor and his two sons in 1897, and an order absolute was made in 1900. It was set aside against one of the sons under S. 108 of C. P. C. of 1882, and a retrial of the suit was ordered as regards that son alone, the decree being held to be final as against the other son and the mortgagor. On the retrial, a decree was passed in 1902 in plaintiff's favour, which, notwithstanding the decree of 1897, purported to be against all the members of the family. On an application by the plaintiff for an order making the decree of 1902 absolute against all the defendants, the son of the mortgagor against whom the decree of 1897 was held to have become final, raised the objection that the decree of 1902 could not stand against him in face of the decree of 1897. His objection was, however, ultimately overruled, and an order making the decree absolute was made in February, 1908.

In a suit subsequently brought by him for a declaration that he was not a party to the decree of 1902 and that he was not bound by it,

Held, that the decree of February, 1908 sufficiently covered each and all of the points urged in the suit, that the case under which those objections were brought forward was competently before the court, which had jurisdiction to entertain them; and that, even if the court had decided wrongly, a fresh suit on matters already completely settled by law was unsustainable (174-5).

It is not open to suitors in India, who have exhausted the remedies competent to them, and after final decree has been obtained against them, to institute a fresh suit, or series of suits, the object of which is to declare that a decree, competently and with adequate jurisdiction obtained therein, is not applicable to them, although they are named in that decree. This procedure is radically incompetent (175). This suit is equivalent to a suit for the rescission and destruction of a former decree of a competent court. That rescission and destruction could be obtained on the ground of fraud "practised on the Courts below"; but fraud has been eliminated from the case. Accordingly these proceedings are a mere colour for a fresh suit on matters already competently settled by law (176). (*Lord Shaw.*) **RAJWANT PRASAD**

DECREE—(Contd.)**Party to—(Contd.)**

PANDE v. RAM RATAN GIR. (1915) 42 I.A. 171 = 37 A. 485 (493-4) = 20 C.W.N. 35 = (1915) M.W.N. 73 = 2 L.W. 671 = 18 M. L. T. 173 = 17 Bom. L. R. 754 = 13 A. L. J. 937 = 30 I. C. 849 = 29 M.L.J. 165.

———Evidence given by, and on behalf of, fatal to his case—Decision in his favour ignoring—Validity. *See* EVIDENCE—PARTY—EVIDENCE GIVEN BY, ETC.

(1925) 53 I. A. 24 (35) = 5 Pat. 312.

Payment directed by.

———*See* DECREE—POSSESSION—DECREE FOR—PAYMENT, ETC.

Payment of amount of—What amounts to.

———Set off of that decree against decree held by judgment-debtor—Consent order of—If amounts to. *See* C.P.C. OF 1908—S. 64—MONEY ATTACHED.

(1881) 8 I.A. 65 (74-5) = 7 C. 107 (117-8).

Plaint—Body of, and Schedule to—Descriptions of claim in—Conflict as to—Property passing under decree in case of.

———Mesne profits—Past profits—Claim for—Period of—Descriptions of—Conflict as to. *See* MESNE PROFITS—PART PROFITS—PERIOD FOR WHICH, RECOVERABLE.

(1881) 8 I.A. 197 (202, 206) = 8 C. 178 (185, 189).

———Property sued for—Descriptions of—Conflict as to. *See* DECREE—PROPERTY SUED FOR.

(1880) 7 C. L. R. 404.

Plaintiff with title—Suit by—Persons deriving title from him joining as plaintiffs in.

———Decree in case of. *See* DECREE—CO-PLAINTIFFS.

Possession—Decree for.

(*See also* POSSESSION—DECREE FOR).

———Encumbrances created by judgment-debtor—Indemnity to decree-holder against—Provision in decree for—Effect—Rights of parties on. *See* PARTITION—DECREE FOR—ENCUMBRANCES, ETC. (1926) 24 L.W. 139.

———Payment directed by, as condition of recovery of possession—Deposit into Court of—Necessity—Payment to decree-holder in person—Sufficiency of.

A decree obtained against the defendant in a suit provided as follows:—"The plaintiffs will have six months within which to pay their share *i.e.*, 10/16ths of the Rs. 1,250 and the Rs. 1,200, with the added interest as directed in the lower Court's judgment. If within 6 months the plaintiffs pay the sums due from them they are to recover possession of the land in suit. But if within that time the plaintiffs do not pay the sums due from them then the suit to stand dismissed with costs."

Held, that the condition as to payment imposed by the decree would be satisfied by a payment to the defendant in person, which he accepted; and that it would be equally satisfied by a payment into Court. (*Lord Salvesen.*) **MAHOMED RAHIMTULLA v. ESMAIL ALLARAKHIA.**

(1924) 51 I.A. 236 (240) = 48 B. 404 =

26 Bom. L. R. 549 = 22 A.L.J. 931 = 34 M.L.T. 99 =

(1924) M. W. N. 422 = A. I. R. 1924 P.C. 133 =

29 C.W.N. 581 = 80 I.C. 411 = 46 M.L.J. 567.

———Payment directed by, as condition of recovery of possession—Mortgagee from plaintiff prior to decree—Deposit by—Effect of—Benefit of—Persons entitled to—Withdrawal fraudulent by him subsequently to defeat right of one of persons entitled to benefit of payment—Deposit subsequent by that person—Effect.

The decree in a suit for possession of property provided that, if the plaintiffs should pay a specified sum to the defendant within 6 months from the date of the decree, they were to recover possession of the suit property, and that in

DECREE—(Contd.)**Possession—Decree for—(Contd.)**

default the suit should stand dismissed with costs. Within the 6 months fixed by the decree. *D*, who had, prior to decree, obtained a mortgage of the share in the suit property of one of the plaintiffs, deposited into court the amount required to be paid by the decree. The respondent was a purchaser of the entire interest of the plaintiffs in the suit, his purchase being subsequent to decree. To defeat the rights of the respondent, *D*, acting in collusion with the defendant in the suit, applied for the withdrawal of the deposit made by him. Notwithstanding respondent's opposition, the Sub-Judge allowed *D* to withdraw the deposit, and *D* did withdraw the deposit. Thereupon the respondent offered to pay the amount deposited by him to the defendant on the footing that such payment should be treated as equivalent to the payment made by *D*. The High Court, reversing the Sub-Judge, allowed the respondent an opportunity of paying the money within a specified short period, such payment to be treated as within the period of 6 months allowed by the decree.

Held, that the order made by the High Court was the only method by which the position which had been inverted by the defendant's action could be restored so as to do justice between the parties.

D's right to withdraw the deposit made by him would have been absolute if no other interests but those of himself and the defendant had been in question. The real object of his withdrawal was, however, to defeat the claims of the respondent, the only other person that had an interest in the condition expressed in the decree being satisfied. The benefit of the deposit having been made before the expiry of the time limit necessarily enured to all parties having an interest in the condition being satisfied. (*Lord Salvesen*.)
MAHOMED RAHIMTULLA v. ESMAIL ALLARAKHIA.

(1924) 51 I.A. 236 (240-1) = 48 B. 404 =

26 Bom. L.R. 549 = 22 A.L.J. 931 = 34 M.L.T. 99 =

(1924) M.W.N. 422 = A.I.R. 1924 P.C. 133 =

29 C.W.N. 584 = 80 I.C. 411 = 46 M.L.J. 567.

—Payment directed by, as condition of recovery of possession—Mortgage prior to suit of suit property from plaintiff—Payment by—Right of—Validity.

The decree in a suit for possession of property provided that, if the plaintiffs should pay a specified sum within 6 months from the date of the decree, they were to recover possession of the suit property, and that in default their suit should stand dismissed with costs. One of the plaintiffs had prior to the date of the decree mortgaged his share of the property involved therein to one *D*, not a party to the suit. The mortgage deed in his favour expressly authorised him to charge on the mortgaged property any expenses which he might be required to make for his protection.

Held, that *D* had an absolute right in a question with the defendant in the suit to make the deposit in the protection of his own property and so prevent his security from becoming valueless. (*Lord Salvesen*.)
MAHOMED RAHIMTULLA v. ESMAIL ALLARAKHIA.

(1924) 51 I.A. 236 (240) = 48 B. 404 =

26 Bom. L.R. 549 = 22 A.L.J. 931 = 34 M.L.T. 99 =

(1924) M.W.N. 422 = A.I.R. 1924 P.C. 133 =

29 C.W.N. 584 = 80 I.C. 411 = 46 M.L.J. 567.

—Ryots or tenants — Possession of — Reservation in decree as to—Scope of—Incumbrances pendente lite—Putni granted pendente lite—Reservation if covers.

The final decree in a partition suit declared the respondents entitled to the possession of the property in dispute against the judgment-debtors of that partition decree without "disturbing the possession of any of the ryots and other tenants." The judgment-debtors had, during the pendency of that suit, granted putni tenure of that property to the appellants *benami* for themselves.

DECREE—(Contd.)**Possession—Decree for—(Contd.)**

Held, that under the decree the respondents acquired an absolute title to the property unencumbered by any putni rights in the appellants. (*Sir Barnes Peacock*.)
PROSONNO GOPAL PAL CHOWDRY v. BROJONATH ROY CHOWDRY.
 (1876) 3 Suth. 340 = Bald. 82 (86) = 26 W.R. 93.

—Unconditional decree—Claim in Courts below to—Privy Council appeal—Decree conditional on payment of binding debts—Claim to—Allowance of. See POSSESSION—DECREE UNCONDITIONAL FOR.

(1913) 40 I.A. 105 (111) = 35 A. 211 (220-1).

—Validity—Plaintiff without title — Defendant with possessory title — Agreement between plaintiff and real owner (made a defendant) to divide suit property — Effect. See POSSESSION—SUIT FOR—POSSESSORY TITLE.

(1866) 10 M.I.A. 511 (529).

Possession—Exclusive of piece of water lying between two estates.

—Possession of—Cross-suits between owners of estates for— Failure of either to prove exclusive possession—Possession found to be between the two—Decree for possession of moiety to each in case of. See BOUNDARY DISPUTE—CROSS SUITS, ETC. (1890) 17 I.A. 62 = 17 C. 814.

Possession—Immediate possession of some items and possession of other items after ascertainment thereof.

—Decree granting—Execution, as regards former before ascertainment of latter. See PRIVY COUNCIL—APPEAL—DECREE IN—EXECUTABILITY.

(1870) 13 M. I. A. 490 (495).

Possession under—Rightful or wrongful.

—Reversal subsequent of decree—Effect. See POSSESSION—WRONGFUL POSSESSION.

(1893) 20 I. A. 160 (163) = 21 C. 142.

Possessory right—Person only with—Declaration of title and injunction against trespasser—Suit for.

—Decree in—Form of. See SPECIFIC RELIEF ACT—S. 42—CASES UNDER—TRESPASSER.

(1893) 20 I. A. 99 (106-7) = 20 C. 834 (842-3).

Property sued for—Descriptions of, in body and schedule of plaint—Variation between.

—Decree in case of—Property passing under.

A Hindu widow executed a mortgage in favour of *P* of "mouzah *B*" and of "mouzah *H*, original with dependency," which appertained to the estate of her deceased husband. *P*'s son, *C*, instituted a suit upon the mortgage against the widow alone, and prayed for the recovery of possession of the mortgaged property after foreclosure of the mortgage, and for a mutation of names. The reversionary heirs of the last male owner intervened in the suit, and a decree was given against them for the plaintiff. In the Schedule to the plaint in that suit mouzah *B* was described as "mouzah *B*, usli with dakhili, that is, mouzah *B* and mouzah *M*," but in the body of the plaint it was described simply as mouzah *B*; in other words, the description in the body of the plaint followed the description in the mortgage deed. The other mouzah included in the mortgage, namely, mouzah *H*, was, however, described even in the body of the plaint, as "mouzah *H*, original with dependency," consistently with its description in the mortgage deed itself. The decree in the suit ordered "that the shares of the disputed mouzahs do come into the possession of the plaintiff."

In a suit subsequently brought by the reversionary heirs for an adjudication of their right to and possession of mouzah *M*, the question was whether the decree in the former suit

DECREE—(Contd.)**Property sued for—Descriptions of, in body and schedule of plaint—Variation between—(Contd.)**

affected mouzah *M*, and whether the subsequent suit was barred by the said decree.

It was found, as a fact in the subsequent suit, that mouzah *B* and mouzah *M* were not usli and dakhili, but that they were two separate and distinct mouzahs.

Held, affirming the High Court, that the suit was not barred by the decree in the former suit.

The description in the body of the plaint in the former suit, and not that in the Schedule, was that upon which the court was called upon to adjudicate. The former suit was not intended to include, and did not include, anything which was not included in the mortgage, and the decree therein did not affect mouzah *M*. (*Sir Barnes Peacock*.) **BABOO HET NARAIN SINGH v. BABOO RAM PERSHAD SINGH.**

(1880) 3 *Suth.* 783 = 7 *C.L.R.* 404 = *Bald.* 367.

—See also **MESNE PROFITS — PAST PROFITS — PERIOD FOR WHICH, ALLOWED.**

(1881) 8 *I. A.* 197 (202, 206) = 8 *C.* 178 (185, 189).

Relief admitted by opponent.

—Incorporation in decree of—Necessity. See **DECREE — ADMITTED RIGHTS.** (1916) 43 *I. A.* 243 (248-9) = 44 *C.* 87 (96).

Relief granted by—Specification of.

—Necessity. See **MORTGAGE—REDEMPTION OF—SUIT FOR, AND FOR POSSESSION—DECREE ALLOWING.** (1876) 3 *Suth.* 298 (300).

—Omission as regards—Remand of case on ground of. See **APPEAL—REMAND IN — GROUNDS — DECREE—RELIEF GRANTED BY.** (1876) 3 *Suth.* 298 (300).

Relief not awarded by, and obtainable only in fresh suit.

—Agreement by judgment-debtor to give in execution—Validity and enforceability of.

Pending an appeal against a decree for possession and past profits, the lower court stayed execution on condition of the defendant giving a security bond to the court undertaking to account in the suit itself for profits subsequent to the institution of the suit not awarded by the decree. The defendant gave such a bond without raising any objection, and execution was thereupon stayed. Under the law, as it was then accepted, however, such profits were recoverable, not in execution proceedings, but by a separate suit.

In proceedings taken for the recovery of the said future profits in execution, the defendant contended that the plaintiff's remedy was by a separate suit.

Held, that the case fell within the principle laid down and enforced by the Judicial Committee in the case of *Pisani v. Attorney-General of Gibraltar*, *L. R.* 5 *P. C.* 516, in which the parties were held to an agreement that the questions between them should be heard and determined by proceedings quite contrary to the ordinary *cursus curiæ* (233-4). (*Sir James W. Colvile*.) **SADASIVA PILLAI v. RAMALINGA PILLAI.** (1875) 2 *I. A.* 219 = 3 *Sar.* 519 = 15 *B. L. R.* 383 = 24 *W. R.* 193 = 3 *Suth.* 190.

—Award of, in execution—Jurisdiction—Absence or irregular exercise of.

In this case pending an appeal against a decree for possession and past profits, the lower Court stayed execution of the decree on condition of the defendant executing a security bond undertaking to account for the profits subsequent to suit not awarded by the decree in that suit itself. In proceedings taken in execution of the decree for the recovery of such future profits, the defendant contended that the decree not having awarded such profits, they were not

DECREE—(Contd.)**Relief not awarded by, and obtainable only in fresh suit—(Contd.)**

recoverable in execution, and that the plaintiff's remedy was by a separate suit. The Civil Judge overruled the objection and held that by virtue of the defendant's undertaking the profits in question were recoverable in execution. With reference to this question, their Lordships made the following observation: "The court here, had a general jurisdiction over the subject-matter, though the exercise of that jurisdiction by the particular proceeding may have been irregular (233). (*Sir James W. Colvile*.) **SADASIVA PILLAI v. RAMALINGA PILLAI.** (1875) 2 *I. A.* 219 = 15 *B. L. R.* 383 = 24 *W. R.* 193 = 3 *Sar.* 519 = 3 *Suth.* 190.

Reversal on appeal of.

—Grounds. See **DECREE—APPEAL FROM—REVERSAL ON.**

—Party in possession under—Revenue paid by, prior to reversal—Recovery from opponent of—Right of. See **CONTRACT ACT—SS. 69, 70—DECREE REVERSED ON APPEAL.** (1893) 20 *I. A.* 160 (163-4) = 21 *C.* 142.

—Possession under decree prior to—Rightful or wrongful. See **POSSESSION — WRONGFUL POSSESSION—DECREE SUBSEQUENTLY REVERSED.**

(1893) 20 *I. A.* 160 (163) = 21 *C.* 142.

Setting aside of.

—Fraud in obtaining decree—Setting aside on ground of. See **DECREE—FRAUD IN OBTAINING—SETTING ASIDE OF DECREE.**

—Suit for—Maintainability — Competent Court—Decree of, irregularly, passed. See **JURISDICTION—ABSENCE OF—IRREGULAR EXERCISE OF.**

(1915) 42 *I. A.* 171 (176) = 37 *A.* 485 (494-5).

Several decrees in same suit.

—Merger of earlier in later—Doctrine of. See **DECREE — MERGER.**

Suit—Events subsequent to.

—Decree on foot of—Grant of—Propriety. See **HINDU LAW—REVERSIONER—PRESUMPTIVE REVERSIONER—WIDOW—ALIENATION BY—POSSESSION OF PROPERTY. SUBJECT OF.** (1871) 14 *M. I. A.* 176 (193)

Title—Declaration of, and injunction against trespasser—Suit by person with only possessory right for.

—Decree in—Form of. See **SPECIFIC RELIEF ACT—S. 42—CASES UNDER—TRESPASSER.**

(1893) 20 *I. A.* 99 (106-107) = 20 *C.* 834 (842-3)

Trespasser—Declaration of title and injunction against—Suit for.

—Decree in—Form of—Plaintiff with only possessory right. See **SPECIFIC RELIEF ACT—S. 42—CASES UNDER—TRESPASSER.**

(1893) 20 *I. A.* 99 (106-7) = 20 *C.* 834 (842-3).

Unascertained sums—Set-off of one of, against another.

—Decree based on—Validity.

The Court has set off one unascertained sum against another unascertained sum. It seems to their Lordships that this mode of settlement, if suggested to the parties as a compromise, might perhaps have been, with their assent, a fit end of the litigation; but they think it cannot properly be made the basis of a decree between hostile litigants, and, therefore, that the decree so founded ought not to stand in its present shape (386). (*Sir Montague E. Smith*.) **MUSST. BEBEE BACHUN v. SHEIKH HAMID HOSSEIN.** (1871) 14 *M. I. A.* 377 = 17 *W. R.* 113 = 10 *B. L. R.* 45 = 2 *Suth.* 531 = 3 *Sar.* 39.

DECREE—(Concl'd.)**Validity of.**

—Defendant deceased—Legal representative real of—Omission to implead—Effect. *See* EXECUTION SALE—NULLITY—IRREGULARITY—LEGAL REPRESENTATIVE, ETC.

—Judgment-debtor's right to dispute—Estoppel. *See* EVIDENCE ACT, S. 115—CASES UNDER — CONSENT DECREE.

—Minor not properly represented in suit—Decree in case of. *See* EXECUTION SALE—NULLITY—IRREGULARITY—MINOR NOT PROPERLY REPRESENTED, ETC.

(1904) 32 I. A. 23 (26) = 32 C. 296 (314-5).

—Person not party to suit or properly represented on record—Decree against. *See* EXECUTION SALE—NULLITY—IRREGULARITY—PERSONS NOT PARTIES TO PROCEEDINGS, ETC.

(1904) 32 I. A. 23 (33) = 32 C. 296 (312).

Variation of, in appeal to avoid misconception.

—*See* DECREE—APPEAL FROM—VARIATION OF DECREE IN, ETC.

Water-course—Artificial water-course on neighbour's land.

—Water flowing to one's own land through—Infringement of—Suit for—Decree in—Form of. *See* WATER-COURSE—ARTIFICIAL WATER-COURSE — NEIGHBOUR'S LAND.

(1878) 6 I. A. 33 = 4 C. 633.

Zur-i-peshgi lease—Possession and mesne profits on—Decree for.

—Execution sale of right and title of lessee under lease—Purchaser at—Mesne profits due under decree—Right to—Decree not attached or sold. *See* EXECUTION SALE — PURCHASER AT — RIGHT OF — ZUR-I-PESHGI LEASE.

(1880) 6 C. 213.

DECREE-HOLDER.

—*See* EXECUTION SALE — PURCHASER AT—DECREE-HOLDER AND ALSO JUDGMENT-DEBTOR.

DEED.

ADMISSION IN—EFFECT.

AFFIRM AND DISAFFIRM.

AGREEMENT.

ALTERATION OF.

AMOUNT RECOVERABLE UNDER—STAMP ON DEED INSUFFICIENT.

ANTE-NUPTIAL AGREEMENT.

ANTE-NUPTIAL SETTLEMENT.

APPROBATE AND REPROBATE.

AREA—BOUNDARY—CONFLICT BETWEEN — WHICH PREVAILS.

ASSIGNMENT.

ATTESTATION OF.

ATTESTORS TO.

AUTHENTICITY OF.

BOND.

BOUNDARY—AREA—CONFLICT BETWEEN.

CANCELLATION OF.

CONSIDERATION FOR.

CONSTRUCTION OF.

CUSTODY PROPER OF.

DATE OF.

DECEASED—DEED BY.

DECLARATION OF INVALIDITY OF.

DEEDS DIFFERENT.

DESCRIPTION OF PROPERTY IN—MISTAKE AS TO—EVIDENCE.

EARLIER AND LATER DEEDS.

EFFECT OF.

DEED—(Cont'd.)

EJECTMENT SUIT—RIGHT OF—DEED BARRING, ENFORCEABILITY OF.

ESCROW.

ESTATE CONVEYED UNDER.

ESTOPPEL BY.

EXECUTANT OF.

EXECUTION OF.

FORGED AND FRAUDULENT DEED—PRACTICE OF SETTING UP.

FORGERY OF.

FRAUD IN REGARD TO.

FRAUDULENT CONCEALMENT OF—THEORY OF. GENUINENESS OF.

INCORPORATION OF ONE, IN ANOTHER.

INEQUITABLE BARGAIN—TEST.

INTENDED EXECUTION BY SEVERAL—ACTUAL EXECUTION BY SOME ONLY.

INTEREST IN.

MISTAKE IN—DESCRIPTION OF PROPERTY — MISTAKE AS TO.

NAME GIVEN BY PARTIES TO.

NATURE OF.

NOTICE OF.

OPERATIVE CHARACTER OF.

OPERATION OF.

REAL TRANSACTION — UNREAL TRANSACTION NOT INTENDED TO OPERATE ACCORDING TO ITS TENOR.

RECITALS IN.

RECTIFICATION OF.

REGISTRATION OF.

REVOCATION OF.

SETTING ASIDE OF.

STAMP ON, INSUFFICIENT.

STRANGER TO.

STRIKING OUT PORTIONS OF, TO MAKE DEED VALID.

SUIT TO SET ASIDE.

UNDUE INFLUENCE.

VALIDITY OF.

VERNACULAR DEED.

WORDS IN.

WRITTEN STATEMENT—DEED SET UP IN.

Admission in—Effect.

—Deed *inter partes*—Deed not *inter partes*—Distinction. *See* ADMISSION—(1) CONSIDERATION AND (2) DEED—ADMISSION IN.

Affirm and disaffirm.

—Rule against. *See* APPROBATE AND REPROBATE.

Agreement.

—*See* AGREEMENT.

Alteration of.

—Enforceability of deed—Effect on. *See* MORTGAGE—EQUITABLE MORTGAGE—ENFORCEABILITY — ALTERATION OF MEMORANDUM, ETC.

(1916) 43 I.A. 122 (125) = 43 C. 895.

—Explanation for—Onus of proof as to — Rule—Exceptions—Condition of deed when first produced—Issue as to—Applicability of rule in case of—Conditions.

In an ordinary case the person who presents an instrument, which is an essential part of his case, in an apparently altered and suspicious state, must fail from the mere infirmity or doubtful complexion of his proof, unless he can satisfactorily explain the existing state of the document. But this rule admits of exceptions, if there be, independently of the instrument, corroborative proof strong enough to rebut the presumption which arises against an apparent and presumable falsifier of evidence; and such corroborative proof will be greatly strengthened, if there be reason to suppose that the opposite party has withheld evidence which

DEED—(Contd.)**Alteration of—(Contd.)**

would prove the original condition and impost of the suspected document. And where one of the issues to be determined is, what was the condition of the document when it was first produced by those who claim under it, it may be fairly contended by the parties claiming under the document that the above rule is not applicable to them, until that question has been decided against them (17-8). (*Lord Justice Knight Bruce.*) **MUSSAMUT KHOOB CONWUR v. BABOO MOODNARAIN SINGH.** (1861) 9 M.I.A. 1 =

1 W. R. 36 (P.C.) = 1 Suth. 465 = 1 Sar. 813.

—*Forgery by—Issue as to—Decision of, solely on inspection of deed and consideration of its contents—Propriety—Evidence in the case—Presumptions from conduct thence arising—Consideration of—Necessity.*

The suit was, *inter alia*, to set aside so much of a deed of grant of a *Mokurrari Istemrari* lease, as purported to be a grant of a conveyance of the suit villages, which was alleged by the plaintiff to be a forged and fabricated document, so far as regarded certain defacements that appeared on the face of the deed. The plaintiff admitted that the deed set up by the defendants-appellants was duly executed and that the grant was by it made to be one for *L.* He contended that the words importing that the grant was to be to *L.* "together with his uterine brothers from generation to generation" had been fraudulently substituted by the appellants. The appellants contended, on the other hand, that those words had always formed part of the document.

The decision of the Sudder Court, which held that there had been a fraudulent alteration of the terms of the deed, and decreed in favour of the plaintiff, rested entirely on the evidence which, in the opinion of the judges, the inspection of the document and the consideration of its contents afforded of the falsity of the explanation of its suspicious appearance given by the appellant. Those judges did not consider the corroborative proofs in support of the appellant's case.

Held, that the case could not be properly decided without weighing the whole evidence on either side, and applying the presumptions from conduct thence fairly arising, to the consideration of the opposite statements or theories with respect to the alteration of the instrument, that had been put forth by the respective litigants (17). (*Lord Justice Knight Bruce.*) **MUSSAMUT KHOOB CONWUR v. BABOO MOODNARAIN SINGH.** (1861) 9 M.I.A. 1 =

1 W. R. 36 (P.C.) = 1 Suth. 465 = 1 Sar. 813.

—*Time of, before signature—Onus of proof of—Suit upon altered deed.*

If a plaintiff produces a bond in this country, or any other instrument which appears to have been altered, the court will not receive it or act upon it till it is most satisfactorily proved by all the subscribing witnesses at the least, and other evidence, that that alteration was made antecedently to the signature. (*Lord Wynford.*) **PETAMBER MANIKJEE v. MOTEECHUND MANIKJEE.**

(1837) 1 M.I.A. 420 (429) = 5 W. R. 53 (P.C.) = 1 Suth. 71 = 1 Sar. 136.

—*Negotiable instrument—Alteration of.* See **NEGOTIABLE INSTRUMENT.**

Amount recoverable under—Stamp on deed insufficient.

—*Cutting down of amount to portion covered by stamp in fact affixed—Permissibility.* See **STAMP ACT II OF 1899, S. 35.** (1871) 14 M. I. A. 24 (39).

—*Payment of deficient stamp duty and penalty—Recovery of entire amount in case of.* See **STAMP ACT II OF 1899, SS. 35, PROVISIO (a) & 26.**

(1924) 51 I. A. 332 = 4 P. 34.

Ante-nuptial agreement.

—*See ANTE-NUPTIAL AGREEMENT.*

DEED—(Contd.)**Ante-nuptial settlement.**

—*See DEED—CONSTRUCTION OF—ANTE-NUPTIAL SETTLEMENT.*

Approbate and reprobate.

—*Rule against.* See **APPROBATE AND REPROBATE.**

Area—Boundary—Conflict between—Which prevails.

—*Decree—Land awarded by.*

Where a decree for possession of land was "that the plaintiff obtain possession of 2,967 beeghas, 10 cottahs of disputed land mentioned in the plaint, and in the map of the Court Ameen, according to the boundaries given in the plaint," and it turned out that those quantities were not strictly accurate, *held*, that the true construction of the decree was that it was a judgment for all the land contained within the boundaries stated in the plaint (447).

The decree must be interpreted as if it were a conveyance of land stating the boundaries, and then saying that it contains so many acres; of course the real conveyance would be of the land within the boundaries, and it would be a mere false description that there was some slight mistake in the quantities (447). **BABOO PUHLWAN SINGH v. MAHARAJAH MOHESHUR BUKSH SINGH.**

(1871) 2 Suth. 442 = 9 B. L. R. 150 (169-70) = 16 W. R. 5 = 2 Sar. 683.

—*Execution sale—Certificate of.*

The plaintiff's son did not purchase all *T's* share in holding No. 85, but only a certain quantity in that holding, the situation of which was not clearly defined. The origin of his title is a sale under the decree of the court directing a sale in execution. The whole holding was sold; there was no unsold residue. The justice of the case requires that the plaintiff, whose son paid for 1 beegah, 14 cottahs should obtain that entire quantity, if so much exists in the holding unsold to others, and if so much does not exist, then all that is capable of being so applied. His claim, however, can extend no further than the sale boundaries (200-1). (*Sir James Colville.*) **RAM CHUNDER DUTT v. CHUNDER COOMAR MUNGUL.** (1869) 13 M. I. A. 181 = 2 Sar. 507.

—*See BENGAL ACTS—LAND REGISTRATION ACT VII OF 1876, S. 7.* (1889) 17 C. 304.

—*See BOUNDARY—EVIDENCE—HAKIKAT CHOW-HUDDIBANDI PAPERS—AREA, ETC.*

(1917) 43 I. C. 361 (368).

—*Jungle land not measured.*

A plot of land conveyed by a sanad under which the defendants-respondents claimed a *mokurari* right was stated to be two puras in extent and to be bounded on the north by a cattle track, on the west by the Kalni Bil, on the south by the Utiarkona khal, and on the east by an ail boundary ridge between Mauzah Sahildeo and Mauza Dattagathi. The land between the Kalni Bil on the west and the boundary ridge between Mauza Sahildeo and Mauza Dattagathi was seven puras in extent, and the defendants claimed to be entitled to the same under the sanad. In 1740 when the sanad was granted, and, in 1815, when it was renewed, the land was covered by jungle and had not been measured. On a question arising as to the extent of land covered by the sanad, the High Court held that extent given therein was merely a misdescription and that the sanad covered all the lands up to the boundaries between the Mauza Sahildeo and Dattagathi. Their Lordships found it difficult to accept the conclusion that the mention of two puras in the sanad merely amounted to a misdescription which might be rejected for the purpose of interpreting that document. (*Sir John Edge.*) **DHARANI KANTA LAHIRI v. GARBAR ALI KHAN.**

(1912) 13 M. L. T. 185 = (1913) M. W. N. 157 = 17 C. W. N. 389 = 17 C. L. J. 277 =

15 Bom. L. R. 445 = 18 I. C. 17 = 25 M. L. J. 95 (100).

DEED—(Contd.)

Area—Boundary—Conflict between—Which prevails—(Contd.)

—See LANDLORD AND TENANT—NOTICE TO QUIT—SUFFICIENCY OF—AREA OF HOLDING.

(1918) 45 I. A. 222 (229-30) = 46 C. 458 (479-80).

Assignment.

—Deed of. See ASSIGNMENT AND ASSIGNMENT DEED.

Attestation of.

(See also (1) HINDU LAW — REVERSIONER — WIDOW—ALIENATION BY—ATTESTATION OF DEED OF; (2) HINDU LAW—WILL—EXECUTION OF—ATTESTATION OF; AND (3) T. P. ACT, S. 59.)

—Consent to deed from—Presumption of.

Quere, whether from the circumstance of A being merely a witness to the execution of a deed by B, A's assent to the deed might be inferred (212). (*Lord Shand.*) SARAT CHUNDER DEY v. GOPAL CHUNDER LAHA.

(1892) 19 I. A. 203 = 20 C. 296 (307) = 6 Sar. 224.

—Attestation of a deed by itself estops a man from denying nothing whatever except that he witnessed the execution of the deed, and by itself does not show that he consented to the transaction which the document effects. (*Sir Lancelot Sanderson.*) BHAGWAN SINGH v. UJAGAR SINGH.

(1927) 47 C. L. J. 189 = 107 I. C. 20 =

30 Bom. L. R. 267 = 29 Punj. L. R. 182 =

32 C. W. N. 538 = I. L. T. 40 L. 49 = 27 L. W. 672 =

26 A. L. J. 553 = (1928) M. W. N. 933 =

A. I. R. 1928 P. C. 20 = 54 M. L. J. 254 (260).

—Deeds executed at short intervals—Attestation of, by same persons — Presumption against genuineness of deeds from. See DEED—GENUINENESS OF—PRESUMPTION AGAINST—ATTESTATION BY SAME PERSONS, ETC.

(1861) 8 M. I. A. 467 (469-70).

—Execution of deed—Attestation after—Practice of.

It is extremely doubtful whether the subscribing witnesses were in fact present at the place of execution; and whether, according to a reprehensible practice, not uncommon in India, their names were not afterwards written on the deed. (*Sir James W. Colville.*) GERESH CHUNDER LAHOREE v. MUSSUMAT BHUGGOBUTTY DEBIA.

(1870) 13 M. I. A. 419 (430) = 14 W. R. (P. C.) 7 =

2 Suth. 339 = 2 Sar. 579.

—Knowledge of contents of deed from—Presumption of.

It is not always that a witness to a document knows what the contents of the document are, or how the parties have been described, but it frequently occurs in native documents that a man signs as a witness to show that he is acknowledging the instrument to be correct. (*Sir Barnes Peacock.*) VADREVU RANGANAYAKAMMA v. VADREVU BULLI RAMAIVA.

(1879) 3 Suth. 680 = Bald. 321 (329) =

5 C. L. R. 439.

—Attestation proves no more than that the signature of an executing party has been attached to a document in the presence of a witness. It does not involve the witness in any knowledge of the contents of the deed nor affect him with notice of its provisions. It could, at the best, be used for the purpose of cross-examination, in order to extract from the witness evidence to show that he was, in fact, aware of the character of the transaction effected by the document to which his attestation was affixed (255). (*Lord Buckmaster, L.C.*) BANGA CHANDRA DHUR BISWAS v. JAGAT KISHORE CHOWDHURY.

(1916) 43 I. A. 249 =

44 C. 186 (199) = 20 M. L. T. 335 =

(1916) 2 M. W. N. 336 = 4 L. W. 448 =

18 Bom. L. R. 868 = 24 C. L. J. 487 = 14 A. L. J. 1103 =

21 C. W. N. 225 = 1 Pat. L. W. 1 = 36 I. C. 420 =

31 M. L. J. 563.

DEED—(Contd.)

Attestation of—(Contd.)

—Assent to deed from—Presumption of—Validity of deed—Right to dispute—Estoppel.

Attestation of a deed by itself estops a man from denying nothing whatever excepting that he has witnessed the execution of the deed. It conveys, neither directly nor by implication, any knowledge of the contents of the document, and it ought not to be put forward alone for the purpose of establishing that a man consented to the transaction which the document effects. It is, of course, possible that an attestation may take place in circumstances which would show that the witness did in fact know of the contents of the document, but no such knowledge ought to be inferred from the mere fact of the attestation (22). A person is not estopped by his mere signature as an attesting witness unless it can be established by independent evidence that to the signature was attached the express condition that it was intended to convey something more than a mere witnessing of the execution, and was meant as involving consent to the transaction (23). If in fact there be a practice that when the consent of parties to transactions is required, it can be obtained by inducing them, by one means or another, to attest a signature of the executing parties, the sooner that practice is discontinued the better it will be for the straightforward dealing essential in all business matters (24-5).

Where the Court below stated: "The mere attestation of a sale-deed does not work an estoppel unless it is pleaded and proved that such attestation has induced a belief followed by action," *held*, that estoppel did not arise from any such circumstance. Attestation itself does not affect it, nor does the belief of other parties as to the meaning of attestation affect the man who has placed his signature as a witness, unless it can be established that he knew that that belief would arise, and signed with that intent (22-3). (*Lord Buckmaster.*) PANDURANG KRISHNAJI v. MARKANDEYA TUKARAM.

(1921) 49 I. A. 16 = 49 C. 334 (341-2) =

26 C. W. N. 201 = 18 N. L. R. 1 = 20 A. L. J. 305 =

15 L. W. 486 = 30 M. L. T. 249 = 35 C. L. J. 409 =

24 Bom. L. R. 557 = 3 U. P. L. R. (P. C.) 85 =

5 N. L. J. 6 = A. I. R. 1922 P. C. 20 = 65 I. C. 954 =

42 M. L. J. 436.

—Marksman—Attestation by—Value of.

The attestation of a deed by persons unable to sign their own names is worth next to nothing (276). (*Lord Romilly.*) SEETHUL PERSHAD v. MUSSUMAT DOOLHIN BADAM KONWUR.

(1867) 11 M. I. A. 268 = 8 W. R. (P. C.) 22 =

2 Suth. 83 = 2 Sar. 281.

—Meaning of. See T. P. ACT, S. 59.

—Same persons attesting deeds executed at short intervals—Suspicion from. See DEED—GENUINENESS OF—PRESUMPTION AGAINST—ATTESTATION BY SAME PERSONS, ETC.

(1861) 8 M. I. A. 467 (469-70).

—Witnesses to deed—Attestation in presence of each other—Provision for—Acknowledgment of attestation in presence of fellow witness—Sufficiency of. See WILLS ACT (XXV OF 1838), S. 7—WITNESSES TO WILL.

(1845) 3 M. I. A. 395 (403-4).

Attestors to.

(See also DEED—ATTESTATION OF.)

—Deeds executed at short intervals—Attestors to, being same persons—Presumption against genuineness of deeds from. See DEED—GENUINENESS OF—PRESUMPTION AGAINST—ATTESTATION BY SAME PERSONS, ETC.

(1861) 8 M. I. A. 467 (469-70).

—Executants if can also be.

Where attestation of a document is, by law, obligatory and an essential part of the document, *Quere*, whether the same person could both execute and witness the document.

DEED—(Contd.)**Attestors to—(Contd.)**

(*Lord Chancellor.*) ARDESHIR BHICAJI TAMBOLI v. THE AGENT, G. I. P. RY. CO., BOMBAY. (1927) 55 I.A. 67 = 52 B. 169 = 47 C. L. J. 214 = 5 O. W. N. 229 = 30 Bom. L. R. 275 = 107 I. C. 124 = 9 P. L. T. 171 = 32 C. W. N. 544 = 27 L. W. 687 = 26 A. L. J. 545 = (1928) M. W. N. 938 = A. I. R. 1928 P. C. 24 = 54 M. L. J. 167 (171).

——List of, in handwriting of writer of deed—Presumption against genuineness of deed from. *See* DEED—GENUINENESS OF—PRESUMPTION AGAINST—ATTESTORS—LIST OF, ETC. (1876) 3 I. A. 154 (186) = 1 M. 69.

——Signatures of, above that of executant—Presumption against genuineness of deed from. *See* DEED—GENUINENESS OF—PRESUMPTION AGAINST—ATTESTORS—SIGNATURES OF, ETC. (1876) 3 I. A. 154 (186) = 1 M. 69.

Authenticity of.

——Meaning of. *See* REGISTRATION ACT OF 1843, S. 2, PROVISOR. (1865) 10 M. I. A. 220 (228).

Bond.

——*See* BOND.

Boundary—Area—Conflict between.

——Which prevails. *See* DEED—AREA—BOUNDARY.

Cancellation of.

——Declaration of invalidity against party of—Distinction—Decree proper. *See* DEED—SETTING ASIDE OF—DECLARATION OF INVALIDITY AGAINST PARTY OF.

——Possession of land covered by—Suits for—Distinction—Test. *See* SPECIFIC RELIEF ACT, S. 39—DEED.

(1902) 29 I.A. 203 (210-3) = 25 A. 1 (15-6).

Consideration for.

(*See also* EVIDENCE ACT, S. 92.)

——Admission in deed of receipt of—Presumption from. *See* ADMISSION—CONSIDERATION.

——Inadequacy of—Setting aside of deed on ground of—Conditions. *See* SALE-DEED—CONSIDERATION FOR—INADEQUACY OF. (1877) 3 C. 192 (196).

——Presumption of—Onus of proof—Possession and enjoyment under deed admitted—Suit to enforce deed—Suit to set aside deed for want of consideration—Distinction.

A contract made under seal does not, no doubt, of itself import that there was a sufficient consideration for the agreement. But the mere denial of the receipt of the consideration stated is not in all cases sufficient to cast upon the party relying upon the instrument the burden of proving payment of that consideration. There is a distinction between a case in which a party claiming under a security bond comes into court to enforce the bond, and the case in which a party, like the respondent, sues to set aside a contract under which there has been possession and enjoyment, and of which, so far as it has yet been capable of being performed, there has been performance. In the latter case, the law of India, as of this and probably every other country, casts upon the plaintiff the burden of establishing at least a good *prima facie* title to the relief which he seeks (313-4). (*Sir James W. Colville.*) KALEEPERSHAD TEWAKEE v. RAJAH SAHIB PERHLAD SEIN.

(1869) 12 M. I. A. 282 = 12 W. R. (P.C.) 6 = 2 B.L.R. (P.C.) 111 = 2 Suth. 225 = 2 Sar. 430.

——Presumption of, from admission in deed of receipt of. *See* ADMISSION—CONSIDERATION.

——Suit to recover—Laches in instituting—Presumption adverse from—Recital in deed of receipt of consideration.

In a suit to recover with interest the amount made payable by the appellants to the respondent under a deed of

DEED—(Contd.)**Consideration for—(Contd.)**

compromise, their Lordships observed, with regard to the argument based on the delay in the institution of the suit: "Another circumstance which also had weight with their Lordships at one time, is the delay in the institution of the suit. That circumstance is no doubt deserving of consideration. It may have been that the respondent was prevented from instituting the suit sooner, by delusive and evasive promises made from time to time. The mere circumstance of the delay in the suit is a circumstance of some weight, but not of any great weight, when we look at the other facts of the case." (*Mr. Baron Parke.*) CHOWDRY DEBY PERSAD v. CHOWDRY DOWLAT SINGH.

(1844) 3 M. I. A. 347 (357-8) = 6 W.R. 55 = 1 Sar. 288 = 1 Suth. 161.

Construction of.

——Abandonment of one—Claim subsequent on basis thereof—Maintainability.

A party who, in a prior suit, deliberately elected to disclaim any title under an instrument as a will, is precluded from insisting in a subsequent suit upon the same instrument as being a valid will and testament (72-3). (*Lord Westbury.*) SRIMUT RAJAH MOOTOO VIJAYA R. B. G. TEVAR v. KATAMA NACHIAR. (1866) 11 M.I.A. 50 = 10 W.R. (P.C.) 1 = 2 Suth. 46 = 2 Sar. 212.

——Actings of parties—Reference to. *See* DEED—CONSTRUCTION—CONDUCT OF PARTIES.

——Ambiguity in deed—Breach of duty—Construction implying—Propriety.

Where a deed admits of more than one construction, that construction of it is to be preferred which is consistent with the presumption that the party to it did not commit a breach of duty in doing what he did by the deed (101). (*Sir James W. Colville.*) NILMADHUB DOSS v. BISHUMBER DOSS.

(1869) 13 M.I.A. 85 = 12 W.R. (P.C.) 29 = 3 B. L. R. 27 = 2 Suth. 257 = 2 Sar. 489.

——Ambiguity in deed—Conduct of parties—Reference to. *See* DEED—CONSTRUCTION—CONDUCT OF PARTIES.

——Ambiguity in deed—Validating construction—Necessity.

All ambiguous documents should be construed rather to make them accord with law than to make them conflict with it. (*Lord Hobhouse.*) MAHARAJAH OF BHARATPUR v. RAM KANNO DEL. (1900) 28 I. A. 35 (42) = 23 A. 181 (190) = 5 C.W.N. 137 = 3 Bom. L.R. 51 = 7 Sar. 792.

——Antecedent communications—Explanation or interpretation of deed by.

A contract must be construed according to its own terms and not explained or interpreted by the antecedent communications which led up to it. (*Viscount Dunedin.*) BOMANJI v. SECRETARY OF STATE. (1928) 56 I.A. 51 =

53 Bom. 230 = 27 A.L.J. 47 = 33 C.W.N. 293 = 49 C.L.J. 179 = I.D. (1929) P.C. 41 =

31 Bom. L.R. 256 = 114 I.C. 1 = A.I.R. 1929 P. C. 34.

——Antecedents facts—Surrounding circumstances—Reference to—Permissibility.

It may be that, if any doubt arises as to the meaning of any of the written instruments, their meaning may be more satisfactorily ascertained by reference to the preceding facts and the surrounding circumstances (461). (*Dr. Lushington.*) ZEMINDAR OF RAMNAD v. ZEMINDAR OF YETTIA-PURAM. (1859) 7 M.I.A. 441 = 1 Suth. 360 = 1 Sar. 701.

——Ante-nuptial settlement—Estate taken by wife under—Absolute estate.

A Hindu executed an ante-nuptial settlement whereby he conveyed immoveable property to his wife B, her heirs,

DEED—(Contd.)**Construction of—(Contd.)**

executors, administrators, and assigns for ever, subject to the following conditions:—

(1) If the said *B* shall die before the said intended marriage has been celebrated and completed then the said property shall revert to and again become the absolute property of the settlor, his heirs, executors, administrators, and assigns.

(2) If the said *B* shall die after the said intended marriage has been celebrated and completed without leaving issue of the said intended marriage who shall succeed to a vested interest in the said property, then the said property shall be dealt with as she may direct or declare by will or deed, or failing any will or deed, then the same shall vest in her legal heirs according to Hindu law of the Bombay school.

Held, that, whether the deed was to be construed according to English law, or by Indian law, *B* took under it an absolute estate of inheritance. (*Lord Davey*.) *BAI KESSERBAI v. HUNSAJ, MORARJI*.

(1906) 33 I.A. 176 (187) = 30 B. 431 (441 2) = 10 C.W.N. 802 = 4 C.L.J. 9 = 8 Bom. L.R. 446 = 3 A.L.J. 484 = 1 M.L.T. 211 = 16 M.L.J. 446.

—Appointment of heir, present and irrevocable—Will. See HINDU LAW—WILL—APPOINTMENT OF HEIR, ETC. (1884) 11 I. A. 197 (208-9) = 11 C. 186 (197-8).

—Area—Boundary—Conflict between—Which prevails. See DEED—AREA—BOUNDARY.

—Area—Sale-deed—Schedule to—Area given in—Assurance or misdescription. See SALE-DEED—AREA IN SCHEDULE TO. (1920) 25 C. W. N. 385 (396-7).

—Assignment deed. See ASSIGNMENT—ASSIGNMENT-DEED.

—Authority to adopt—Will—Distinction—Test. See HINDU LAW—ADOPTION—AUTHORITY TO ADOPT—WILL.

—Boundary—Area—Conflict between. See DEED—AREA—BOUNDARY.

—Breach of duty—Construction implying. See DEED—CONSTRUCTION—AMBIGUITY IN DEED—BREACH OF DUTY. (1869) 13 M. I. A. 85 (101).

—Circumstances to be considered.

The question is entirely one of construction, and in common with all such questions can only be properly answered after a consideration of all the surrounding circumstances, the position of the parties to the agreement, its subject-matter, and the apparent purpose and object thereof, and in particular of the provisions to be construed (278). (*Lord Warrington of Clyffe*.) *GEORGE RICHARDS LAFFER v. FRANCIS ARNOLD GILLEN*. (1927) 47 C. L. J. 327 = A. I. R. 1927 P. C. 275 = 107 I. C. 347 (1).

—Circumstances relating to execution of deed—Reference to.

In a case in which the question was whether, by an agreement between one *P* and certain persons called the Watsons, *P* became, at least as regards third persons, a partner with the Watsons, *held*, that it was necessary to advert to some extrinsic facts to explain the circumstances under which the agreement was made and acted on (98). (*Sir Montague E. Smith*.) *MOLLWO MARCH & CO. v. THE COURT OF WARDS*. (1872) Sup. I. A. 86 = 10 B. L. R. 312 = 18 W. R. 384 = 3 Sar. 168 = 9 Moo. P. C. (N. S.) 214 = 2 Suth. 715.

—Where the question was whether a pottah and an ikrarnamah of even date created a mortgage, or were a sale of the property affected by those deeds with a provision for

DEED—(Contd.)**Construction of—(Contd.)**

its repurchase on certain conditions personal to the mortgagor, *held*, that in order to determine that question it was necessary to consider the circumstances under which the two documents were executed, as well as to examine the documents themselves (130-1). (*Sir Robert P. Collier*.) *SITUL PERSHAD v. LUCHMI PERSHAD SINGH*.

(1883) 10 I. A. 129 = 10 C. 30 (33-4) = 13 C. L. R. 382 = 4 Sar. 470.

—Collateral security—Deed depositing—Sale of security within meaning of—Return of, to assignee of debtor on payment of its full value if a.

A document by which *F. & Co.* deposited with the appellant bank chilli copper as collateral security for amounts due by them to the bank on various accounts gave the bank the right to sell or dispose of the copper by public or private sale for reimbursing itself in default of payment. *F. & Co.* having become insolvents, the bank delivered the copper over to their assignees on payment of its full value.

Held, that returning the copper to the assignees on payment of its full value was a disposition of it fairly within the terms of the instrument depositing the collateral security, that such a disposition of the copper was a sale of it in all essential particulars, and that the assignees were purchasers for a full consideration (39-40). (*Dr. Lushington*.) *BANK OF BENGAL v. RADAKISSEN MITTER*.

(1842) 3 M. I. A. 19 = 1 Sar. 231.

—Compromise. See COMPROMISE.

—Compromise confirmed by decree of Court—Deed executed pursuant to—*Maxim* Ut res magis valeat quam pereat—Applicability.

In dealing with an instrument of this kind carrying out a decision of the court, their Lordships ought to take for their guidance the rule that, if possible, such a document should be construed, *ut res magis valeat quam pereat*.

N.B.—The document in question was a settlement executed in compliance with an agreement, which embodied a compromise of a suit arrived at between the parties, which compromise was again confirmed by a decree of the Court. (*Lord Phillimore*.) *LAL RAM SINGH v. DEPUTY COMMISSIONER OF PARTABGARH*. (1923) 50 I. A. 265 (273) = 45 A. 596 (603) = 21 A. L. J. 777 = 26 O. C. 257 = 9 O. & A. L. R. 746 = 33 M. L. T. 355 = (1923) M. W. N. 591 = 10 O. L. J. 513 = 29 C. W. N. 86 = 76 I. C. 922 = A. I. R. 1923 P. C. 160.

—See also DEED—CONSTRUCTION—Contemporanea Expositio.

—Conduct of parties—Reference to—Permissibility.

In a case in which the question was whether, by an agreement between one *P* and certain persons called the Watsons, *P* became, at least as regards third persons, a partner with the Watsons, *held*, that the acts of *P* subsequent to the agreement could not in any way add to or enlarge his liability under it (99). (*Sir Montague E. Smith*.) *MOLLWO MARCH & CO. v. THE COURT OF WARDS*.

(1872) Sup. I. A. 86 = 10 B. L. R. 312 = 18 W. R. 384 = 3 Sar. 168 = 9 Moo. P. C. (N. S.) 214 = 2 Suth. 715.

—See DEED—CONSTRUCTION—ESTATE CONVEYED—EVIDENCE—TERMS OF DEED. (1875) 24 W. R. 176.

—Their Lordships think that this case may be decided upon the construction of the document, and that it is not necessary to have recourse to the exposition of it to be derived from the conduct of the parties. It is satisfactory, however, to find that the view which has been taken by their Lordships of the construction of this document is that which the parties themselves evidently entertained (227). (*Sir Montague E. Smith*.) *BABOO LAKHRAJ ROY v. KUNHYA SINGH*. (1877) 4 I. A. 223 = 3 C. 210 (213) = 3 Sar. 758 = 3 Suth. 453.

DEED—(Contd.)**Construction of—(Contd.)**

——Parol evidence of what took place a considerable time after the execution of a document can hardly affect its construction (101). (*Sir James Colville.*) **PALLIKELA GATHA MARCAR v. SIGG.** (1880) 7 I. A. 83 =

2 M. 239 (258-9) = 3 Suth. 742 = 4 Sar. 131.

——What took place after the execution of that document can have no bearing on the construction of it (154-5). (*Lord Macnaghten.*) **VISSANJI SONS & CO. v. SHAPURJI BURJORJI BHAROOCHA.** (1912) 39 I. A. 152 =

16 C. W. N. 769 = 14 Bom. L. R. 493 = 9 A. L. J. 811 =

(1912) M. W. N. 691 = 16 C. L. J. 53 = 36 Bom. 387 =

12 M. L. T. 90 (P. C.) = 16 I. C. 98 = 23 M. L. J. 77.

——*Conduct of parties—Reference to—Permissibility—Ambiguity as to meaning of deed.*

The conduct of the parties to a contract reduced into writing may not vary or alter it, but their conduct may help to explain or elucidate a contract open to different meanings.

In a case, therefore, in which the question was whether a deed of arrangement between a Burmese, subject to the Burmese Buddhistic law, and his children by his deceased wife, was a division of inheritance in view of his approaching marriage with the respondent, or whether it was a mere agreement of partnership, *held*, that the mode in which the children of the deceased wife dealt with the shares allotted to them under the said arrangement was material, and that it helped to strengthen the conclusion that the arrangement was more a record of a division of rights and interest rather than a deed of partnership. (*Mr. Amcer Ali.*) **MA THAUNG v. MA THAN.** (1923) 51 I. A. 1 (8) =

51 C. 374 = 19 L. W. 477 = (1924) M. W. N. 662 =

3 Bur. L. J. 333 = 29 C. W. N. 559 =

A. I. R. 1924 P. C. 88 = 80 I. C. 1031 =

46 M. L. J. 618.

——*Conduct of parties—Reference to—Permissibility—Nature real of transaction—Reference for finding out. See EVIDENCE ACT, S. 92—DEED—NATURE REAL OF TRANSACTION, ETC.*

(1917) 44 I. A. 236 = 45 C. 320.

——*See HINDU LAW—WILL—CONSTRUCTION—CONDUCT OF PARTIES.* (1880) 7 I. A. 196 (207) =

3 A. 91 (103).

——*Conduct of parties—Reference to—Permissibility—Unambiguous deed.*

The legal construction or legal effect of an unambiguous document cannot be controlled or altered by evidence of the subsequent conduct of the parties (149). (*Lord Davey.*) **BALKISHEN DAS v. RAM NARAIN SAHU.**

(1903) 30 I. A. 139 = 30 C. 738 (752) =

7 C. W. N. 578 = 5 Bom. L. R. 461 = 8 Sar. 489.

——*Confirmatory deed—Fresh deed—Test. See HINDU LAW—GIFT—CONSTRUCTION—FRESH GIFT.*

(1919) 46 I. A. 285 (291) = 43 M. 244 (251).

——*Consent of party to compromise—Provision in agreement as to—Meaning and effect—Consent to be taken when possible. See LITIGATION—AGREEMENT TO FINANCE—COMPROMISE OF LITIGATION.*

(1924) 52 I. A. 1 = 48 M. 230 = 47 M. L. J. 93 (127-8).

——*Contemporanea expositio—Reference to—Ambiguous document.*

Contemporanea expositio as a guide to the interpretation of documents is often accompanied with danger, and great care must be taken in its application. But in the present case their Lordships do not feel themselves able to reject the assistance which it affords. The sanad upon which these important rights are founded is a document of a general and informal character. It admittedly is capable of a variety of constructions. The extreme literal construction is adopted by neither party. And when the ambi-

DEED—(Contd.)**Construction of—(Contd.)**

guity covers the geographical and pecuniary extent of an admittedly ambiguous grant, their Lordships think it legitimate to observe what was the footing upon which the grantors from the date of the grant and for a long period of time proceeded (211). (*Lord Shaw.*) **RAGHOJIRAO SAHEB v. LAKSHMANA RAO SAHEB.**

(1912) 39 I. A. 202 = 36 B. 639 (656) =

16 C. W. N. 1058 = 12 M. L. T. 472 =

(1912) M. W. N. 1140 = 14 Bom. L. R. 1226 =

17 C. L. J. 17 = 16 I. C. 239 = 23 M. L. J. 383.

——*Contemporaneous deed in favour of stranger—Admissibility in evidence of. See COMPROMISE—CONSTRUCTION—PAYMENT OUT OF OBLIGOR'S SHARE, ETC.*

(1919, 23rd May) H. C. File for 1919

(P. C. A. 64 of 1918).

——*Contemporaneous deeds of similar nature—Control by.*

The question was as to the construction of a sunnud dated 22—6—1800 granting a jaghire to one N. It was said that another sunnud or other sunnuds of the same kind were given at the same time relating to other jaghires.

Held that, assuming that was so, the question to be considered would not thereby be altered (57). (*Sir Robert P. Collier.*) **GULABDAS JUGJIVANDAS v. COLLECTOR OF SURAT.**

(1878) 6 I. A. 54 = 3 B. 186 (187) =

3 Sar. 889.

——*Contemporaneous transactions—Reference to—Permissibility—Deed not setting forth complete relations between parties.*

Two deeds were executed on 9—12—1918, one a deed of sale of the suit properties by the appellants to the 1st respondent, and the other an agreement of reconveyance by that respondent to the appellants. In relation to those deeds the question was who, on the right construction of a clause in the agreement of reconveyance, was entitled pending completion to have possession of the suit properties. The first court held that it was the female appellant. The Chief Court took the other view. Upon the construction put by the first court, there was on the face of the transaction little advantage to be gained out of it by the first respondent.

Their Lordships nevertheless adopted the construction put by the first court, observing:—"But this consideration" (that upon the construction adopted there was on the face of the transaction little to be gained out of it by the 1st respondent) "is of less importance when it is remembered that there were contemporaneous transactions between the appellants and the 1st respondent's husband. The complete relations indeed between the parties are not set forth in the deeds before the Board" (890 1). (*Lord Blanesburgh.*) **MA SA BON v. MA DA TWER.** (1924) 20 L. W. 884 =

84 I. C. 561 = A. I. R. 1924 P. C. 233.

——*Correspondence prior and subsequent between parties—Reference to. See CONTRACT ACT, S. 55—TIME OF ESSENCE OF CONTRACT—INTENTION AS TO—EVIDENCE.*

(1915) 43 I. A. 26 (33) = 40 B. 289 (299).

——*Covenant to pay out of obligor's share of inheritance in particular estate—Estate insolvent and obligor inheriting nothing—Liability to pay in case of. See COMPROMISE—CONSTRUCTION—PAYMENT OUT OF OBLIGOR'S, ETC.*

(1919, 23rd May) H. C. File for 1919

(P. C. A. 64 of 1918).

——*Debtor—Deed given to creditor by, undertaking to convey property as agreed to liquidate debt—Contract to convey property in complete extinguishment of debt—Charge on property for debt.*

I., who was indebted to the appellant, gave him a document dated 2—8—1923 which ran as follows:—"I confirm that we owe you nearly half-a-lakh of rupees, I shall convey

DEED—(Contd.)**Construction of—(Contd.)**

you my property known as "Mount Pleasant" as agreed by me to liquidate the amount as soon as I feel a little better."

Held, that the document of 2-8-23 might be regarded as an obligation to grant an out-and-out transfer, liquidating the amount due in the sense that no debt remained between the parties, the property having been given and accepted in complete liquidation, that is to say, in the sense of complete extinguishment of any existing debt, or as creating an equitable charge upon the property. (*Lord Shaw*.)

KHOO SAIN BAN v. JAN GUAT TEAN.

(1929) 7 R. 234 = 31 Bom. L. R. 873 = 30 L. W. 18 = 50 C. L. J. 99 = 117 I. C. 489 = 1929 M. W. N. 619 =

I. R. (1929) P. C. 257 = 33 C. W. N. 652 =

A. I. R. 1929 P. C. 141 = 57 M. L. J. 529.

—Deed, contemporaneous, earlier, other and subsequent—Reference to. *See* DEED—CONSTRUCTION (1) CONTEMPORANEOUS DEED; (2) EARLIER DEED; (3) OTHER DEED; AND (4) SUBSEQUENT DEED.

—Deed entire—Construction giving effect to—Necessity. *See* DEED—CONSTRUCTION—ENTIRE DEED.

—Each part of deed—Giving effect to—Necessity. *See* DEED—CONSTRUCTION—ENTIRE DEED.

—Earlier deed by same party—Decision on—If and when a precedent for interpretation of later deed by him.

The decision on an earlier document by the same person does not afford a precedent for the interpretation of a later deed by him, where the language of the two documents is entirely dissimilar (141). (*Sir Arthur Wilson*.) **NAWAB HAIDAR HUSAIN KHAN v. NAWAB FAGHUR MIRZA.**

(1905) 32 I. A. 135 = 27 A. 383 (391) = 2 C. L. J. 57 =

9 C. W. N. 817 = 3 A. L. J. 64 = 7 Bom. L. R. 850 =

8 O. C. 270 = 8 Sar. 826 = 15 M. L. J. 327.

—English law rules based on feudal customs, such as rule in Shelly's case—Inapplicability to deed by Hindu in Bombay. (*Lord Buckmaster*.) **MADHAVRAO GANPATRAO DESAI v. RAGHUNATH AGASKAR.** (1927) 55 I. A. 74 =

52 B. 176 = 47 C. L. J. 198 = 30 Bom. L. R. 282 =

107 I. C. 119 = 27 L. W. 400 = I. L. T. 40 B. 86 =

26 A. L. J. 560 = 32 C. W. N. 925 =

A. I. R. 1928 P. C. 33 = 54 M. L. J. 245.

—Entire deed to be considered—Each part of it to be given effect to.

An instrument must be taken as a whole, and that construction must be put upon it which will be a reasonable one, and will give effect to all the parts of it (6). (*Sir Richard Couch*.) **DEPUTY COMMISSIONER OF RAE BARELI v. I. AL RAMPAL SINGH.** (1884) 12 I. A. 1 =

11 C. 237 (244) = 4 Sar. 585 = R. & J.'s No. 87.

—It is one of the cardinal principles of construction of written documents that they must be construed as a whole; each provision they contain must receive attention; and from their several provisions the true intention of the parties to them is to be ascertained. (*Lord Atkinson*.) **MUTHU CHETTIAR v. MEENAKSHISUNDARAM AIYAR.**

(1927) L. T. 40 Mad. 47 = (1928) M. W. N. 91 =

5 O. W. N. 166 = 47 C. L. J. 183 = 107 I. C. 1 =

30 Bom. L. R. 261 = 27 L. W. 395 = 32 C. W. N. 569 =

26 A. L. J. 488 = A. I. R. 1928 P. C. 35 =

54 M. L. J. 82.

—Estate conveyed—Absolute or not—Words—*Naslan*—*bad-naslan*—Use of—Effect.

In the various cases in which the expressions *mokurruri*, *istimirari*, *istimirari mokurruri*, have been weighed and examined with a view to see whether an absolute estate was conferred or not, it seems to have been taken for certain that, if only the words *naslan*—*bad naslan* had been added, there would be an end to the argument, because an absolute

DEED—(Contd.)**Construction of—(Contd.)**

interest would have been clearly conferred (16-7). (*Lord Hobhouse*.) **THAKUR HARIHAR BUKSH v. THAKUR UMAN PARSHAD.**

(1886) 14 I. A. 7 =

14 C. 296 (307) = 4 Sar. 766.

—Estate conveyed—Deed executed in one capacity—Rights of executant in another capacity if pass under. *See* (1) EXECUTOR—CONVEYANCE BY, OF ALL RIGHT AND TITLE IN PROPERTY. (1914) 41 I. A. 189 =

42 C. 56 (64).

(2) MORTGAGE—EXECUTION OF, IN ONE CAPACITY.

(1919) 11 L. W. 241 (244-5)

—Estate conveyed—Evidence—Terms of deed—Surrounding circumstances—Conduct subsequent of parties—*Pottah* granted by *Zemindar*.

In order to determine the question whether the *pottah* granted in 1854 by a *Zemindar* to one *K* conveyed an estate for life only or an estate of inheritance, *held*, their Lordships must arrive as well as they can at the real intention of the parties, to be collected chiefly, no doubt from the terms of the instrument itself, but to a certain extent also from the circumstances existing at the time of its execution, and further by the conduct of the parties since its execution (159). **ROBERT WATSON & CO. v. MOHESH NARAIN ROY.** (1875) 3 Suth. 159 = 24 W. R. 176.

—Estate conveyed—Inheritance—Estate of—Gift of—Enumeration of heirs—Inaccuracy in—Effect. *See* HINDU LAW—GIFT—CONSTRUCTION—ESTATE OF INHERITANCE. (1905) 32 I. A. 181 (184) = 33 C. 23 (28).

—Estate conveyed—Life-estate to *A* and as to one-half of property granted, to his children and descendants after his death—Grant of—Alienation by grantee or descendants—Restriction on—Effect—Person unborn at date of *pottah*—Right to take under it.

Where a *pottah* stipulated that the lessee should remain in possession of the properties granted during her lifetime at a fixed rent, and on her death her descendants, who might according to the *Shastras* become her heirs, should permanently remain in possession of one-half of the properties and pay the annual rent, that the lessee or her descendants should not have any power to transfer the property, and if there should be no descendants of the lessee, *i.e.*, children born of her womb or their children, the lessors and their representatives should have power to resume and to take possession of the remaining one-half, and the properties mentioned in the *pottah* should revert to the grantor.

Held that, on the true construction of the *pottah*, the *pottadar* did not take an absolute estate in the one-half, and that, there being no descendant of hers living at the date of the *pottah*, the same reverted to the lessor at her death.

The *pottah* cannot be construed as giving one-half of the properties to the lessee for life, and the other half to her for an inheritable estate. It was plainly not intended that the lessee should have the power of disposing of that half by deed or by will. According to the ordinary meaning of the words, the gift of the half is a specific one to her descendants, to take effect on her death (157). (*Sir Richard Couch*.) **RAJA PUDMANUND SINGH BAHADUR v. HAYES.** (1901) 28 I. A. 152 = 28 C. 720 (733-4) =

5 C. W. N. 806 = 3 Bom. L. R. 803 = 8 Sar. 125.

—Estate conveyed—Question as to—Language of deed—Speculations as to idea of all or some of parties to deed—Control of language by. *See* SALE-DEED—INTEREST PASSING UNDER. (1914) 41 I. A. 189 (196) =

42 C. 56 (65-6).

—Events subsequent if can affect.

The true construction of a document cannot be affected by what happened subsequently. The grant, whatever its

DEED—(Contd.)**Construction of—(Contd.)**

effect, was not necessarily avoided because subsequent events disappointed the expectation in which it was made (73). That consequence cannot affect the construction of the document which must be considered by the light of the circumstances, as they existed at the time of its execution (76). (*Sir James W. Colville.*) **PERIASAMI v. PERIASAMI.**

(1878) 5 I. A. 61 = 1 M. 312 (328) = 2 C. L. R. 81 = 3 Suth. 508 = 3 Sar. 795.

—Events which have not happened—Rights of parties on—Declaration of. *See* HINDU LAW—WILL—CONSTRUCTION—EVENTS WHICH HAVE, ETC.

—Evidence. *See also* EVIDENCE ACT, SS. 91, 92.

—Evidence—Intention of parties—Evidence of—Admissibility of. *See* DEED—CONSTRUCTION—INTENTION OF PARTIES—MEANING OF WORDS USED.

(1917) 32 M. L. J. 559 (563).

—Evidence—Intention of parties—Oral evidence of—Admissibility. *See* under DEED—CONSTRUCTION OF—INTENTION OF PARTIES.

—Evidence—Oral evidence—Admissibility.

In construing a deed, parol evidence is to be considered in so far only as it determines the position of the parties at the time of its execution, which may afford some reason for the making of the instrument.

The intention of the parties to the deed is to be collected from its terms, and without regard to what may have been said in the parol evidence touching their intention. (*Sir Lawrence Peel.*) **SOOKYABOYE AMMAL v. LUTCHMI AMMAL.**

(1869) 13 W. R. (P. C.) 3 = 2 Suth. 282.

—Evidence—Property demised—Issue as to—Negotiations prior—Non-existence of area within boundaries specified—Evidence of—Admissibility of, to vary terms of deed.

The question as to what was demised under a registered kabuliyat (whether it was the land included in the boundaries specified in the schedule to the kabuliyat irrespective of the area specified therein or whether the land demised was that indicated by the area specified irrespective of the existence or otherwise of so much of land within the boundaries specified) depends upon the true construction of the kabuliyat and that construction cannot be varied by extraneous evidence as to the negotiations which led up to the contract which was, in fact, made, or by evidence shewing that within the boundaries specified in the schedule to the kabuliyat there were not lands of the area specified (230). (*Sir John Edge.*) **DURGA PRASAD SINGH v. RAJENDRA NARAYAN BAGCHI.**

(1913) 40 I. A. 223 =

41 C. 493 (507) = 18 C. W. N. 66 = 21 I. C. 750 =

(1914) M. W. N. 1 = 15 M. L. T. 68 = 19 C. L. J. 95 =

16 Bom. L. R. 42 = 26 M. L. J. 25.

—Execution of deed—Circumstances relating to—Reference to. *See* DEED—CONSTRUCTION—CIRCUMSTANCES RELATING TO, ETC.

—Execution of deed—Situation and rights of parties at time of—Reference to. *See* DEED—CONSTRUCTION—SITUATION AND, ETC.

—Execution sale—Certificate of—Construction. *See* EXECUTION SALE—CERTIFICATE OF.

—Falsa demonstratio—Applicability of maxim of. *See* DEED—AREA—BOUNDARY.

—Family arrangement or will. *See* HINDU LAW—WILL—FAMILY ARRANGEMENT.

—Fresh deed—Confirmatory deed—Test. *See* HINDU LAW—GIFT—CONSTRUCTION—FRESH GIFT.

(1919) 46 I. A. 285 (291) = 43 M. 244 (251).

DEED—(Contd.)**Construction of—(Contd.)**

—Future and contingent interest—Release of—Deed effecting. *See* HINDU LAW—WILL—CONSTRUCTION—GIFT OVER—FUTURE AND CONTINGENT INTERESTS UNDER. (1892) 21 I. A. 35 (37) = 20 C. 373.

—Future rights—Declaration of. *See* HINDU LAW—WILL—CONSTRUCTION—FUTURE RIGHTS.

—Gift. *See* GIFT AND HINDU LAW—GIFT.

—Gift *inter vivos*—Will—Distinction—Test. *See* HINDU LAW—WILL—GIFT *inter vivos*.

—Grant. *See* GRANT.

—Guardian—Deed by—Capacity in which, executed—Individual capacity or capacity of guardian. *See* under HINDU LAW—MINOR—GUARDIAN—DEED BY—CAPACITY IN WHICH, EXECUTED.

—Heirs—Class of—Leading member of—Enumeration of—All members of class if included.

In a document between Hindus, and indeed in the Mitakshara itself, it is by no means unusual to find that the leading member of a class is alone mentioned when it is intended to comprehend the whole class (272). (*Sir James W. Colville.*) **CHOWDHRY CHINTAMAN SINGH v. MUSSAMUT NOWLUKHO KONWARI.**

(1875) 2 I. A. 263 = 1 C. 153 (162) = 24 W. R. 255 = 3 Sar. 537 = 3 Suth. 204.

—Hindu—Deed by—Words in—Meaning of—English Law technical meaning—Inapplicability of.

In settling the construction of a deed executed by a Hindu in Bombay, held that, unless there was a special reason afforded by the deed itself to the contrary, the technical meaning given to words in English law must be disregarded. (*Lord Buckmaster.*) **MADHAVRAO GANPAT RAO DESAI v. RAGHUNATH AGASKAR.**

(1927) 55 I. A. 74 = 52 B. 176 =

47 C. L. J. 198 = 30 Bom. L. R. 282 = 107 I. C. 119 =

27 L. W. 400 = I. L. T. 40 B. 86 = 26 A. L. J. 560 =

32 C. W. N. 925 = A. I. R. 1928 P. C. 33 =

54 M. L. J. 245.

—Hindu lady—Letter written by—Substance of transaction to be looked to.

In dealing with a letter written by a Hindu lady it is desirable not to rest upon a minute criticism of the particular expressions used, but to look to what was the substance of the transaction. (*Sir James Colville.*) **RAJAH VELLANKI VENKATA KRISHNA RAO v. VENKATA RAMA LAKSHMI NARASAYYA.**

(1876) 4 I. A. 1 (11-2) = 1 M. 174 (188) =

26 W. R. 21 = 3 Sar. 669 = 3 Suth. 353.

—Hindu widow—Husband's deed in favour of. *See* HINDU LAW—WIDOW—HUSBAND.

—India—Rule applicable in—Nothing peculiar.

It is not contended that there are any peculiar rules of construction in India applicable to the instrument called a will or deed (173). (*Dr. Lushington.*) **REWUN PERSAD v. MUSSUMAT RADHA BEEBY.**

(1847) 4 M. I. A. 137 =

7 W. R. 35 (P. C.) = 1 Suth. 172 = 1 Sar. 327.

—Indians—Deeds of—Liberal construction of—Necessity.

Deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses. (*Lord Justice Knight Bruce.*) **HUNOONMANPERSHAD PANDAY v. MUSSUMAT BABOOEE MUNRAJ KOONWEREE.**

(1856) 6 M. I. A. 393 (411) = 18 W. R. 81 =

2 Suth. 29 = 1 Sar. 552 = Sevestre 253 N.

DEED—(Contd.)**Construction of—(Contd.)**

—*Held*, that the principle laid down by Lord Justice Knight Bruce that "Deeds and contracts of the people of India ought to be liberally construed. The form of expression, literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses" was particularly applicable to a case in which the question was whether the effect of a deed of conveyance executed by a Hindu widow in respect of immoveable property inherited by her husband was to sell and convey the absolute interest in the piece of immoveable property or merely what might be termed her life-interest in the same.

Held, reversing the High Court, that, in holding, on the strength of a recital in the granting part of the deed that the widow conveyed and sold all her rights and interest in the property sold which she had inherited from her deceased husband, that only her life-interest in the property was sold and conveyed, the High Court fell into the very error which Lord Justice Knight Bruce stated should be guarded against, and that the other portions of the deed clearly showed that the absolute interest was intended to be conveyed and sold. (*Lord Atkinson.*) **VASONJI MORARJI v. CHANDA BIBI.**

(1915) 37 A. 369 (375, 378) =

19 C. W. N. 873 = 17 Bom. L. R. 556 = 18 M. L. T. 31 =

(1915) M. W. N. 449 = 2 L. W. 676 = 22 C. L. J. 180 =

29 I. C. 781 = 29 M. L. J. 130.

—*Inheritance—Contravention of rules of—Construction resulting in—Permissibility.*

The second clause of this document, if it were construed literally, would appear to give the Talook, in the event of the death of the younger son to each of the lawful widows as shall have male issue; but such a disposition would at once contravene the ordinary rules of devolution of Hindu property, and not be in accordance with the usages of Hindus, and as there is no mention of any change of intention as to the proprietary right, a construction which would postpone male issue to their mothers, is obviously inadmissible (509). (*Lord Cairns.*) **SRI GAJAPATHI RADHIKA PATTA MAHA DEVI GARU v. SRI GAJAPATHI NILAMANI PATTA MAHA DEVI GARU.**

(1870) 13 M. I. A. 497 = 14 W. R. (P. C.) 33 =

6 B. L. R. 202 = 2 Suth. 365 = 2 Sar. 601.

—*Intention expressed by words used—Ascertainment of—Mode of.*

In all cases of the construction of a deed, the object is to see what is the intention expressed by the words used. But from the imperfection of language, it is impossible to know what that intention is without inquiring further, and seeing what the circumstances were with reference to which the words were used (274). (*Lord Atkinson.*) **ROYAL BANK, CANADA v. SALVATORI.**

(1927) A. I. R. 1927 P. C. 272 = 30 Bom. L. R. 760 =

107 I. C. 346 = 47 C. L. J. 300.

—*Intention of executant—Ascertainment of—Mode of.*

The intention of the donor is to be ascertained by reading the terms of the deed as a whole, and giving to them the natural meaning of the language used. (*Sir Lancelot Sanderson.*) **AMJAD KHAN v. ASHRAF KHAN.**

(1929) 56 I. A. 213 = 4 Luck. 305 =

31 Bom. L. R. 809 = 30 L. W. 91 = 116 I. C. 405 =

I. R. (1929) P. C. 189 = 27 A. L. J. 571 =

6 O. W. N. 483 = 33 C. W. N. 753 =

A. I. R. 1929 P. C. 149 = 57 M. L. J. 439.

—*Intention of executant—Effect contrary to—Giving of—Propriety.*

In a case in which an instrument was, on its right construction, held to be a will and not a present irrevocable appointment of a successor, it was contended that the executant had no power to make the appointment of a

DEED—(Contd.)**Construction of—(Contd.)**

successor to the property by will, and therefore, to give effect to the instrument, it must be construed as a present appointment.

Held, that it was impossible to give effect to the instrument contrary to the intention of its author (209). (*Sir Montague E. Smith.*) **PARTAB NARAIN SINGH v. TRILOKIANATH SINGH.**

(1884) 11 I. A. 197 =

11 C. 186 (199) = 4 Sar. 567 = Bald. 174 =

R. & J's No. 86.

—*Intention of executant gathered from indications in the deed and in conduct of parties—Control of construction by.*

Where by a sale-deed the vendors conveyed all the right and title that they possessed in the property, and, therefore, according to the ordinary rule, the right and title which one of the vendors possessed as executor in the property would have passed under the deed, the learned judges of the High Court held that that interest did not pass, basing their judgment on what they considered to be indications in the deed and in the conduct of the parties that the intention was that only the beneficial interest possessed by the vendors should be conveyed.

Quaere, whether it was permissible to permit such considerations to affect the interpretation of the deed. (*Lora Moulton.*) **BRIJRAJ NOPANI v. PURA SUNDARY DASSEE**

(1914) 41 I. A. 189 = 42 C. 56 (64) = 24 I. C. 296 =

1 L. W. 555 = 16 M. L. T. 338 = (1914) M. W. N. 679 =

20 C. L. J. 368 = 18 C. W. N. 1313 = 16 Bom. L. R. 797 =

12 A. L. J. 1185 = 27 M. L. J. 93.

—*Intention of parties—Meaning of words used—Basis proper of construction—Evidence of intention—Admissibility of.*

In construing the terms of a deed the question is not what the parties may have intended, but what is the meaning of the words which they used. In construing the deed, evidence of the intention of the parties to it is clearly inadmissible. (*Lord Parmoor.*) **MAHARAJAH MANINDRA CHANDRA NANDI v. RAJA SRI SRI DURGA PRASHAD SINGH.**

(1917) 22 M. L. T. 202 =

(1917) M. W. N. 448 = 6 L. W. 110 =

21 C. W. N. 707 = 25 C. L. J. 567 = 19 Bom. L. R. 493 =

15 A. L. J. 432 = 1 Pat. L. W. 627 = 38 I. C. 929 =

10 Bur. L. T. 229 = 32 M. L. J. 559 (563).

—*Intention of parties—Oral evidence of—Admissibility.* See EVIDENCE ACT, S. 92—DEED—NATURE REAL OF TRANSACTION, ETC. (1917) 44 I. A. 236 = 45 C. 320.

—*Under S. 92 of the Evidence Act, as between the parties to an instrument, oral evidence of intention is not admissible for the purpose, either of construing deeds or of proving the intention of the parties.* (*Sir Lawrence Jenkins.*) **BAIJNATH SINGH v. MAHOMED HAJEE ABBA.**

(1924) 3 B. 106 = A. I. R. (1925) P. C. 75 =

27 Bom. L. R. 787 = 3 Pat. L. R. 227 = 86 I. C. 332 =

48 M. L. J. 339 (344).

—*Intention of parties—Speculations as to—Control of language of deed by—Propriety.*

In a case in which the question was whether, under a deed of gift executed by a Hindu in favour of his wife, the latter took a life estate or a Hindu widow's estate in the property conveyed to her, the High Court arrived at the conclusion that she took a widow's estate only, though the plain and obvious construction of the language of the instrument pointed to her taking a life estate, on a supposed understanding come to between the executant and his adopted son at the time of the execution of the instrument. There was no evidence extraneous to the instrument of any such understanding; and no such understanding was expressed or

DEED—(Contd.)**Construction of—(Contd.)**

was to be inferred by necessary or even reasonable implication from the language of the instrument.

Held, that the Court could not, upon mere conjecture of what might probably have been intended, interpret the instrument so as materially to alter the conclusion suggested by its plain and obvious construction (260). (*Sir Robert P. Collier.*) **MUSSUMAT BHAGBUTI DAE v. CHOWDRY BHOLANATH THAKOOR.** (1875) 2 I. A. 256 = 1 C. 104 = 24 W.R. 269 = 3 Suth. 186 = 3 Sar. 528.

—See **SALE-DEED—INTEREST PASSING UNDER.**

(1914) 41 I. A. 189 (196) = 42 C. 56 (65-6).

—A court called upon to construe a deed is concerned to consider the actual language employed, and it is beyond its province to enter the region of speculation (246). (*Lord Parmoor.*) **ATTORNEY-GENERAL OF MANITOBA v. KELLEY.** (1922) 31 M.L.T. 238 (P. C.).

—Interest passing under deed. See **DEED—CONSTRUCTION—ESTATE CONVEYED.**

—Interlineations and erasures appearing on deed—Examination of, as aid to construction—Propriety.

The terms of the document as actually executed are upon this point sufficiently clear to make it unnecessary for their Lordships to adopt the somewhat doubtful course of examining, as an aid to construction, interlineations and erasures as these now appear upon the parchment (890). (*Lord Blanesburgh.*) **MA SA BON v. MA DA TWE.**

(1924) 20 L. W. 884 = 84 I. C. 561 = A. I. R. 1924 P. C. 233.

—International instrument. See **INTERNATIONAL AGREEMENT AND INTERNATIONAL INSTRUMENT.**

—Invalidity of deed—Construction leading to. See **DEED—CONSTRUCTION OF—VALIDATING CONSTRUCTION.**

—Later deed. See **DEED—CONSTRUCTION—SUBSEQUENT DEED**

—Law—Contravention of—Construction resulting in. See **DEED—CONSTRUCTION—VALIDATING CONSTRUCTION.**

—Liability under deed—Extent of—Intention of executant—Impression of Court—Mistakes in—Effect.

What a person who gives an obligation considers is the extent of his obligation is of no avail. You are to look at what he does, not to what he thinks. You are to gather what he means from what he has said in his instrument, not from what he suggests. You are to look to his obligation, which he has contracted in point of fact and in point of law, an obligation which is binding upon him, not to the intention, and motives, and expectation, and speculation, which he may have had in his own mind at the time he so bound himself (328). Even if the Court was mistaken as to the extent of his obligation, that would not avail him. The extent of his obligation depends entirely upon the terms of the instrument given by him (329). (*Lord Brougham.*) **RAJAH GOPAL INDER NARAIN ROY v. RAJAH JAGARNATH GURG.** (1839) 2 M. I. A. 311 = 5 W. R. 129 = 1 Suth. 93 = 1 Sar. 193.

—Maxim—*Falsa demonstratio*—Application of. See **DEED—AREA—BOUNDARY.**

—Maxim—*Ut res magis valeat quam pereat*—Applicability. See **DEED—CONSTRUCTION—COMPROMISE CONFIRMED BY DECREE OF COURT.**

(1923) 50 I. A. 265 (273) = 45 A. 596 (603).

—Mistake of parties as to nature or effect of deed—Construction of deed if can be affected by. See **DEED—CONSTRUCTION—LIABILITY UNDER DEED.**

(1839) 2 M. I. A. 311 (329).

DEED—(Contd.)**Construction of—(Contd.)**

—The true character which a document intrinsically bears cannot be altered by the misconception of the parties as to its character. A document which is really of the nature of a settlement of account cannot be turned into an award, if it is really not an award, by the parties thinking that it is an award. (*Lord Sumner.*) **AHMED KHAN v. ALI EBRAHIM.** (1924) 27 Bom. L.R. 746 = A. I. R. 1925 P. C. 177 (178).

—Mortgage deed—Construction of. See **MORTGAGE DEED.**

—Mortgage or sale—Nature real of transaction.

The appellant sued to redeem certain lands, which the respondents, deriving title from one *N*, deceased, claimed to hold free from any right or equity of redemption.

The lands in question were originally waste lands the property of the Government. In 1866 and 1867 they were sold to the appellant in three lots under the rules then in force for the sale of waste lands in British Burmah. On payment of preliminary expenses and a fraction of the purchase-money as required by the rules, each of the three lots was conveyed to the appellant "in full proprietary right" subject to conditions intended to protect the interest of the Government as an unpaid vendor. In 1871, at the joint request of the appellant and *N*, the property was transferred into *N*'s name in the Government books, and thenceforth he was recognised as owner and acted as such. The question was: "What was the real meaning of that transaction? Was it an absolute sale or a transfer by way of security?"

Held, upon a construction of documents not wholly unambiguous, and upon a consideration of all the surrounding circumstances, reversing the courts below, that the transaction was not one of sale, but of transfer by way of security. (*Lord Macnaghten.*) **KADER MOIDEEN v. NEPEAN.**

(1894) 21 I. A. 96 = 21 C. 882 = 6 Sar. 453.

—Mortgage or sale with a contract for re-purchase—Nature real of transaction.

Where *S* executed an instrument which, upon the face of it, purported to be an absolute Bill of sale of a taluk and lands therein described to the appellant in consideration of the sum of Rs. 39,500, and on the same day the appellant executed to *S* an agreement importing that on payment of the sum of Rs. 39,500 with interest at 12 per cent. per annum on a specified date, the sale should be void, but that in the event of the sellers not paying the principal and interest according to his engagement the agreement was to be null and void, and the purchaser (the appellant) was to become the absolute proprietor of the property, *held*, that the effect of the two instruments was simply to secure the re-payment of the sums lent by the appellant to *S* with interest on the day named, by means of that kind of mortgage which is known in India as *Bye-bil-wuffa* or conditional sale (346-7). (*Sir James Colville.*) **FORBES v. AMEEROONISSA BEGUM.**

(1865) 10 M. I. A. 340 = 5 W. R. 47 = 1 Suth. 621 = 2 Sar. 153.

—*R* was the eldest of three brothers, *C* being a half-brother of the other two. *R* purchased a 14 annas share of some 52 villages in a Zemindary in the joint names of himself and his two brothers. It was intended that he should have 10 out of the 14 annas, and that each of his brothers should have two annas. He paid the greater part of the purchase-money; the brothers paid a comparatively small part of it, and they were indebted to him. In order to recover that debt, amounting with interest to upwards of Rs. 40,000, he brought an action, and obtained judgments against both of them for something more than Rs. 20,000.

When these were the transactions between *R* and *C*, a pottah was entered into by *C*, in which he purported to grant in mokurruri on perpetual tenure, to his brother *R* his two-annas share in the 52 villages, at an annual rental of Rs. 497. The deed spoke of the sum of Rs. 30,005 as the

DEED—(Contd.)**Construction of—(Contd.)**

consideration or peshkas nuzurana money "out of which," C said, "I have taken Rs. 10,000 in cash for payment of the debt due to L and the balance Rs. 20,005 was paid on account of the decretal money, principal with interest, and costs due to R from me, after deduction of Rs. 1,023 remitted out of the decretal money due to the said decree-holder", (R) "and of the amount of costs incurred in the Zillah Court, and also after deduction of one half of the decretal money due from P, second defendant; and whereas a deed of acquittance of this date, with a receipt stamp affixed thereto, has been obtained by me from the said decree-holder" (R) "I, the declarant, have from the beginning of 1271 Fusli, executed this pottah of perpetual mokurruri lease," and so on.

By the ikrarnamah of the same date it was stipulated between the contracting parties that when C, or his heirs, paid off the said nuzurana money of Rs. 30,000, without interest, from their own pocket, without taking money from any other person, to R and his heirs, then R, or his heirs, would without demanding interest, return the said pottah or perpetual lease to the said C, and C should have no claim in respect of the mesne profits for the period of the mokurraridar's possession.

The question was whether those documents, though they purported on the face of them to be a sale with a power of repurchase, really amounted to a mortgage, or whether the real intention of the parties was that there should be a sale, that the debt should be acquitted, and that there should be a power, of repurchase under certain conditions personal to C.

Held, affirming the Courts below, that the real intention of the parties was that there should be a sale with a provision for the re-purchase of the property on certain conditions personal to C.

The finding of the Courts below, in the first place, is entirely consistent with the terms of both documents. The opposite finding would not be consistent with the terms of either, certainly not with the terms of the pottah, which speaks of the debt having been acquitted and discharged. To hold that it was not acquitted and discharged, but that these documents were really a security for it, would be to contradict the terms of the instrument (132).

Then, again, looking at the surrounding circumstances, among other things, at the value of the property, and at the relation of the parties, their Lordships are of opinion that the Courts below have come to the right conclusion (132). (*Sir Robert P. Collier.*) **SITUL PERSHAD v. LUCHMI PERSHAD SINGH.** (1883) 10 I. A. 129 = 10 C. 30 = 13 C. L. R. 382 = 4 Sar. 470.

—By a document dated 20—2—1835 A and others, who professed to be the proprietors of the property therein mentioned, declared that they had of their own accord absolutely sold the entire property to G "in lieu of Rs. 4,000 of the current coin." On the same day another document was executed by which G, reciting the deed, said:—"However, I have as a matter of favour, mercy, kindness, and indulgence executed this deed, and do hereby stipulate that if all these vendors will, within a period of ten years from the date of this deed, pay in a lump sum, and without interest, the whole amount specified above, I shall accept the same, and cancel this valid sale. During the aforesaid term, I shall remain in possession, collect the rent, enjoy the profits, and be liable for loss; the vendors shall have no concern whatever; I shall not claim interest from the vendors, nor will they demand profits from me, after the expiry of the term. In case the whole of the principal is not paid according to the terms of this document the vendors shall not be able to cancel the sale by payment of the principal."

The suit out of which the appeal arose was instituted nearly 50 years after the date of the said deeds by the

DEED—(Contd.)**Construction of—(Contd.)**

representatives of the vendors claiming to redeem the property upon payment of the Rs. 4,000.

Held, reversing the High Court, that the case was not one of mortgagor and mortgagee, but one of an absolute sale with a right to repurchase within a period of ten years.

In the case of *Alderson v. White Lord Chancellor Cranworth* says:—"The rule of law on this subject is one dictated by common sense—that *prima facie* an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to re-purchase." In this case the vendors did not stipulate that they should have a right to re-purchase; but the vendee, as a matter of grace and kindness, stipulated that they should have that right. The Lord Chancellor proceeded: "In every such case the question is, what upon a fair construction is the meaning of the instruments? Here the first instrument was on the face of it an absolute conveyance; the second gave a right to repurchase on payment, not of what should be due, but of the full amount of the purchase money"—exactly corresponding to the terms of the two documents in the present case, whereby the vendee gave the right to the vendors to take back the property if within the period of ten years they should pay the same amount, namely, Rs. 4,000. "Was that, if taken according to its terms, a lawful contract? Clearly so. What then is there to show that it was intended to be a mere mortgage? I think that the Court after a lapse of thirty years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be." (*Sir Barnes Peacock.*) **BHAGWAN SAHAI v. BHAGWAN DEVI.** (1890) 17 I. A. 98 = 12 A. 387 = 5 Sar. 557.

—Where the question was whether two deeds, one, an absolute deed of sale, and the other, an agreement of even date to reconvey, together constituted a mortgage by conditional sale of the property dealt with by them or an out-and-out sale with a contract of re-purchase, *held*, that the transaction evidenced by the deeds was intended to be and was a mortgage by conditional sale (68).

Their Lordships were of opinion that the deeds themselves contained important indications of the intention of the parties that the transaction was to be only a mortgage. They referred to the following circumstances as being indications of such intention:—

(1) the provision in the agreement to reconvey that if the vendee objected to receive the money and relinquish the property the vendor might deposit the amount in the treasury "by virtue of this agreement," and obtain possession over the property. This provision at once suggested a reference to Regulation I of 1798 as being in the opinion of the parties applicable to the case;

(2) the provision in the agreement to re-convey making the estate redeemable on payment not only of the price fixed for the re purchase, but also of amounts payable under a separate account. This gave the transaction the character of a mortgage so far as the separate account was concerned, and if it was to some extent a mortgage it might well be held to be so entirely; and

(3) the fact that at the date of the deeds in question the property was worth considerably more than the stated price. Their Lordships did not place much reliance on this circumstance. (*Lord Davey.*) **BALKISHAN DAS v. LEGGE.** (1899) 27 I. A. 58 (67-8) = 22 A. 149 (160.1) = 4 C. W. N. 153 = 2 Bom. L. R. 523 = 7 Sar. 601.

—*Held*, affirming the Court below, that the transaction effected by two instruments, a deed of 29—8—1852, and an agreement of 5—9—1852, was an absolute sale out-and-out

DEED—(Contd.)**Construction of—(Contd.)**

of the property mentioned in the deed of August 29 with a contract for re-purchase, and not a mortgage.

The following, amongst other, circumstances were relied upon in support of the above conclusion :—

(1) The deed of August 29 upon its face purported to be an absolute deed of sale. It did not refer to any contemplated or antecedent agreement of re-sale or re-purchase, and did not disclose any intention whatever to treat the disposal of the property mentioned in it as anything other than an absolute transfer on sale for a certain definite sum (287).

(2) A deed of hypothecation executed by the same parties on the same date, August 29, 1852, showed that none of the parties to the sale deed of the same date had religious scruples against the receipt or payment of interest on money lent, and that, when desiring and intending to create a mortgage, they would not have adopted special methods of conveyancing to conceal the fact that interest for the loan was, in fact, to be given and received (287-8).

(3) There was no evidence of any agreement come to between the parties prior to the sale deed of August 29 that the property comprised in it should be mortgaged to the so-called vendees for the sum therein mentioned, and no evidence that that agreement should be carried out by a deed of sale and a contract for re-purchase (288).

(4) The agreement of September 5, 1852, stated that the executants had agreed to re-convey of their own free will and because they were willing to help the vendors and treat them with kindness. It imposed the restriction that the amount to be paid for redemption should be paid by the vendors out of their own pocket without selling or mortgaging the property comprised in the sale deed to other persons (288-9). And, though there was a clause in the agreement conferring upon the vendors the right and power to deposit the amount fixed for re-sale in court such as was contemplated by Bengal Regulations I of 1798 and XVII of 1806, the clause was so obscure and contradictory that it could not furnish any true guide to the intention of the parties (290-1). (*Lord Atkinson.*) **JHANDA SINGH v. WAHID-UD-DIN.** (1916) 43 I. A. 284 =

38 A. 570 (577-8) = 14 A. L. J. 1189 = 20 M. L. T. 529 = (1916) 2 M. W. N. 570 = 21 C. W. N. 66 = 25 C. L. J. 524 = 5 L. W. 189 = 19 Bom. L. R. 1 = 36 I. C. 38 = 31 M. L. J. 750.

—The question was as to the true nature of a transaction of August 4, 1908, between the appellant and the late Raja of Kalahaste. The transaction was evidenced by two documents, the first being described as an indenture made by way of conveyance by the Rajah as vendor to the appellant as purchaser, and the second purporting to be an agreement by the appellant as vendor to the Raja as purchaser. The question was whether the transaction was really a mortgage by conditional sale of the properties in suit or whether it was an absolute sale of the properties to the appellant with an agreement on his part to reconvey on the strict performance by the Raja of certain defined conditions.

Held, reversing the High Court and restoring the Sub-Judge, that, when all the provisions of the documents were viewed in the light of the surrounding circumstances, the inference was irresistible that a mortgage and a mortgage only was in the direct contemplation and intention of both parties to the transaction.

The following, amongst other, circumstances were relied upon in support of the above conclusion :—

(1) The transaction was not the result either of any bargaining as to the value of the property conveyed or as to the price to be paid.

(2) The price mentioned was, at the date of the transaction, a most grossly inadequate one for the property and

DEED—(Contd.)**Construction of—(Contd.)**

was much less than could have been realised by private sale or even by a court sale.

(3) The Raja had not only an option to repurchase, but he was put under an obligation to buy if the appellant thought fit to require him to do so.

(4) The agreement to reconvey showed that time was not of the essence of the exercise by the Raja of his rights in that matter.

(5) The provision in the agreement to reconvey that credit was in certain contingencies to be given to the Raja for his share of the compensation paid by Government for portions of the mortgaged property expropriated by it by a deduction from the 6 lakhs otherwise payable by him on re-purchase.

(6) The reservation of the right of re-purchase in the conveyance itself and the reservation of minerals. (*Lord Blanesburgh.*) **NARASINGERJI GYANAGERJI v. PANUGANTI PARTHASARATHI.** (1924) 51 I. A. 305 =

47 M. 729 = 20 L. W. 701 = 10 O. & A. L. R. 1172 = A. I. R. 1924 P. C. 226 = 40 C. L. J. 481 = (1924) M. W. N. 915 = 23 A. L. J. 161 = 27 Bom. L. R. 4 = 29 C. W. N. 246 = 26 P. L. R. 18 = 82 I. C. 993 = 47 M. L. J. 809.

—The question was whether a transfer of certain shares in an oil company was a mortgage or a sale with a right of re-purchase.

Held, on a consideration of all the surrounding circumstances; among which were the facts that the amount paid by the transferee had no relation to the market price of the shares, but was merely the amount advanced for interest as debt to the transferor, and that the transferor's claim to the dividends in the shares was recognised, that the transaction was a mortgage and not a sale with a right of re-purchase. (*Sir Lawrence Jenkins.*) **BAIJNATH SINGH v. MAHOMED HAJEE ABBA.** (1924) 3 R. 106 =

A. I. R. 1925 P. C. 75 = 27 Bom. L. R. 787 = 3 Pat. L. R. 227 = 86 I. C. 332 = 48 M. L. J. 339 (344).

—*Mortgage or sale with contract for re-purchase—Nature real of transaction—Agreement for re-sale executed seven days later—No such agreement made before execution of sale-deed.*

To make good the contention that an absolute transfer on sale of property for a certain definite sum by A to B, and an agreement executed seven days later by B in favour of A undertaking to reconvey the property in certain events, constituted a mortgage by way of conditional sale and not an out-and-out sale of the property with a contract for re-purchase, it must be shown that an agreement had been come to between the parties that the property in question should be mortgaged to B for the sum specified, and next that that agreement should be carried out by a deed of sale and a contract for re-purchase. If no such agreement was made before the deed of sale was executed and the deed of agreement was an after-thought, only suggesting itself after the sale-deed had been executed and delivered, it would not suffice. The execution of the deed of sale and of the contract of repurchase would then form two separated and independent transactions, not two connected and inter-dependent parts of one and the same transaction (288). (*Lord Atkinson.*) **JHANDA SINGH v. WAHID-UD-DIN.** (1916) 43 I. A. 284 = 38 A. 570 (575) = 14 A. L. J. 1189 = 20 M. L. T. 529 = (1916) 2 M. W. N. 570 = 21 C. W. N. 66 = 25 C. L. J. 524 = 5 L. W. 189 = 19 Bom. L. R. 1 = 38 I. C. 38 = 31 M. L. J. 750.

—*Mortgage or sale with contract for re-purchase—Nature real of transaction—Bengal Regulations I of 1798 and XVII of 1806—Machinery under, made applicable to case—Effect of.*

The provisions of Bengal Regulations I of 1798 and XVII of 1806 were intended to apply to mortgages effected by con-

DEED—(Contd.)**Construction of—(Contd.)**

ditional sale and contracts for repurchase; and the fact that their machinery is made applicable to a particular case might, if the clause intended to have that effect was properly drawn, disclose to some extent an intention that it was intended to create a mortgage.

The clause in the case before their Lordships being extremely ill-drawn, and its provisions being self-contradictory, *held*, that it could not furnish any true guide to the intention of the parties (290-1). (*Lord Atkinson.*) **JHANDA SINGH v. WAHID-UD-DIN.** (1916) 43 I. A. 284 =

38 A. 570 (577-8) = 14 A. L. J. 1189 = 20 M. L. T. 529 = (1916) 2 M. W. N. 570 = 21 C. W. N. 66 = 25 C. L. J. 524 = 5 L. W. 189 = 19 Bom. L. R. 1 = 36 I. C. 38 = 31 M. L. J. 750.

——Mortgage or sale with contract for re-purchase—Nature real of transaction—Circumstances under which documents in question were executed—Reference to—Necessity.

In order to determine whether a potta and an ikrarnamah of even date amount to a mortgage or to a sale of the property with a provision for its re-purchase on certain conditions personal to the mortgagor it is necessary to consider the circumstances under which the two documents were executed, as well as to examine the documents themselves (130-1). (*Sir Robert P. Collier.*) **SITUL PERSHAD v. LUCHMI PERSHAD SINGH.** (1883) 10 I. A. 129 =

10 C. 30 (33-4) = 13 C. L. R. 382 = 4 Sar. 470.

——Mortgage or sale with contract for re-purchase—Nature real of transaction—Evidence admissible in case of question as to—Rule as to—Effect of S. 92 of Evidence Act upon.

As at present advised, their Lordships must not be taken to subscribe to the view that there has been introduced into the law of India such a radical change in the laws of evidence as is suggested by the Chief Justice, a change which would have the effect of excluding from the class of mortgages by conditional sale many transactions which, before the Evidence Act, would have been held to be within that class. (*Lord Blanesburgh.*) **NARASINGERJI GYANAGERJI v. PANUGANTI PARTHASARATHI.**

(1924) 51 I. A. 305 (318) = 47 M. 729 = 20 L. W. 701 = 10 O. & A. L. R. 1172 = A. I. R. 1924 P. C. 226 = 40 C. L. J. 481 = (1924) M. W. N. 915 = 23 A. L. J. 161 = 27 Bom. L. R. 4 = 29 C. W. N. 246 = 26 P. L. R. 18 = 82 I. C. 993 = 47 M. L. J. 809.

——Mortgage or sale with contract for re-purchase—Nature real of transaction—Intention of parties—Oral evidence of—Admissibility—Surrounding circumstances—Reference to—Permissibility.

Where in a case in which an absolute deed of sale and an agreement of even date to reconvey were executed in respect of certain property, the question arose whether the two deeds together constituted a mortgage of the property or an out-and-out sale with a contract of re-purchase, *held*, that oral evidence was, under S. 92 of the Evidence Act, inadmissible for the purpose of construing the deeds or ascertaining the intention of the parties, and that the case must be decided on a consideration of the contents of the documents themselves, with such extrinsic evidence of surrounding circumstances as might be required to show in what manner the language of the document was related to existing facts (65). (*Lord Davey.*) **BALKISHEN DAS v. LEGGE.** (1899) 27 I. A. 58 = 22 A. 149 (158-9) = 4 C. W. N. 153 = 2 Bom. L. R. 523 = 7 Sar. 601.

——Where a question arises as to whether two instruments constitute a mortgage by way of conditional sale or an out-and-out sale of the property dealt with with a contract for re-purchase, the test is the intention of the parties to the

DEED—(Contd.)**Construction of—(Contd.)**

instruments. That intention, however, must be gathered from the language of the documents themselves viewed in the light of the surrounding circumstances (287). Oral evidence is inadmissible for the purpose of proving that intention (291). (*Lord Atkinson.*) **JHANDA SINGH v. WAHID-UD-DIN.** (1916) 43 I. A. 284 =

38 A. 570 (574, 579) = 14 A. L. J. 1189 = 20 M. L. T. 529 = (1916) 2 M. W. N. 570 = 21 C. W. N. 66 = 25 C. L. J. 524 = 5 L. W. 189 = 19 Bom. L. R. 1 = 38 I. C. 38 = 31 M. L. J. 750.

——Mortgage or sale with contract for re-purchase—Nature real of transaction—Lapse of time—Question raised after long—Evidence cogent necessary to show that deed is not what it purports to be.

A court after a lapse of thirty years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be (293).

The above remark applied to a case in which the question was whether two instruments in writing, the first a deed purporting to be an absolute transfer on sale for a certain definite sum, and the second (executed seven days later), constituted when taken together a mortgage by way of conditional sale, or constituted an out-and-out sale of the property comprised in the deeds with a contract for re-purchase, and the plaintiff sued 44 years after the lapse of the period of ten years fixed by the second deed for re-purchase for redemption alleging the transaction to be a mortgage by way of conditional sale (293). (*Lord Atkinson.*) **JHANDA SINGH v. WAHID-UD-DIN.** (1916) 43 I. A. 284 = 38 A. 570 (580) = 14 A. L. J. 1189 = 20 M. L. T. 529 = (1916) 2 M. W. N. 570 = 21 C. W. N. 66 = 25 C. L. J. 524 = 5 L. W. 189 = 19 Bom. L. R. 1 = 38 I. C. 38 = 31 M. L. J. 750.

——Mortgage or sale with contract for re-purchase—Nature real of transaction—Surrounding circumstances—Reference to—Permissibility—Oral evidence—Admissibility.

Where the question was whether a transaction embodied in two documents was merely a mortgage by conditional sale of the properties in suit or was an absolute sale of those properties to the appellant with an agreement on his part to reconvey on the strict performance by the Raja (the other party to the transaction) of certain defined conditions, their Lordships observed that they could decide the question with no reference to any oral evidence other than that of surrounding circumstances such as in *Lord Davey's* words in *Balkishen Das v. Legge* (L. R. 27 I. A. 58) were clearly required to show in what manner the language of the documents was related to existing facts. (*Lord Blanesburgh.*) **NARASINGERJI GYANAGERJI v. PANUGANTI PARTHASARATHI.** (1924) 51 I. A. 305 (312) =

47 M. 729 = 20 L. W. 701 = A. I. R. 1924 P. C. 226 = 10 O. & A. L. R. 1172 = 40 C. L. J. 481 = (1924) M. W. N. 915 = 23 A. L. J. 161 = 27 Bom. L. R. 4 = 29 C. W. N. 246 = 26 P. L. R. 18 = 82 I. C. 993 = 47 M. L. J. 809.

——S. 92 merely prescribes a rule of evidence; it does not fetter the court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances. (*Sir Lawrence Jenkins.*) **BAIJNATH SINGH v. MAHOMED HAJEE ABBA.**

(1924) 3 R. 106 = A. I. R. (1925) P. C. 75 = 27 Bom. L. R. 787 = 3 Pat. L. R. 227 = 86 I. C. 332 = 48 M. L. J. 339 (344).

——See also DEED — CONSTRUCTION — MORTGAGE OR SALE WITH CONTRACT FOR RE-PURCHASE — NATURE REAL OF TRANSACTION — INTENTION OF PARTIES.

——Name given by parties to deed—Effect of. See DEED—NAME GIVEN BY PARTIES TO,

DEED—(Contd.)**Construction of—(Contd.)**

Occasion of grant—Reference to. *See* DEED—CONSTRUCTION—SURROUNDING CIRCUMSTANCES.

(1878) 6 I.A. 54 (59) = 3 B. 186 (189).

Operative part—General language in early portion of—Control of, by subsequent particularisation. *See* POWER OF ATTORNEY—CONSTRUCTION OF—OPERATIVE PART

(1881) 8 I. A. 39 (44-5) = 7 C. 245 (251).

Operative part—Preamble—Conflict between. *See* MORTGAGE DEED—CONSTRUCTION—PREAMBLE.

(1898) 26 C. 395.

Operative part—Recital—Conflict between—Which prevails.

The construction of an ambiguous stipulation in a deed may undoubtedly be governed or qualified by a recital; but, on the other hand, if the intention of the parties is clearly to be collected from the operative part of the instrument, that intention is not to be defeated or controlled because it may go beyond what is expressed in the recital (100).

From the operative part of a mortgage deed it appeared that the security was intended to cover the general balance that might become due from the mortgagors to the mortgagees upon all the accounts between them. *Held*, applying the above principle, that in such a case the security could not be limited by the paragraph in the deed in the nature of a recital to advances made upon contracts for future deliveries of produce, where the words of recital were not necessarily repugnant to such construction (99,100). (*Sir James Colville.*) *PALLIKELAGATHA MARCAR v. SIGG.*

(1880) 7 I.A. 83 = 2 M. 239 (256-8) = 3 Suth. 742 = 4 Sar. 131.

Other deeds—Dispositions and language of—Reference to—Deeds between same parties and part of one design.

Each of several deeds executed by one person in favour of another should be interpreted by itself, and a subsequent deed cannot properly be referred to for the purpose of interpreting a prior deed. If, however, it appears expressly, or by reasonable implication from the contents of the several deeds, that they all formed part of one entire design, then the construction of any one could properly be aided by the dispositions made and the language found in the others (662). *COLLECTOR OF MOORSHEDEBAD v. RANEE SHEBESURRU.*

(1872) 2 Suth. 661 = 18 W. R. 226.

Other deeds—Language of—If a guide to construction of deed in question.

On a question of the construction and effect of a document, each case must be determined on its own circumstances, and each document must be construed according to the words which are contained in it. (*Sir Barnes Peacock.*) *GOBIND LAL ROY v. HEMENDRA NARAIN ROY CHOWDHRY.* (1889) 17 C. 686 (687) = 5 Sar. 497.

The language of one instrument does not afford much assistance in the construction of another (165). (*Lord Macnaghten.*) *SUBBARAYER v. SUBBAMMAL.*

(1900) 27 I.A. 162 = 24 M. 214 (218) = 4 C.W.N. 805 = 2 Bom. L.R. 982 = 7 Sar. 782.

In a case in which the question was whether a surety bond executed by the directors of a limited company to secure advances obtained by the company imposed a personal liability upon the directors (executants) or merely pledged the credit of the company, it was said, in support of the contention that the bond did not impose a personal liability upon the executants, that if one looked at the documents of the kind one would find that the bond in question was only a common form intended for cases where

DEED—(Contd.)**Construction of—(Contd.)**

there was a pledge of assets, and that if regard was had to the circumstances in other transactions one would find that in other transactions those gentlemen did not pledge themselves personally.

Held that, as, on the face of the bond in question, there was no difficulty in giving it an intelligible meaning as constituting a personal pledge, extrinsic evidence was inadmissible to affect its meaning.

This surety bond which was executed on the specific occasion must be taken to have been executed for the purpose of the occasion, and it cannot be assumed that it had reference to any other circumstances of a different date. (*Viscount Haldane.*) *PANNA LAL v. NIHAL CHAND.*

(1922) 16 L.W. 80 (82, 3) = (1922) M.W.N. 376 = 26 C.W.N. 737 = 36 C.L.J. 5 = 24 Bom. L.R. 971 = 31 M.L.T. 129 = 2 P.L.R. (P.C.) 1922 = (1922) P. C. 46 = 67 I. C. 423 = 43 M. L. J. 66.

See also DEED—CONSTRUCTION OF—SUBSEQUENT DEED—WORDS IN.

Parties not before court—Rights of—Declaration of. *See* HINDU LAW—WILL—CONSTRUCTION—PARTIES NOT BEFORE COURT.

Payment "on demand"—Deed creating obligation of—Effect—Demand prior to enforcement of obligation—Necessity.

In this country (England) various cases have arisen with regard to obligations payable on demand; a promissory note not payable on demand, is payable immediately. It is important, however, in some cases of negotiable securities, that the demand be made within a reasonable time, in other cases that the demand should be made immediately, and in some without any demand at all. In one case it was laid down that in the case of a bond with a penalty to pay a certain sum on demand, an express demand must be made before the action can be maintained. So in an action on a promise to pay a collateral sum on request. These authorities show that there may be cases where an action would not lie except where a request or demand is made, and others where such demand is not necessary (229). (*Lord Justice Knight Bruce.*) *AMEER-OOON-NISSA v. MOORAD-OOON-NISSA.* (1855) 6 M. I. A. 211 = 1 Sar. 533.

Payment of sum out of obligor's share of inheritance in particular estate—Estate insolvent and obligor inheriting nothing—Obligation to pay in case of. *See* COMPROMISE—CONSTRUCTION—PAYMENT OUT OF OBLIGOR'S SHARE, ETC.

(1919, 23rd May) H. C. File for 1919 = (P. C. A. 64 of 1918).

Plan entire of executant—Legal bar to giving effect to—Position of plan—Giving effect to—Duty of Court.

Cases are not rare in which a court of construction, finding that the whole plan of a donor of property cannot be carried into effect, will yet give effect to part of it rather than hold that it shall fail entirely (178). (*Sir Arthur Hobhouse.*) *RAI BISHER CHAND v. ASMAIDA KOER.*

(1884) 11 I. A. 164 = 6 A. 560 (573) = 4 Sar. 512.

Portions of deed—Striking out of, to make it valid—Propriety. *See* HINDU LAW—JOINT FAMILY—FATHER—LEASE IN EFFECT COLLATERAL SECURITY, ETC.

(1922) 44 M. L. J. 728 (730-1).

Power of Attorney. *See* POWER OF ATTORNEY.

Preamble—Operative part—Conflict between. *See* MORTGAGE DEED—CONSTRUCTION—PREAMBLE.

(1898) 26 C. 395.

Preamble—Substantive disposition—Test. *See* HINDU LAW—GIFT—WIFE. (1924) 47 M. L. J. 585.

Recital—Operative part—Conflict between. *See* DEED—CONSTRUCTION—OPERATIVE PART—RECITAL.

DEED—(Contd.)**Construction of—(Contd.)**

- Sale-deed. See SALE-DEED.
- Security bond. See SURETY—BOND EXECUTED BY.
- Settlement deed. See SETTLEMENT DEED.

—*Situation and rights of parties at time of execution of deed—Reference to—Necessity.*

The situation of the parties must be looked at, and the deed must be construed with reference to the situation of the parties and their rights at the time the deed was executed (17). (*Mr. Pemberton Leigh.*) SREEMUTTY RABUTTY DOSSEE v. SIBCHUNDER MULLICK.

(1854) 6 M. I. A. 1 = 1 Sar. 484.

—Statute—Deed taken under—Ambiguity in construction of—Provisions of Statute—Reference to—Necessity. See STATUTE—DEED TAKEN UNDER.

(1923) 33 M. L. T. 438 (441) P. C.

—Statute subsequent—Reading into deed of—Propriety.

It would be a novel proceeding to read into an agreement a section in an Act subsequently passed. (*Lord Davey.*) THAKUR GANESH BAKSH v. THAKUR HARIHAR BAKSH.

(1904) 31 I. A. 116 (120) =

26 A. 299 (309) = 8 C. W. N. 521 = 8 Sar. 628 =

6 Bom. L. R. 505 = 7 O. C. 116 = 14 M. L. J. 190.

—Striking out of offensive portions of deed to make it valid—Propriety of. See HINDU LAW—JOINT FAMILY—FATHER—LEASE IN EFFECT COLLATERAL, ETC.

(1922) 44 M. L. J. 728 (730-1).

—Subject-matter to which deed was intended to apply—Reference to. See DEED—CONSTRUCTION—SURROUNDING CIRCUMSTANCES—SUBJECT-MATTER TO WHICH DEED WAS INTENDED TO APPLY.

(1924) 52 I. A. 1 (20) = 48 M. 230.

—Subsequent deed—Words in—Meaning of—Earlier deed by same party—Reference to, for ascertaining meaning—Permissibility.

The question was as to the meaning of the word "heirs" in a deed of trust of 1839 executed by the then king of Oudh, whereby he settled a sum of money deposited with or lent to the East India company as security for certain persons for the benefit of persons connected with his family. It was contended that the plain meaning of that word in that deed, *viz.*, heirs general, should be rejected, and the word must be understood as including only heirs who were also issue, because on the construction of an earlier deed of 1838 executed by the same king, the Privy Council held that the words "heirs" and "issue," which were both used therein, should each be understood as meaning heirs who were also issue. That deed of 1838 was also of the nature of a treaty or arrangement with the East India Co., by which the king settled pensions on other members of his family.

Held, that, inasmuch as the deed of 1839 did not embody or refer to the deed of 1838, the two deeds were not in any sense parts of one transaction, and they were not even contemporaneous documents, the deed of 1838 so construed could not be used for the purpose of ascertaining the meaning of the deed of 1839 (140-1). (*Sir Arthur Wilson.*) NAWAB HAIDAR HUSAIN KHAN v. NAWAB FAGHFUR MIRZA.

(1905) 32 I. A. 135 = 27 A. 383 (391) =

2 C. L. J. 57 = 9 C. W. N. 817 = 3 A. L. J. 64 =

7 Bom. L. R. 850 = 8 O. C. 270 = 8 Sar. 326 =

15 M. L. J. 327.

—Subsequent deed between parties—Dispositions made by, and language found in—Reference to—Deeds not parts of one design.

The High Court, apparently disregarding their own rule that each deed should be interpreted by itself infer from the

DEED—(Contd.)**Construction of—(Contd.)**

insertion of such a power in the subsequent deed, and the omission of it in this (the earlier one), an intention to restrain alienation. The subsequent deed cannot properly be referred to for this purpose. If it had appeared expressly, or by reasonable implication from the contents of the deeds that they all formed part of one entire design, then the construction of any one could properly be aided by the dispositions made, and the language found, in the others, but it cannot be inferred from these deeds that they are parts of one design, or that they form a connected series to be construed as a whole (112). RAJA CHUNDERNATH ROY v. KOOAR GOBINDNATH ROY.

(1872) 11 B. L. R. 86 = 18 W. R. 221 = 2 Suth. 608.

—Subsequent deed between parties—Interpretation placed in, on deed in question—Reference to.

On the true construction of an Ikrarnama purporting to be by all, but in fact executed by some of the members of the family of a deceased Mahomedan, it was found that the Ikrarnama was not effectual to give the 1st appellant the share in the property of the deceased which it purported to give her. From some of the subsequent documents, however, it appeared that the members of the family treated her as being entitled to that share.

Held, that the said facts were not interpretative of the true construction of the prior written agreement, *viz.*, the Ikrarnama.

At most those facts show that many members of the family construed it (the Ikrarnama) wrongly, or were imperfectly informed as to what had happened. (*Lord Sumner.*) KARIMUNNESSA KHATUM v. MAHOMED FAZLUL KARIM.

(1924) 88 I. C. 149 = (1925) A. I. R. (P. C.) 70 (74).

—Subsequent deed by executor in favour of executant modifying effect of deed in question—Reference to.

In this case the question was as to the real effect of certain hibbanamahs executed by the defendant in favour of the plaintiff, his son. The deeds purported to be absolute gifts to the son of various properties of considerable value.

It appeared that subsequent to the dates of the said hibbanamahs, the son executed in favour of the father certain ikrars which modified the operation of the hibbanamahs.

Held, that, in considering the real effect of the hibbanamahs, they ought to be construed by the light reflected upon them by the ikrars (106). (*Sir Montague E. Smith.*) AMEEROONISSA KHATOON v. ABEDOONISSA KHATOON.

(1875) 2 I. A. 87 = 15 B. L. R. 67 = 23 W. R. 208 =

3 Sar. 423 = 3 Suth. 87.

—Surety bond. See SURETY—BOND EXECUTED BY SURROUNDING CIRCUMSTANCES—REFERENCE TO—PERMISSIBILITY.

—See DEED—CONSTRUCTION—ANTECEDENT FACTS.

(1859) 7 M. I. A. 441 (461).

This document being ambiguous, the construction of it may be aided by looking at the surrounding circumstances (163). (*Sir Montague E. Smith.*) RANI MEWA KUWAR v. RANI HULAS KUWAR.

(1874) 1 I. A. 157 =

13 B. L. R. 312 = 3 Sar. 354 = R. & J's No. 27.

—See DEED—CONSTRUCTION—ESTATE CONVEYED—EVIDENCE—TERMS OF DEED. (1875) 24 W. R. 176.

—In construing a deed, it is proper to have regard to the surrounding circumstances (260). (*Sir Robert P. Collier.*) MUSSUMAT BHAGBUTI DAE v. CHOWDRY BHOLANATH THAKOOR.

(1875) 2 I. A. 256 = 1 C. 104 =

24 W. R. 268 = 3 Suth. 186 = 3 Sar. 528.

—The question depends upon the construction of the sunnud; but that construction may be aided by a consideration of the surrounding circumstances, and of the occasion on which it was granted (59). (*Sir Robert P. Collier.*) GULABDAS JUGJIVANDAS v. COLLECTOR OF SURAT.

(1878) 6 I. A. 54 = 3 B. 186 (189) = 3 Sar. 889.

DEED—(Contd.)**Construction of—(Contd.)**

—See DEED—CONSTRUCTION—MORTGAGE—SALE WITH CONTRACT FOR RE-PURCHASE—NATURE REAL OF TRANSACTION—SURROUNDING CIRCUMSTANCES.

A document must be construed in light of the surrounding circumstances (988). (*Lord Dunedin.*) DEPUTY COMMISSIONER OF KHERI *v.* RANI BIJAI RAJ KOER.

(1917) 43 I. C. 987 = 8 L. W. 1 = (1918) M. W. N. 324 = 22 C. W. N. 305 = 20 O. C. 260 = 4 O. L. J. 739.

—Surrounding circumstances—Subject-matter to which deed was intended to apply—Reference to.

In the construction of written or printed documents it is legitimate in order to ascertain their true meaning, if that be doubtful, to have regard to the circumstances surrounding their creation and the subject-matter to which it was designed and intended they should apply (20). (*Lord Atkinson.*) VATSAVAYA VENKATA JAGAPATI *v.* POOSAPATHI VENKATAPATI. (1924) 52 I. A. 1 = 48 M. 230 =

20 L. W. 298 = A. I. R. 1924 P. C. 162 =

35 M. L. T. 210 = (1924) M. W. N. 607 =

26 Bom. L. R. 786 = 29 C. W. N. 57 = 80 I. C. 807.

47 M. L. J. 93 (126) =

—Terms of—Contradiction or variation of—Evidence for purpose of—Admissibility. See EVIDENCE ACT—SS. 91, 92.

—Terms of—Fair and reasonable working of deed—Terms necessary for—Supplying of—Duty of Court. See AGREEMENT—TERMS NECESSARY, ETC.

(1880) 7 I. A. 83 (105) = 2 M. 239 (261-2).

—Terms of—Striking out of offensive, to make deed valid—Propriety. See HINDU LAW—JOINT FAMILY—FATHER—LEASE IN EFFECT COLLATERAL SECURITY, ETC. (1920) 44 M. L. J. 728 (730-1).

—Translation of Vernacular deed. See DEED—CONSTRUCTION—VERNACULAR DEED—TRANSLATION OF.

—Treaty—Exterritoriality in—Meaning of. See TREATY—EXTERRITORIALITY IN.

(1901) 28 I. A. 121 (131-2) = 26 B. 1 (13).

—Trust deed. See UNDER TRUST DEED.

—Validating construction—Necessity. See DEED—CONSTRUCTION—INHERITANCE—CONTRAVENTION OF RULES OF. (1870) 13 M. I. A. 497 (509).

—If the estate which a testator intended to convey by his will was one which the law prohibits, effect cannot be given to his intention; but before coming to this conclusion their Lordships must be satisfied that the instrument does not fairly admit of being construed in a sense to which the law will give effect (146-7). (*Sir Robert Collier.*) BHOOBUN MOHINI DEBYA *v.* HURRISH CHUNDER CHOWDHRY.

(1878) 5 I. A. 138 = 4 C. 23 (27) = 2 C. L. R. 339 = 3 Sar. 815 = 3 Suth. 537.

—See DEED—CONSTRUCTION—AMBIGUITY IN DEED—VALIDATING CONSTRUCTION.

(1900) 28 I. A. 35 (42) = 23 A. 181 (190).

—Upon the construction contended for, this lease thus contained on its face a declaration of its own non-validity. It need hardly be observed that a suicidal interpretation of the sort must be the last resort of construction. *A fortiori*—if in the circumstances an *a fortiori* is possible—such a construction should not be adopted at the instance of an applicant who was not party to the contract in issue (299). (*Lord Shaw.*) ALARIC JOSEPH SEGUIN *v.* ANNA THERESA BOYLE. (1922) 31 M. L. T. (P. C.) 289.

—Vernacular deed—Translation of—Official translation—High Court differing from—Procedure to be adopted in case of—Translation to be adopted by P.C. in case of conflict between two translations.

In a case in which the construction of a Hindu will, expressed in Urdu, was in question, the High Court was of opinion that the official translation of the will was in one

DEED—(Contd.)**Construction of—(Contd.)**

respect inaccurate. One of the learned Judges, who knew the Urdu language, gave a translation of his own and adopted the same as the basis of his judgment in which the other learned Judges concurred.

On appeal their Lordships observed that if the official translation and that by the learned Judge materially differed; they must accept the official translation as correct.

If that (the official) translation was incorrect there was ample opportunity to have it judicially corrected in the High Court after evidence as to its correctness or incorrectness had been taken and recorded in the Court in which the correctness of the official translation was challenged. The Judicial Committee has no means of inquiring into the correctness of an official translation of a document in a Vernacular Language of India, except by sending the case back to the Court with a direction to make such inquiry (31). (*Sir John Edge.*) SASIMAN CHOWDHURAI *v.* SHIB NARAYAN CHOWDHURY. (1921) 49 I. A. 25 =

1 P. 305 (311) = 15 L. W. 434 =

26 C. W. N. 425 = 20 A. L. J. 362 = 35 C. L. J. 427 =

24 Bom. L. R. 576 = (1922) M. W. N. 368 =

A. I. R. 1922 P. C. 63 = 3 Pat. L. T. 133 =

30 M. L. T. 242 = 66 I. C. 193 = 42 M. L. J. 492.

—Vernacular deed—Translation of—Official and High Court translations—Conflict between—Translation to be adopted by Privy Council in case of. See DEED—CONSTRUCTION OF—VERNACULAR DEED—TRANSLATION OF—OFFICIAL TRANSLATION. (1921) 49 I. A. 25 (31) = 1 P. 305 (311).

—Vernacular deed—Translation of—Official and trial Judge's translations—Conflict between—Preference of former to latter (1). (*Sir Robert P. Collier.*) GULABDAS JUGJIVANDAS *v.* COLLECTOR OF SURAT.

(1878) 6 I. A. 54 (56) = 3 B. 186 = 3 Sar. 889.

—(2). (*Sir Arthur Hobhouse.*) VENKATESWARA IVAN *v.* SHEKHARI VARMA. (1881) 8 I. A. 143 (155) = 3 M. 394 (397) = 4 Sar. 259.

—Vernacular deed—Translation by High Court of, at variance with official translation—Appellant to Privy Council questioning correctness of High Court translation—Duty of.

Where, in a case in which the construction of a deed was in question, the judges of the High Court considered that the official translation of the deed was to some extent imperfect, and gave their decision upon the construction which they put upon the original document, which was before them, *held* that it was incumbent on the appellant, who questioned the correctness of the view of the High Court as to the effect of the deed, to furnish their Lordships with the translation of the document on which the High Court relied, or at all events some information with reference to it (111-2). (*Sir Robert P. Collier.*) RAJ BAHADUR SINGH *v.* ACHUMBIT LAL.

(1879) 6 I. A. 110 = 6 C. L. R. 12 = 3 Suth. 598 = 4 Sar. 15 = Bald. 203.

—Vernacular deed—Translation by High Court of—Appellant before Privy Council questioning correctness of—Procedure in case of—Transmission of appellant's sworn translation—Transmission of original deed.

In this case the plaintiff challenged the accuracy of the translation from the original mortgage bond sued upon relied upon by the High Court and he applied for permission to send to England as part of the record another sworn translation which he alleged was the correct one. The High Court did not think itself warranted in authorising that, but it directed that the original mortgage should be sent to England. This was done and a member of their

DEED—(Contd.)**Construction of—(Contd.)**

Lordships' Board, who could read the Vernacular, read it and was of opinion that the translation relied upon by the High Court was incorrect. (*Lord Phillimore.*) MANNA LAL v. KARU SINGH. (1919) 13 L. W. 652 (655) =

1 Pat. L. T. 6 = 56 I. C. 766 = 39 C. L. J. 256.

—Vernacular deed—Translation of, adopted by Privy Council.

On a question of the construction of a Vernacular will, their Lordships must abide by the official translation of it (277-8). (*Lord Hothouse.*) KARANSI MADHOWJI v. KARSANDAS NATHA. (1898) 23 B. 271 = 7 Sar. 427.

—Vernacular words—Meaning of—Opinion of Indian Courts as to—Value attached by Privy Council to. See VERNACULAR WORDS—MEANING OF.

(1921) 49 I. A. 54 (57-8) = 46 B. 481 (486).

—Will—Appointment of heir, present and irrevocable—Distinction—Test—Hindu widow with power of appointing heir—Deed by. See HINDU LAW—WILL—APPOINTMENT OF HEIR, PRESENT AND IRREVOCABLE.

(1884) 11 I. A. 197 (208-9) = 11 C. 186 (197-8).

—Will—Authority to adopt—Distinction—Test. See HINDU LAW—ADOPTION—AUTHORITY TO ADOPT—WILL.

—Will—Codicil or *inter vivos* conveyance—Allowance—Bequest of, "from this date"—Deed creating. See HINDU LAW—WILL—CODICIL OR *inter vivos* CONVEYANCE.

(1917) 43 I. C. 987 (988).

—Will—Deed amounting to a. See all other cases under HINDU LAW—WILL.

—Will—Family arrangement—Distinction—Test. See HINDU LAW—WILL—FAMILY ARRANGEMENT.

—Will—Gift *inter vivos*—Distinction—Test. See HINDU LAW—WILL—GIFT *inter vivos*.

—Will—Inheritance—Right of—Declaration of—Deed having effect merely of—Distinction—Test. See HINDU LAW—WILL—INHERITANCE—DECLARATION OF RIGHT OF.

—Will—Settlement deed—Distinction—Test. See SETTLEMENT DEED—WILL.

—Word same used in different places in deed—Meaning of, same throughout—Rule as to—Nature of and limits to.

By a deed of trust the then King of Oudh settled a certain sum of money for the purpose of paying certain pensions for the benefit of certain members of his family and for *wakf* expenses. The deed appointed trustees to administer the religious endowment and a *vakil* to pay the pensions.

The question arose as to the true meaning of the word "heirs" used in the deed with reference to the pensions to the members of the King's family. It appeared clearly that the word meant heirs general and was not limited to heirs who were also issue. It was said that that meaning must be rejected and the word understood as meaning only heirs who were also issue, because, in the clauses of the deed relating to the devolution of the rights of the mutawallis of the religious endowment and of the *vakil* of the pensions, the terms "heirs" and "descendants" were used as convertible terms. It was contended that for that reason the word "heirs" must, throughout the whole deed, mean heirs who were also descendants.

Their Lordships rejected the contention, observing:—

The descent of the trusteeship and the descent of the beneficial interest in the pensions are distinct things, and their Lordships have no right to assume that the King intended them to be governed by the same rules. The ambiguity of the language used on the one subject cannot

DEED—(Contd.)**Construction of—(Contd.)**

control the clear and unambiguous words employed with regard to the other (141-2). (*Sir Arthur Wilson.*) NAWAB HAIDAR HUSAIN KHAN v. NAWAB FAGHFUR MIRZA. (1905) 32 I. A. 135 = 27 A. 383 (391-2) =

2 C. L. J. 57 = 9 C. W. N. 817 = 3 A. L. J. 64 =

7 Bom. L. R. 850 = 8 O. C. 270 = 8 Sar. 826 =

15 M. L. J. 327.

—There is no rigid rule that the same meaning ought to be given to an expression in every part of the document in which it appears. "The truth is that there is no rule of such general application as is contended for. A difficulty or ambiguity may be solved by resorting to such a device, but it is only in such cases that it is necessary or permissible so to do." (*Lord Warrington of Clyffe.*) WATSON v. HAGGITT. (1928) 47 C. L. J. 295 = 107 I. C. 459 =

(1928) A. C. 127 = A. I. R. 1928 P. C. 115 =

56 M. L. J. 91 (94).

—Word same used in regard to different subject-matters—Meaning of, if necessarily same. See DEED—CONSTRUCTION—WORD SAME USED IN DIFFERENT PLACES IN DEED.

—Words in deed—Meaning of. See also WORDS—MEANING OF.

—Words in deed—Meaning of—Hindu—Deed by—Words in—English law technical meaning of—Inapplicability of. See DEED—CONSTRUCTION—HINDU—DEED BY.

(1927) 55 I. A. 74 = 52 B. 176.

—Words in deed—Meaning of—Parties using words—Interests of, at the time—Regard for—Necessity.

You must look at the words of the deed with reference to the parties who use them, and the grant must be consistent with that; consistent with the interests of those who make the grant (23). (*Mr. Pemberton Leigh.*) SREEMUTTY RABUTTY DOSSEE v. SIBCHUNDER MULLICK.

(1854) 6 M.I.A. 1 = 1 Sar. 484.

—Words in deed—Meaning to all—Giving of—Principle of—Limitations to. See DECREE—CONSTRUCTION OF—EXPRESSIONS IN DEED. (1896) 23 I. A. 119 (125) =

24 C. 8 (18).

—Words in deed—Style—Common words of—Meaning of, when not surplusage. See CONVEYANCE—STYLE.

(1924) 52 I. A. 109 = 4 P. 244.

—Words in deed—Superfluous words—Instance of.

It is true that with such a meaning the sentence in question adds nothing of value to the document; it merely takes notice that some place of delivery is to be mentioned more definite than the very wide area of Bengal. The addition is natural enough, and though it may be legally superfluous, such superfluities are not unknown in agreements. (125). (*Lord Hobhouse.*) GRENON v. LUCHMEENARAIN

AUGURWALLAH. (1896) 23 I. A. 119 = 24 C. 8 (18) =

7 Sar. 66.

—Words in deed—Vernacular words—Meaning of—Opinion of Indian Courts as to—P.C.'s interference with. See VERNACULAR WORDS—MEANING OF.

—Words in deed—Zerai land—Meaning of, in deed disposing of Zemindary land and reserving to executant part of land as "Zirat land". See ZEMINDAR—DEED BY, DISPOSING OF ZEMINDARY LAND, ETC.

(1917) 34 M. L. J. 97 (100-1).

Custody proper of.

—Renewal of prior bond—Custody of prior cancelled bond in case of—Obligor's or obligee's. See BOND—RENEWAL OF PRIOR. (1858) 7 M.I.A. 207 (222-3).

—See also EVIDENCE ACT, S. 90, EXPL.

Date of.

—Date appearing on face of deed—Correctness of—Presumption. See DEED—EXECUTION OF—DATE OF.

(1916) 44 I. A. 72 (77) = 44 C. 662 (671).

DEED—(Contd.)**Date of—(Contd.)**

——Mistake as to, in plaint in suit based on deed—Suspicion as to genuineness of deed from. *See* DEED—GENUINENESS OF—PRESUMPTION AGAINST—DATE OF DEED.

——Native and English dates—Conflict between—Which prevails. *See* DATE.

Deceased—Deed by.

——*See* DECEASED.

Declaration of invalidity of.

——Possession of land covered by—Suits for—Distinction—Test. *See* SPECIFIC RELIEF ACT, SS. 39, 42—DEED. (1902) 29 I.A. 203 (210-3) = 25 A. 1 (15-6).

——Setting aside and retention in Court of—Distinction—Decree proper. *See* DEED—SETTING ASIDE OF—DECLARATION OF INVALIDITY AGAINST PARTY OF.

Deeds different.

——*See also* DEED—CONSTRUCTION OF—(1) EARLIER DEED; (2) LATER DEED; (3) OTHER DEEDS; & (4) SUBSEQUENT DEED.

——Execution of, at short intervals—Attestation of all by same persons—Presumption against genuineness from. *See* DEED—GENUINENESS OF—PRESUMPTION AGAINST—ATTESTATION BY SAME PERSONS, ETC.

——Fabrication of—Scheme of—Presumption against genuineness of any of deeds from. *See* DEED—GENUINENESS OF—PRESUMPTION AGAINST—FABRICATION OF DEEDS.

——Transaction embodied in—Same or different—Presumption—Registration of deeds at same time—Effect.

The argument, founded on the non-registration of these instruments of dedication at the time or shortly after the time of their execution, and on the subsequent registration of them at the time of the registration of the first deed of partition, *viz.*, that they constituted in effect one instrument, and rested on the sole foundation of the first deed of partition, appears to have no foundation of fact to support it, since the mere contemporaneous registration of the three furnishes no ground for presuming such union (302). (*Sir Robert Phillimore.*) JUGGUT MOHINI DOSSEE *v.* MUSUMAT SOOKHUMONEY DOSSEE.

(1871) 14 M.I.A. 289 = 10 B.L.R. 19 (P.C.) = 17 W.R. (P.C.) 41 = 2 Suth. 512 = 3 Sar. 23.

Description of property in—Mistake as to—**Evidence.**

——Later deeds in favour of third parties by same executant—Rectification of, at their instance—Evidence of—Admissibility. *See* SPECIFIC RELIEF ACT, S. 31—MORTGAGE DEED—RECTIFICATION—MISDESCRIPTION OF PROPERTY. (1914) 41 I.A. 110 (119-20) 41 C. 972 (988).

Earlier and later deeds.

——Cancellation of former by latter—Question as to—Mixed law and fact. (*Sir Lancelot Sanderson.*) CHOCKALINGAM CHETTIAR *v.* E.N.M.K. CHETTIAR FIRM.

(1927) 6 B. 113 = 107 I.C. 461 = 47 C.L.J. 429 = 32 C.W.N. 677 = 30 Bom L.R. 788 = 27 L.W. 811 (816) = A.I.R. 1928 P.C. 44 = 54 M. L. J. 517.

——Earlier deed—Decision on—Precedent for interpretation of later deed if a. *See* DEED—CONSTRUCTION OF—EARLIER DEED BY SAME PARTY.

(1905) 32 I. A. 135 (141) = 27 A. 383 (391).

Effect of.

——Decision as to—Binding nature of, in subsequent suit.

In a suit brought by the plaintiffs for a declaration that under a *brittipatra*, they were entitled to maintenance at a particular rate per annum, and that that maintenance was a charge upon the defendants' Zemindari, it appeared that

DEED—(Contd.)**Effect of—(Contd.)**

in a former suit the High Court had decided that the document in question had no effectual binding power over the estate, and did not affect it in any way between the parties. *Held*, that the plaintiffs' claim was barred by *res judicata* by reason of the decision in the prior suit. (*Lord Macnaghten.*) DURGA PRASAD *v.* SHASHIBALA DEBI.

(1911) 14 I.C. 463 = (1912) M.W.N. 73 = 11 M.L.T. 73 = 9 A.L.J. 165 = 15 C.L.J. 180 = 14 Bom. L. R. 177 = 16 C.W.N. 603.

——*Ex facie* effect—Plea against—Proof of—Lapse of time—Plea raised after long. *See* DEED—CONSTRUCTION OF—MORTGAGE—SALE WITH CONTRACT FOR REPURCHASE—NATURE REAL OF TRANSACTION—LAPSE OF TIME. (1916) 43 I.A. 284 (293) = 38 A. 570 (580).

——Misrepresentation as to—Plea of—Proof of—Onus—Quantum.

It would be a very dangerous thing to allow people who have induced others to advance money on the faith of their undertakings to escape from the plain effect of those undertakings on the plea that they did not understand them. It requires a clear case of misleading to succeed on such a plea (181). (*Lord Hobhouse.*) HODGES *v.* DELHI AND LONDON BANK, LTD. (1900) 27 I.A. 168 = 23 A. 137 (150) = 5 C.W.N. 1 = 2 Bom. L.R. 967 = 7 Sar. 767 = 10 M.L.J. 279.

Ejectment suit—Right of—Deed barring.

——Fraudulent and inoperative nature of—Plea of—Maintainability. *See* EJECTMENT SUIT—RIGHT OF—DEED BARRING. (1869) 4 B.L.R. 16 (28) = 13 W.R. (P.C.) 14.

Enforceability of.

——Misrepresentations—Execution of deed procured by—Effect. *See* LANDLORD AND TENANT—LEASE—ENFORCEABILITY—REGISTERED DEED PROCURED BY MISREPRESENTATIONS. (1889) 16 I.A. 233 (237-8) = 17 C. 291 (297).

Escrow.

——Delivery on condition—Effect until condition is performed in case of.

A deed may be delivered on a condition that it is not to be operative until some event happens or some condition is performed. In such a case it is until then an escrow only (316). (*Viscount Haldane.*) MACEDO *v.* BEATRICE STROUD. (1922) 31 M.L.T. 312 (P.C.).

Estate conveyed under.

——*See also* DEED—CONSTRUCTION OF—ESTATE CONVEYED.

——Nature of—Decision as to—Binding nature of, in subsequent suit.

A portion of a taluk was attached in execution of a decree against the appellant and sold without limit of title. Thereupon the plaintiff instituted a suit against the appellant, his judgment-creditors, and the purchaser at the execution sale for a declaration that the plaintiff was entitled as the immediate reversioner to an absolute estate in the portion sold on the death of the appellant, and that after the death of the appellant the sale would be inoperative as against him (plaintiff). In that suit the appellant set up the defence that he had an absolute title to the portion sold. And the question for decision was whether that defence was *res judicata* by reason of the decision in a prior suit brought by the father and predecessor in title of the plaintiff against the appellant, that decision being to the effect that the appellant had only a life interest in the portion of the taluk and that the plaintiff's father had a vested

DEED—(Contd.)**Estate conveyed under—(Contd.)**

remainder therein and could set aside any alienation thereof by the appellant beyond that of his life interest.

Held, affirming the court below, that the defence was *res judicata*. (*Sir Arthur Wilson*.) **RAJA RAMPAL SINGH v. RAM GHULAM SINGH.** (1904) 32 I.A. 17 = 27 A. 37 = 1 C.L.J. 46 = 2 A.L.J. 237 = 8 Sar. 727.

Estoppel by.**—Plea of—Ambiguity in deed—Effect.**

This document is in ambiguous language; and those who rely upon it as an estoppel,—the nature of an estoppel being to exclude an inquiry by evidence into the truth,—must clearly establish that it does amount to that which they assert (161). (*Sir Montague E. Smith*.) **RANI MEWA KUWAR v. RANI HULAS KUWAR.** (1874) 1 I.A. 157 = 13 B.L.R. 312 = 3 Sar. 354 = R. & J.'s No. 27.

Executant of.

—Attesting witness if can also be. *See* DEED—ATTESTORS TO—EXECUTANTS IF CAN ALSO BE.

(1927) 55 I.A. 67 = 52 B. 169.

—Capacity of. *See also* HINDU LAW—WILL—EXECUTION OF—CAPACITY OF TESTATOR.

—Capacity of—Evidence of—Official inquiry and finding as to capacity at about time of deed in question—Value of.

Proceedings in lunacy under the law for that purpose were taken against B, an Oudh talookdar. An inquiry was made into the state of his mind, which ended in an order dated 6—11—1871, by which he was found not to be of unsound mind and incapable of managing his affairs. Upon that he was put into the management of his affairs.

On an issue as to whether, at the date of a sale-deed executed by B on 29—7—1872, he was capable of entering into contracts, and of knowing the nature of the contracts which he entered into, *held* that, although B was, and had been found in some subsequent suits to be, a man of weak intellect, yet, as he was at the time of the execution of the sale-deed in question considered by the proper authorities, who made inquiries, to be capable of managing his affairs, he must be taken to have been capable at that time of entering into contracts, and of knowing the nature of the contracts which he entered into (149-50). (*Sir Richard Couch*.) **RANI JANKI KUNWAR v. RAJA AJIT SINGH.**

(1887) 14 I.A. 148 = 15 C. 58 (62) = 5 Sar. 92.

—Capacities different—Executant with—Execution of deed by, in one capacity—Rights of executant in other capacity if pass under. *See* DEED—CONSTRUCTION—ESTATE CONVEYED—DEED EXECUTED IN ONE CAPACITY.

—Comprehension of nature of disposition—Capacity for—Persons wanting in—Protection of—Rules for.

The law of India contains well-known principles for the protection of persons, who transfer their property to their own disadvantage, when they have not the usual means of fully understanding the nature and effect of what they are doing. In this it has only given the special development, which Indian social usages make necessary, to the general rules of English law, which protect persons, whose disabilities make them dependent upon or subject them to the influence of others, even though nothing in the nature of deception or coercion may have occurred. This is part of the law relating to personal capacity to make binding transfers or settlements of property of any kind (350). (*Lord Sumner*.) **MUSAMMAT FARID-UN-NISSA v. MUNSHI MUKHTAR AHMAD.** (1925) 52 I.A. 342 = 47 A. 703 = 2 O.W.N. 662 = 28 O.C. 338 = 23 A.L.J. 1000 = 42 C.L.J. 531 = (1925) M.W.N. 918 = 12 O.L.J. 656 = 28 Bom. L.R. 193 = 30 C.W.N. 337 = A.I.R. 1925 P.C. 204 = 89 I.C. 649 = 49 M.L.J. 758.

DEED—(Contd.)**Executant of—(Contd.)**

—Incapacity of—Undue influence—Execution under—Issues as to—Mixing up of—Propriety.

The Chief Court appear to have mixed up the questions of undue influence and incapacity. They are totally different issues (10). (*Lord Halsbury*.) **SAYAD MUHAMMAD v. FATTEH MUHAMMAD.** (1894) 22 I.A. 4 = 22 C. 324 (336) = 6 Sar. 515.

—Insanity of—Setting aside of deed on ground of—Suit for—Helplessness and weakness of executant—Relief on foot of—Grant of.

In two suits brought for the cancellation of two mortgage-deeds granted to the respondent by the appellant's father, the ground of action was that the appellant's father was insane, and that the deeds were obtained by fraud. The evidence adduced to show mental unsoundness in appellant's father went to insanity in its crudest and most palpable form, and there was no case of helplessness or weakness. That evidence was, however, discredited by the courts below. Appellant also failed to make out any case of fraud. The court of first instance, however, held that, though the appellant's father was not insane, he was weak and helpless and that the respondent defrauded him, and on this footing, gave appellant a limited decree. *Held* by their Lordships that it was not legitimate to commute an insufficient case of insanity into a complete case of weakness, when the type of insanity connoted in the evidence was something quite different, and that, the appellant having failed to make out any case of fraud, his suit was liable to dismissal. (*Lord Robertson*.) **DURGA BAKHSH SINGH v. MIRZA MUHAMMAD ALI BEG.** (1904) 31 I. A. 235 = 27 A. 1 = 7 O. C. 287 = 8 Sar. 725.

—Insanity of—Setting aside of deed on ground of—Suit for—Undue influence—Relief on foot of—Grant of.

A sued to invalidate and annul certain transactions by his mother, the effect of which was, in substance, to transfer nearly the whole of her properties or their proceeds to her daughter. The plaint alleged that at the time of the said transactions the mother was suffering from dementia and was not in a fit state of mind to execute contracts or to manage her affairs and that up to a short time prior to the date of the said transactions, she was residing with her said daughter and was entirely under her dominion and control. The only issue raised with regard to these allegations was as to whether the mother was in an unsound state of mind at the date of the said transaction and the parties went to trial on that issue. There was no allegation in the plaint, and there was no issue, as to whether the transactions were in any event voidable on the ground of undue influence. For the first time, the trial Judge, in his judgment, thought that plaintiff might have rested his case on undue influence and held that the transactions were voidable on that ground. On appeal, held by their Lordships that the question of undue influence was never properly before the court at all and ought not to have been considered. (*Sir Arthur Wilson*.) **ISMAIL MUSSAJEE MOOKEEDUM v. HAFIZ BOO.**

(1906) 33 I. A. 86 = 33 C. 773 (782-3) = 10 C.W.N. 570 = 3 A.L.J. 353 = 3 C. L. J. 484 = 8 Bom. L.R. 379 = 1 M. L. T. 137 = 9 Sar. 94 = 16 M. L. J. 166.

—Minority of—Onus of proof of. *See* SALE DEED—SETTING ASIDE OF—SUIT FOR—MINORITY OF EXECUTANT.

(1877) 3 C. 192 (195).

—Where, in a suit brought on the strength of title acquired under a conveyance of the suit property by the real owner, the defendant pleads the invalidity of the conveyance on the ground that the vendor was at the time of the conveyance a minor, the onus to prove minority is on the defendant who asserts it. When he brings no reliable evidence to prove

DEED—(Contd.)**Executant of—(Contd.)**

such assertion, the defect in his proof cannot be cured by a mere criticism of the evidence brought by the plaintiff (101). (*Lord Dundelin.*) **RAJA OF DEO v. ABDULLAH.**

(1918) 45 I. A. 97 = 45 C. 909 (917) = 16 A. L. J. 576 = (1918) M. W. N. 406 = 22 C. W. N. 891 = 8 L. W. 163 = 24 M. L. T. 62 = 28 C. L. J. 192 = 20 Bom. L. R. 851 = 45 I. C. 770 = 35 M. L. J. 46.

—Where a deed is executed by a person who alleges himself to be a major at the time of execution, a heavy burden rests upon him or his representatives when they set up the defence of minority. (*Lord Salvesen.*) **SADIQ ALI KHAN v. JAI KISHORI.** (1928) 47 C. L. J. 628 =

26 A. L. J. 685 = 32 C. W. N. 874 = 5 O. W. N. 547 = 28 L. W. 17 = 109 I. C. 387 (2) = 30 Bom. L. R. 1346 = A. I. R. 1928 P. C. 152 = 55 M. L. J. 88 (90).

—Signature of. *See also* HINDU LAW—WILL—EXECUTION OF—SIGNATURE OF TESTATOR.

—Signature of—Forgery of—Finding as to, based on comparison of Oorya handwriting by European Judge—Propriety—Genuineness of signature admitted by party disputing deed.

In a case in which the question was as to the genuineness of a deed of authority to adopt alleged to have been executed by a deceased zemindar, the appellant, who impugned it as a forgery, admitted that the signature, and the Sankhu and Chakran (the emblems on the deed) were of the deceased's handwriting, and the case made by him and his witnesses was that the forgery was effected by filling up, after the death of the deceased, a blank paper, which had those genuine marks and signature upon it. And yet the trial Judge by an examination and comparison of the signature of the deceased in the deed with his admitted signatures, expressed himself satisfied that the signature in the deed purporting to be that of the deceased was itself forged.

Held that, notwithstanding the conclusion of the trial Judge, it must be assumed that the signature of the deceased upon the deed was of his handwriting (176).

Their Lordships agree with the Judges of the High Court in thinking that little weight ought to be given to a comparison of Oorya handwriting by an European Judge, however skilled and experienced, when opposed to the admissions of those who dispute the document (176). (*Sir James W. Colville.*) **SRI RAGHUNADHA v. SRI BROZO KISHORO.**

(1876) 3 I. A. 154 = 1 M. 69 = 25 W. R. 291 = 3 Sar. 583 = 3 Suth. 263.

—Signature of—Necessity—Seal of executant—Affixing of—Sufficiency of—Proof clear and convincing of such affixing—Necessity.

The ikrar was sealed with the executant's seal, but not signed. The signature was not necessary; but no doubt its absence made it proper that the proof of the affixing of the seal should be clear and convincing (110). (*Sir Montague E. Smith.*) **AMEEROONISSA KHATOON v. ABED- OONISSA KHATOON.** (1875) 2 I. A. 87 =

15 B. L. R. 67 = 23 W. R. 208 = 3 Sar. 423 = 3 Suth. 87.

—Signature of, below those of attestors—Presumption against genuineness of deed from. *See* DEED—GENUINENESS OF—PRESUMPTION AGAINST—ATTESTORS—SIGNATURES OF, ETC. (1876) 3 I. A. 154 (186) =

1 M. 69.

—Signature existing of—Document written above—Characteristic signs of.

The writing in the document appears to be close at the beginning and to expand towards the end, the characteristic signs of a document written above an existing signature. (*Lord Atkin.*) **KESSAR BAI v. JETHABHAI JIVAN.**

(1928) 28 L. W. 737 = 111 I. C. 169 =

A. I. R. 1928 P. C. 277.

DEED—(Contd.)**Executant of—(Contd.)**

—Signature of, with prefix "Babu" or "Mr."—Improbability in India of.

In a will alleged to have been executed by one Ram Narain, deceased, the signature of the testator ran as "Babu Ram Narain" instead of as "Ram Narain." The only explanation offered with regard to the extraordinary circumstance of Ram Narain signing himself as Babu Ram Narain was that in petitions to the authorities as a mark of respect Ram Narain signed simply as Ram Narain, and that in other cases he signed as Babu Ram Narain.

Their Lordships observed that that was palpably a false explanation and opposed to all Indian experience (683). (*Mr. Amcer Ali.*) **BINDESHRI PRASAD v. BAISAKHA BIBI.** (1919) 24 C. W. N. 674 = 61 I. C. 431.

—Sound disposing state of mind of—Proof of—Religious Endowment—Head of—Deed appointing successor by.

The question was whether the Sajjadanashin or religious head of a Mahomedan shrine was, when he executed a deed dated 29—7—1884 appointing the appellant as his successor and heir, in a state of mind capable of appreciating the nature of the act that he was performing.

Held, on the evidence reversing the Chief Court of the Punjab, that the evidence established sufficiently that the Diwan, religious head, was in a state of mind which showed that he knew what he was doing, and that the act which he did was one which he intended to do, and that he was capable of understanding the nature and consequences of the act which he had done (10). (*Lord Halsbury.*) **SAYAD MUHAMMAD v. FATTEH MUHAMMAD.**

(1894) 22 I. A. 4 = 22 C. 324 (335-6) = 6 Sar. 515.

Execution of.

(*See also* DEED—GENUINENESS OF.)

—Admission of—Effect of—Validity and real nature of deed—Right to contest—Effect on.

An admission by the executant of a deed of its actual execution proves the mere *factum* of the deed and does not preclude her from contesting its validity and maintaining that it was colorable, and not real (121). **MUSSUMAT USHRUFOONNESSA BEGUM v. BABOO GRIDHAREE LALL.**

(1872) 19 W. R. 118 = 2 Suth. 763 = 5 Sar. 708.

—Admission before Registrar of, after document explained to executant—Plea by executant of ignorance of transaction in case of—Value of.

In a case in which the executant of a deed admitted execution before the Registrar after the deed had been explained to her, *held* that her story that she was ignorant of the nature of the transaction could not be accepted. (*Sir John Wallis.*) **SENNIMALAI GOUNDAN v. SELLAPPA GOUNDAN.** (1928) 33 C. W. N. 407 = 29 L. W. 439 = 114 I. C. 568 = A. I. R. 1929 P. C. 81 = 56 M. L. J. 511 (515).

—Admission in pleadings of—What amounts to.

Where the respondent referred to a deed of gift under which the appellants claimed to derive title, and gave distinct notice that its execution was not admitted, the execution of the deed was put in issue in the course of the suit in the ordinary way, and both the Courts below tried the question and *held* that the execution was not proved, *held*, that the execution of the deed could not be considered as never having been in contest. (*Lord Macnaghten.*) **ANAND KUAR v. TANSUKH.** (1889) 11 A. 396.

—Admission of voluntary, before Court soon after deed—Compulsion by threats—Execution under—Plea of, raised after death of person alleged to have threatened—Value of. *See* COMPROMISE—EXECUTION OF—COMPULSION BY THREATS. (1839) 2 M. I. A. 181 (249).

—Admission subsequent and verbal by executant of—Value of.

The only legal proof which the Pundit gives of the actual

DEED—(Contd.)**Execution of—(Contd.)**

execution of the document is the subsequent and verbal admission of the executant in a conversation with him. The learned Judges of the High Court laid some stress on that admission. But their Lordships need not remark upon the danger of trusting to that kind of evidence, unless the witness is wholly above suspicion (429). (*Sir James W. Colville.*) GERESH CHUNDER LAHOREE *v.* MUSSUMAT BHUGGOBUTTY DEBIA. (1870) 13 M. I. A. 419 =

14 W. R. (P. C.) 7 = 2 Suth. 339 = 2 Sar. 579.

—Attestation of witnesses if included in—Will—Distinction. See HINDU LAW—WILL—EXECUTION OF—MEANING OF. (1845) 3 M. I. A. 395 (406-7).

—Capacity of executant. See under DEED—EXECUTANT OF.

—Capacities different—Person with—Execution of deed in one capacity by—Rights of executant in other capacities if pass under. See DEED—CONSTRUCTION OF—ESTATE CONVEYED—DEED EXECUTED IN ONE CAPACITY.

—Date of—Date appearing on face of deed—Correctness of—Presumption.

It is a general though not a conclusive presumption that a document was made on the day of the date it bears. (*Sir Lawrence Jenkins.*) MINA MUKARI BIBI *v.* BIJOY SINGH DUDHURIA. (1916) 44 I. A. 72 (77) = 44 C. 662 (671) =

21 M. L. T. 344 = 5 L. W. 711 = 21 C. W. N. 585 =

25 C. L. J. 508 = 19 Bom. L. R. 424 = 15 A. L. J. 382 =

1 Pat. L. W. 425 = 40 I. C. 242 = 32 M. L. J. 425.

—Duress—Execution under—Proof of.

The suit was brought by one *N* to recover possession of certain lands with mesne profits, and to set aside a deed of sale purporting to have been executed by him to one *I*, in consideration of Rs. 4,000. The plaintiff alleged that he agreed to sign and that he executed the deed of sale for the said consideration, in consequence of pressure and duress put upon him, and in order to get back certain papers, etc., of his, which had been abstracted by the defendant and his servants. The gist of his case was duress not only of goods but of person,—personal restraint, and danger to his life and reputation.

Held, reversing the Courts below, that the evidence not only fell very far short of proof that the plaintiff was subjected to personal violence of the nature and degree stated in the plaint, but that it was insufficient to warrant the general conclusion that the deed was forcibly taken from him (61). (*Sir James Colville.*) GUTHRIE *v.* ABOOL MOZUFFER. (1871) 14 M. I. A. 53 = 2 Sar. 660 =

15 W. R. (P. C.) 50 = 7 B. L. R. 630 = 2 Suth. 429.

—Evidence of—Kazi's seal—Attestation by—Copy of deed kept in his book—Evidence afforded by—Value of—Circumstances removing.

The question was as to the genuineness of a deed of gift alleged to have been executed by one *N* in favour of the appellant on 27-12-1809. It was alleged that *N* took the deed, either on the 29th or 30th of December, to the Kazi to have it attested by his seal, which seemed to have very much the effect of a notarial recognition of the instrument. The question was as to the importance to be attached to that part of the evidence in the case which arose from the Kazi's book.

By the Regulations of 1793, it was the duty of the Kazis to keep copies of the instruments which they executed. A witness, however, stated that Kazis in that neighbourhood were not aware of that Regulation; that no orders had been issued to that effect to them, but that they were in the habit of keeping copies for their own satisfaction. How those books of the Kazis, as they were called, were bound, or in what form they were, did not very clearly appear; but it seemed that at some period, which must have been after March 1818, all the books of the Kazis in that district were

DEED—(Contd.)**Execution of—(Contd.)**

called for by the Judge of the Zillah Court; that they were all sent in to him, and that then those books appeared to have been made up into volumes, and they were directed in future to keep records of those instruments in volumes, and then, those things having been thus divided, and apparently made up for each year, the Kazi and the Judge, one at the beginning and the other at the end of the document, affixed their signatures as an authentication of it. All this was done after the litigation had occurred, for the plaint in the suit was filed in 1817; and there was no sufficient proof that there could have been no interpolation of the document in question between the year 1816, when it was first mentioned by the parties who produced it, and the period of March 1818, or the subsequent period, whatever it was, at which those records were made up and authenticated in the manner mentioned above.

Held, that under the circumstances all or nearly all the value of the evidence arising from the Kazi's book was removed (166-8).

Certainly, if nothing more had appeared to us, except that that book had been produced, with the signature of the Kazi at the beginning, and the signature of the English Judge at the end, that book appearing to have been regularly kept, and this document (the deed of gift in question) entered there, it would have been such evidence as, notwithstanding all the difficulties of the case in other respects, would have induced us to say that we should not recommend Her Majesty to confirm the judgment below (166-7). (*Mr. Pemberton Leigh.*) BABOO KASI PERSAD NARAIN *v.* MUSSUMAT KAWALBASI KOER.

(1851) 5 M. I. A. 146 = 1 Suth. 225 = 1 Sar. 412.

—Evidence of—Nawab executant—Seal of deceased—Seals on deed being true impressions of, if sufficient proof of execution by deceased.

In a suit instituted against the heirs of a deceased Nawab on two bonds alleged to have been executed by the deceased in favour of the plaintiffs, issues were raised as to whether the bonds had been duly executed by the deceased.

Held, that no Court of Justice would in the circumstances accept the mere proof that the seals on the bonds were true impressions of the deceased Nawab's seal, as sufficient proof of the due execution by him of either bond (124). (*Sir James W. Colville.*) SHAH KOONDUN LALL *v.* RAJAH AMEER HUSSUN KHAN. (1866) 11 M. I. A. 120 =

2 Sar. 239 = R. & J.'s No. 6 (Oudh)

—Evidence of—Quantum—Beneficiary under deed—Suit by—Suit to set aside deed on ground of forgery and brought against beneficiary under deed—Distinction.

With regard to the quantum of proof required of the due execution of a deed, there is a distinction between the case in which the suit is by the party claiming under the deed to recover possession by virtue of the title derived under the deed, and the case in which the suit is to set aside the deed on the ground of forgery, and the party claiming under the deed is in possession and has been found to be in lawful possession by a Magistrate's award. KURALI PRASAD MISSER *v.* ANANTARAM HAJRA. (1871) 2 Sar. 695 =

8 B. L. R. 490 = 16 W. R. 16 = 2 Suth. 454.

—Evidence of—Quantum—Lapse of time—Effect.

In considering the witnesses who were called, and the absence of witnesses, the length of time which had elapsed from the period when the deeds (the genuineness of which was in question) were executed to the time of the inquiry must be borne in mind. Without casting the responsibility of the delay in raising the question of the genuineness of the deeds on the one side or the other, the fact of the delay is certainly important when we come to consider the evidence which was given, and that which, if the case had been heard at an earlier period, might have been expected to be

DEED—(Contd.)**Execution of—(Contd.)**

given (98-9). **RAJAH CHUNDERNATH ROY v. KOOER GOBINDNATH ROY.** (1872) 11 B. L. R. 86 = 18 W. R. 221 = 2 Suth. 608.

—Evidence of, fixing time and place—Persons likely to depose against execution at that time and place—Failure of opponent to examine—When material.

The case as to the execution of the deed is, that it was executed in the house of *M*; that the consideration money was brought there, that it was paid there, and the date of the transactions is fixed by the date of the deed. Yet not a single witness is brought from the family of *M* either to impeach his handwriting, or to prove that this story was a mere figment, and that the parties were not there at that time, and that no such transaction as deposed to took place. It may be true that this kind of evidence is very often given by witnesses who do not receive much credit; but in every case it must depend on the character of the particular witnesses whether such evidence is credible or not, and the absence of any attempt to prove such a case is a circumstance which is certainly open to much observation (501-2). **KURALI PRASAD MISSEER v. ANANTARAM HAJRA.** (1871) 8 B. L. R. 490 = 16 W. R. 16 = 2 Sar. 695 = 2 Suth. 454.

—Evidence of, required—Deed involving extinction and alteration of patrimonial rights and degrading alteration of status and moral life of others. See CEYLON LAW.

(1927) 54 M. L. J. 388 (392-3).

—Formalities necessary—Delivery—Necessity—Effect—Mode of making delivery.

No particular technical form of words or acts is necessary to render an instrument the deed of the party who has executed it. For as soon as there are acts or words showing that it is intended to be executed as his deed that is sufficient. The usual way of showing this is formal delivery.

"But any other words or acts that sufficiently show that it was intended to be finally executed will do as well. And it is clear on the authorities as well as the reason of the thing, that the deed is binding on the obligor before it comes into the custody of the obligee nay, before he even knows of it; though, of course, if he has not previously assented to the making of the deed, the obligee may refuse it."

The grantor may deliver to his own servant, if the grantor makes delivery, intending to make the deed his own deed. A deed may be validly executed, even though it remains in the custody of the person who made it or his agent (315-6). (*Viscount Haldane*) **MACEDO v. BEATRICE STROUD.** (1922) 31 M. L. T. 312 (P.C.).

—Fraud and intimidation—Execution under—Proof of—Invalidity of deed in case of.

The appellant was the Chief Manager of the Agent's Court at Ganjam, and his brother held the office of Moon-shee to one of the assistant agents. The respondent was a Zemindar of wealth and considerable position within the District of Ganjam, and was, at the dates of the instruments in question, a very young man, acting in the management of his affairs under the advice of his uncle. The instruments in question were executed when the respondent was under duress, and the evidence showed that when the respondent executed the instruments in dispute he was really under the influence of the feelings by which he alleged that he was induced to grant them, *viz.*, that he believed that it was in the power of the appellant, through his own influence and that of his brother with the Government authorities, to injure and to ruin him, and that for two years he had been suffering under such influence, and that the only way of relieving himself would be to comply with the exactions of the appellant (76).

Held, affirming the judgments below, that the deeds in

DEED—(Contd.)**Execution of—(Contd.)**

question were null and void, as having been obtained by fraud and intimidation.

For the purposes of this suit, the important question is, what was the impression in the respondent's mind and under which he acted, rather than whether the impression itself was or was not well founded (76). When regard is had to the nature of these instruments, and to the relative situation of the parties when they were executed, we think that more evidence would justly have been required to support them than was produced in this case by the appellant, even if the transactions had taken place in Europe. But here they took place in a wild part of India, where exaggerated notions are entertained by the natives of the extent of power possessed over them by the Officers of the Government, and no great confidence seems to be felt in the honesty of the subordinate officers, or the vigilance with which they are controlled by their superiors (76). (*Lord Kingsdown*.) **PAKALA BALAKRISTNAMA PATRULU v. SREE NARAINA MARDARAZ DEVU.** (1864) 10 M. I. A. 60 = 2 Sar. 66.

—Fraud and undue influence—Execution under—Proof of.

Held, on the evidence affirming the Courts below that a deed of hypothecation and a sale-deed, both in favour of the same person, were executed under fraud and undue influence and were brought about by a conspiracy between the lender or vendee and the manager of the borrower or vendor (216). (*Sir Robert P. Collier*.) **AJIT SINGH v. BIJAI BAHADUR SINGH.** (1884) 11 I. A. 211 = 11 C. 61 (66-7) = 4 Sar. 560 = R. & J.'s No. 84 (Oudh).

—Intended execution by several—Actual execution by some only—Validity of deed as against executants. See DEED—VALIDITY—INTENDED EXECUTION, ETC.

(1922) 44 M. L. J. 396 (404-5).

—Issue as to—Finding proper on—Forgery—Finding of, neither necessary nor proper. See DEED—FORGERY OF—Deficit probatio—PLEAS OF. (1858) 7 M. I. A. 148 (155).

—The suit was brought by the respondents, the reversionary heirs of a deceased Hindu, to recover from the appellant the moveable and immoveable properties of the deceased held by his widow as his heiress until her death shortly before suit. The appellant was the brother's daughter of the widow and she set up a deed of gift by the widow disposing of the whole of the suit property in her favour.

Held that, if in such a case the court come to the conclusion that the appellant had failed to establish the validity of the deed of gift on which she relied, it was not necessary to say that she and her witnesses must be taken to have been guilty of conspiracy, perjury, and forgery, and that it was sufficient to say that the proof fell very far short of what was required to support the affirmative of the issue, which she was bound to prove (169). (*Sir James W. Colville*.) **MUSSUMAT THAKOOR DEYHEE v. RAI BALUK RAM.** (1866) 11 M. I. A. 139 = 10 W. R. (P. C.) 3 = 21 I. J. N. S. 106 = 2 Suth. 49 = 2 Sar. 231.

—In a suit in which the genuineness of a will is in question, it is enough for the court to hold that the alleged will is not proved. It is not necessary for the court to go further and hold that the document was a forgery (188-9). (*Lord Macnaghten*.) **SUKH DEI v. KEDAR NATH.** (1901) 28 I. A. 186 = 23 A. 405 (413) = 5 C. W. N. 895 = 3 Bom. L. R. 704 = 8 Sar. 109.

—In a case in which the question was whether a paper writing alleged to have been the last will of a lady was in fact executed by or on her behalf, the District Judge found that the will was not a genuine document, but a forgery. *Held*, that in so finding the District Judge went beyond what the law required.

It would have been enough for the purpose of the case

DEED—(Contd.)**Execution of—(Contd.)**

to find that the alleged will was not proved. (*Sir Lawrence Jenkins.*) **BAIKUNTHA NATH CHATTORAJ v. PRASANAMMOYI DEBYA.** (1922) 27 C. W. N. 797 = 9 O. & A. L. R. 501 = 72 I. C. 286 =

A. I. R. 1922 P. C. 409 = 44 M. L. J. 699 (706).

—Meaning of. See REGISTRATION ACT OF 1908, S. 35—EXECUTE IN—MEANING OF. (1927) 55 I. A. 8 = 55 C. 532 = 54 M. L. J. 473 (478-9).

—Minority—Execution during—Plea of—Onus of proof of. See DEED—EXECUTANT OF—MINORITY OF.

—Onus of proof of—Deed of very doubtful authenticity and linked to deeds previously fabricated.

The appeal arose out of a suit brought by the respondents, praying, *inter alia*, to have their right to the mouzahs specified in an ikrarnamah of the 13th of December, 1852, established in terms of the said ikrarnamah; to have their possession of the property in suit confirmed and allowed to stand; and to have the name of the original appellant (the widow of the alleged executant of the said ikrarnamah) expunged, and their own names inserted in the register as owners of the mouzahs.

The alleged ikrarnamah, which was the sole foundation of the claims urged by the respondents in the suit, appeared to be *prima facie* a document of very doubtful authenticity. It was closely linked to deeds previously fabricated.

Held that, under the circumstances, a heavy onus lay upon the respondents to prove the due execution and delivery of the ikrarnamah set up by them (27). (*Lord Watson.*) **COOMARI RODESHWAR v. MANROOP KOER.**

(1885) 13 I. A. 20 = 4 Sar. 689.

—Signature of executant. See DEED—EXECUTANT OF—SIGNATURE OF.

—Undue influence—What is.

The question of what is undue influence is sometimes a difficult one. Lord Granworth, when giving judgment in the House of Lords in the case of *Boyse v. Rossborough* (6 H. L. Rep. 49), gives this definition: "It is sufficient to say, that allowing a fair latitude of construction, they must arrange themselves under one or other of these heads—coercion or fraud" (10-11). (*Lord Halsbury.*) **SAYAD MUHAMMAD v. FATTEH MUHAMMAD.**

(1894) 22 I. A. 4 = 22 C. 324 (336-7) = 6 Sar. 515.

—Undue influence—Evidence against—Respectable person knowing that deed was going to be unfairly obtained and managing not to be present at its execution—Corroborative evidence of transaction by—Value of.

It is by no means improbable that a person in a respectable position in life, knowing that a deed was about to be unfairly obtained, would take care not to be personally present, and would contrive to give only such corroborative evidence of the transaction as he might think he could safely give (429). (*Sir James W. Colville.*) **GERESH CHUNDER LAHOREE v. MUSSUMAT BHUGGUBUTTY DEBIA.** (1870) 13 M. I. A. 419 = 14 W. R. (P. C.) 7 = 2 Suth. 339 = 2 Sar. 579.

—Undue influence—Evidence of—Revocation of or attempt to revoke deed if and when.

The question was whether there was any evidence tendered by the appellant in the courts below for the purpose of showing any undue influence used to coerce M into executing the instrument in question. It was not shown that any such evidence was tendered, excepting what was called a revocation, or an attempt to revoke, by M, long after the date of the instrument in question.

Held that, though a revocation or an attempt to revoke might be accompanied by circumstances showing that undue influence had been used in procuring the execution of the instrument or throwing light upon that question, yet, where no such circumstances were suggested, it was impossi-

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ble to hold that the fact of what was called the revocation standing alone would have any bearing on undue influence used on the execution of the instrument (143-4). (*Sir Arthur Hobhouse.*) **THAKUR ISHRI SINGH v. BALDEO SINGH.** (1884) 11 I. A. 135 = 10 C. 792 (803-4) =

13 C. L. R. 418 = 4 Sar. 528 = R. & J.'s No. 79 (Oudh). —Undue influence—Execution under. See also CONTRACT ACT, S. 16.

—Undue influence—Execution under—Incapacity of executant—Issues as to—Mixing up of—Propriety. See DEED—EXECUTANT—INCAPACITY OF.

(1894) 22 I. A. 4 (10) = 22 C. 324 (336).

—Undue influence—Issue as to—Issue as to validity of deed if covers. See DEED—EXECUTION OF—UNDUE INFLUENCE—PLEA OF—ISSUE AS TO VALIDITY OF DEED, ETC. (1875) 2 I. A. 87 (107).

—Undue influence—Issue as to—Points to be considered in case of.

Where undue influence is relied upon as invalidating a deed, it is necessary to examine very closely all the circumstances of the case. The principles are always the same though the circumstances differ, and, as a general rule, the same questions arise. They are (1) was the transaction a righteous transaction, that is, was it a thing which a right-minded person might be expected to do? (2) was it an improvident act, that is to say, does it show so much improvidence as to suggest the idea that the executant was not master of himself and not in a state of mind to weigh what he was doing? (3) was it a matter requiring a legal adviser? and (4) did the intention of executing the deed originate with the executant (92-3). (*Lord Macnaghten.*) **MD. BUKSH KHAN v. HOSSEINI BIBI.**

(1888) 15 I. A. 81 = 15 C. 684 (698-700) = 5 Sar. 175.

—Undue influence—Issue as to—Propriety—Forgery—Setting aside of deed on ground of—Suit for. See DEED—FORGERY OF—SETTING ASIDE OF DEED ON GROUND OF—SUIT FOR—UNDUE INFLUENCE.

(1888) 15 I. A. 81 (86) = 15 C. 684 (692).

—Undue influence—Plea of—Appeal—Maintainability of—Forgery of deed—Plea in court below only of. See DEED—FORGERY OF—PLEA IN COURT BELOW OF.

(1875) 2 I. A. 87 (107-8).

—Undue influence—Plea of—Issue as to validity of deed if covers.

In a case in which the plaintiff sought to set aside certain ikrars purporting to be executed by him, the only issue directed to those instruments was in the following terms:—"All the three ikrars said to have been given by the plaintiff to the defendant genuine and valid deeds?"

Quære, whether the objection that the ikrars were obtained by undue influence could, if the previous proceedings had raised it, be held to be comprehended in the word "valid" in the issue (107). (*Sir Montague E. Smith.*) **AMEEROONISSA KHATOON v. ABEDOONISSA KHATOON.**

(1875) 2 I. A. 87 = 15 B. L. R. 67 = 23 W. R. 208 = 3 Sar. 423 = 3 Suth. 87.

—Undue influence—Proof of.

The appellant sued the respondent to recover the amount of a loan bond executed by the latter in favour of the former. The question was whether, as pleaded by the respondent, the bond had been obtained by such undue pressure and threats as were sufficient to vitiate the contract.

The respondent was a boy of eighteen without proper counsel or assistance. The appellant was a person conversant with law suits,—a person of great wealth and great power. There was a suit pending at the time in which the legitimacy of the respondent and his title to a Zemindary were in question. The appellant had acquired a sort of irregular interest in that suit. The suit bond was obtained

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from the respondent by the appellant under threats of otherwise carrying on the litigation against the respondent *per fas aut nefas*. The evidence showed that those threats overcame the respondent's free-will, and induced him, contrary to his own judgment and his own sense of right, and without any evidence that any such sum as was claimed by the appellant was due, to execute the bond extorted from him.

Held, affirming the High Court, that the bond could not stand against the respondent (267). (*Sir James W. Colvile*.) CHEDAMBARA CHETTY *v.* RANGA KRISHNA MUTHU VIRA PUCHAIVA NAICKER. (1874) 1 I. A. 241 =

22 W. R. 148 = 13 B. L. R. 509 = 3 Sar. 373.

—*Held*, agreeing with the Court of the Judicial Commissioner, that the instrument of 1884 was not procured by undue influence (111). (*Lord Macnaghten*.) UMRAO SINGH *v.* LACHHMAN SINGH. (1911) 38 I. A. 104 =

33 A. 344 (355) = 8 A. L. J. 465 = 15 C. W. N. 497 =

13 C. L. J. 519 = 9 M. L. T. 507 = 13 Bom. L. R. 404 =

(1911) 2 M. W. N. 242 = 14 O. C. 133 = 10 I. C. 285 =

21 M. L. J. 637.

—In a suit for the cancellation of a deed of sale executed by the plaintiff, on the ground of undue influence, *held*, affirming the High Court, which had reversed the Court below, that the plaintiff had not succeeded in establishing that the deed was procured from him by the undue influence of the beneficiary under the deed, or by him acting in conspiracy with or through the agency of the other defendants. (*Lord Shaw*.) POOSATHURAI *v.* KANNAPPA CHETTIAR.

(1919) 47 I. A. 1 = 43 M. 546 = 18 A. L. J. 344 =

27 M. L. T. 316 = 13 Bur. L. T. 28 = 55 I. C. 447 =

38 M. L. J. 349.

—*Undue influence—Proof of—Suit to set aside deed on that ground.*

The suit was to set aside an ikrarnamah executed by the three plaintiffs, the daughter's sons of T, in favour of the sons and grandsons of the brothers of T. By the ikrarnamah the plaintiffs gave up to the defendants, the said sons and grandsons of the brothers of T, practically a half of their share of the property of their maternal grandfather. The facts found were that the plaintiffs became entitled to the property of T, on the death of his last surviving widow, their mother being a lunatic and so disentitled to inherit, that at the time the eldest of the plaintiffs was not very much over age and the others were minors, that soon after the death of the plaintiffs' grandmother, their uncles appeared with a large force and took possession of the property of the deceased, that as both parties apprehended an affray, they sent petitions to the authorities, who accordingly issued orders summoning the parties before them and binding them to keep the peace, and that the ikrarnamah was executed to avoid all this. It further appeared that the deed was executed without any consideration whatever, and that when the plaintiffs executed the same they were not fully acquainted with their rights and had no professional advice.

Held, that the ikrarnamah should be set aside because the circumstances under which it was executed constituted a state of things likely to overawe the plaintiffs, and materially to affect the free exercise of their will. (*Sir Robert P. Collier*.) PREM NARAIN SINGH *v.* PARASRAM SINGH.

(1877) 4 I. A. 101 = 3 Sar. 713 = Bald. 108.

—Witness—Execution in presence of—Acknowledgment to him of having executed deed in his absence—Distinction. See ACKNOWLEDGMENT—DOING AN ACT IN PRESENCE OF A PERSON. (1845) 3 M. I. A. 395 (402).

Forged and fraudulent deed—Practice of setting up.

—*Common in India.*

The practice of setting up forged and fraudulent deeds is too common in India (228). (*Lord Justice Turner*.) SREENAATH BHUTTACHARJEE *v.* RAMCOMUL GUNGO.

DEED—(Contd.)**Forged and fraudulent deed—Practice of setting up—(Contd.)**

PADYA. (1865) 10 M. I. A. 220 = 3 W. R. (P. C.) 43 = 1 Suth. 600 = 2 Sar. 121.

Forgery of.

—*Confidential agent of executant—Forgery by—Improbability of.*

In a suit upon a bond purporting to have been written by the confidential agent of the obligor, the latter pleaded that the bond was a forgery. Their Lordships observed:—If the bond had been a forgery, it is utterly inconceivable that, of all persons in the world, the name of the obligor's own confidential agent should have been selected for forgery as the writer of it. The obligor having the means of disproving the bond, if forged, by producing his own agent to say that he did not write, does not venture to call him or any other witness to the point. (*Lord Kingsdown*.) CHEYT RAM *v.* CHOWDHREE NOWBUT RAM. (1858) 7 M. I. A. 207 (222) =

5 W. R. 3 = 1 Suth. 319 = 1 Sar. 627.

—*Deficit probatio—Pleas of—Distinction—Sufficiency of latter plea.*

Where the appellant relied upon a deed, the effect of which would be to exonerate him from a demand made against him by the respondent, and the latter attacked its genuineness, *held* that it was not necessary to contend that the deed was forged, and that it was sufficient to say that there was a *deficit probatio* (155). (*Dr. Lushington*.) BUNWAREE LALL *v.* MAHARAJAH HETNARAIN SINGH.

(1858) 7 M. I. A. 148 = 4 W. R. 128 = 1 Suth. 607 =

1 Sar. 610.

—*Finding of—Propriety—Execution of deed—Issue as to. See DEED—EXECUTION OF—ISSUE AS TO—FINDING PROPER ON.*

—*Genuineness of—Proofs of—Distinction. See DEED—GENUINENESS OF—FORGERY OF—PROOFS OF.*

(1871) 17 W. R. 108 (111-2).

—*Plea in Court below only of—Undue influence—Execution under—Plea in appeal of—Maintainability.*

In a suit brought to set aside certain deeds, on the ground that they were forged, the question whether the deeds were obtained by undue influence was not raised either in the issues, or at the trial, or even in the grounds of appeal to the High Court. The High Court nevertheless declined to give effect to the deeds on the ground that they were obtained by undue influence.

Held that, in the circumstances of the case, it was too late to set up that plea for the first time before the High Court, especially as the evidence did not seem to have been directed to it (107-8). (*Sir Montague E. Smith*.) AMEE-ROONISSA KHATOON *v.* ABEDOONISSA KHATOON.

(1875) 2 I. A. 87 = 15 B. L. R. 67 = 23 W. R. 208 =

3 Sar. 423 = 3 Suth. 89

—*Setting aside of deed on ground of—Propriety—Available evidence adduced in support of deed—No evidence contra.*

Although it may be desirable carefully to examine cases of possible fraud, yet instruments which are proved by all the attesting witnesses, and against which there is no evidence on the other side, ought not to be set aside and treated as worth nothing, on a mere possible suspicion of perjury and forgery (508-9). KALICHANDRA CHOWDHRY *v.* SHIB CHUNDRA. (1870) 6 B. L. R. 501 = 15 W. R. 12 =

2 Sar. 621 = 2 Suth. 383.

—*Setting aside of deed on ground of—Suit for—Failure to establish case—Appeal—Invalidity of deed, though genuine—Plea of—Permissibility.*

In a suit brought to set aside a deed as a forged and fabricated document, their Lordships *held*, agreeing with the High Court, that the plaintiff had failed to establish his case. Before their Lordships the appellant (plaintiff)

DEED—(Contd.)**Forgery of—(Contd.)**

endeavoured to raise and argue a further objection to the deed in question, *viz.*, that it was executed in contemplation of the executant joining the rebels, and with a view to escape the consequences of a forfeiture of his property.

Their Lordships declined to allow the objection to be raised on the ground that that case was not made either in the plaint or in the pleadings, that it was not raised in either of the Courts below, and that it was quite a different case from that which alone was put forward in the plaint, and which had been the subject of discussion in the Courts below. (*Sir Montague E. Smith.*) **GOSSAIN LUCHMI NARAIN POORI v. POKHRAJ SINGH DIN DYAL LAL.**

(1879) 3 **Suth.** 581 (583) = **Bald.** 189 = 3 **I. J.** 220.

—*Setting aside of deed on ground of—Suit for—Proof required in—Onus—Laches in instituting suit—Principals in transaction and some of attestors dead.*

The question in the appeal was whether a mokurruree lease granted by one M was a genuine or a forged document. The High Court found it to be genuine.

The plaintiff represented the purchaser of the suit property at an auction sale by Government in 1859. The mokurruree in question was granted in 1857. The suit was brought only in 1871. The mokurruree in question was thus acted upon for a period of nearly 12 years prior to suit. The three principals in the transaction were dead. Two at least of the attesting witnesses had also died prior to suit.

Held, that there ought surely to be a strong case on the part of the plaintiff who came into court to set aside the deed at so late a period to induce the court to give him relief, and that the evidence adduced by him had failed to establish his case (583). (*Sir Montague E. Smith.*) **GOSSAIN LUCHMI NARAIN POORI v. POKHRAJ SINGH DIN DYAL LAL.**

(1879) 3 **Suth.** 581 = **Bald.** 189 = 3 **I. J.** 220.

—*Setting aside of deed on ground of—Suit for—Undue influence—Execution under—Validity in law of deed—Issues as to—Propriety of.*

In a suit brought to recover possession of certain property on the allegation that a hibbanama, or deed of gift, purporting to have been executed by plaintiff in respect thereof, was a forged document, the only ground of action alleged in the plaint was, that the hibbanama was a fabricated document and that plaintiff's alleged signature was a forgery. Amongst the issues framed in the suit were: (1) whether the hibbanama was genuine and valid and executed with plaintiff's knowledge and consent, or whether it was manufactured without her knowledge and consent, or whether it was executed under undue influence; and (2) whether in case the said hibbanama was proved to be genuine it was invalid on any ground according to Mahomedan Law. *Held*, that the latter part of the first issue and the second ought not to have been admitted. They were absolutely inconsistent with the case made by plaintiff and only became possible on the assumption that the alleged cause of action was unfounded (86). (*Lord Macnaghten.*) **MAHOMED BUKHSH KHAN v. HOSSEINI BIBI.**

(1888) 15 **I.A.** 81 = 15 **C.** 684 (692) = 5 **Sar.** 175.

—*Setting aside of deed on ground of, and consequential reliefs—Suit for—Genuineness of deed—Relief on foot of—Grant of.*

The suit was to set aside certain ikrarnamas purporting to have been executed by the plaintiff in favour of the defendant, his father, which ikrarnamas had the effect, if genuine, of modifying the operation of three deeds of gift, executed by the defendant in favour of the plaintiff and containing ostensibly absolute gifts to the plaintiff of properties of considerable value. The only prayer in the plaint

DEED—(Contd.)**Forgery of—(Contd.)**

was to have the ikrars set aside as fabricated, and the plaintiff put into possession of the properties claimed with mesne profits. Under the ikrars, if genuine, the defendant would have been entitled to the possession and control of the property during his lifetime, though other persons might have been entitled to a share of the profits accruing in his lifetime.

The ikrars were found to be genuine; the plaintiff was held not entitled to have them set aside, and to turn the defendant out of possession. It was at the same time found that the rights of the parties fell to be governed by the provisions contained in the deeds of gift and in the ikrars, read and construed as a whole. The question, therefore, arose whether the plaintiff was entitled to any relief in the suit as framed, or whether it ought to be dismissed.

Held, that the form of the suit as framed did not allow of the rights of the parties under the deeds of gift and the ikrars, read and construed as a whole, being declared in it (111-2).

The present suit which treats the defendant as a trespasser liable for mesne profits cannot be sustained (112). (*Sir Montague E. Smith.*) **AMEEROONISSA KHATOON v. ABEDOONISSA KHATOON.**

(1875) 2 **I.A.** 87 =

15 **B.L.R.** 67 = 23 **W.R.** 208 = 3 **Sar.** 423 = 3 **Suth.** 87.

—*Signature existing—Deed written above—Characteristic signs of. See DEED—EXECUTANT OF—SIGNATURE EXISTING OF.*

(1928) 28 **L. W.** 737.

Fraud in regard to.

—*Consideration—Absence of—Setting aside of deed on grounds of—Suit for—Proof required in—Onus of.*

The suit was brought by the respondent to set aside a Zur-i-peshgi deed purporting to have been executed by him to the appellant and his deceased brother for securing to them the repayment of a sum of Rs. 49,000 and odd. The respondent's case was that the deed impeached was obtained from him fraudulently and without consideration. It was admitted that the appellant and his brother had been in possession of the property under the deed for several years. The appellant's case was that he was in such possession even at the date of suit, but that was disputed by the respondent.

Held that, considering that it lay upon the respondent to establish a clear and consistent case for setting aside his own deed, the evidence adduced by him wholly failed to do so (321).

If it lay upon the appellant to prove the truth of his case, he has very imperfectly done so (321). (*Sir James W. Colvile.*) **KALUPERSHAD TEWARREE v. RAJAH SAHIB PERHLAD SEIN.**

(1869) 12 **M.I.A.** 282 =

12 **W. R. (P.C.)** 6 = 2 **B.L.R. (P.C.)** 111 = 2 **Suth.** 225 =

2 **Sar.** 430.

—*Duress—Setting aside of deed on grounds of—Onus on plaintiff in.*

In a suit by the appellant to set aside a deed of release executed by him on the ground that it had been obtained from him by fraud and duress, principally by duress, *held*, that the onus lay on the appellant to satisfy the court that there was such duress or fraud through which the deed was obtained, and that it was not sufficient to say that there was a case of doubt, that it was not perfectly clear that the appellant was a free agent, and that there might be suspicions on the conduct of the other party (17). (*Lord Brougham.*) **MOTEE LAL OPUDHIYA v. JUGGURNATH GURG.**

(1836) 1 **M.I.A.** 1 = 5 **W.R.** 25 (**P.C.**) =

1 **Sar.** 88 = 1 **Suth.** 45.

—*Plea of—Proof necessary in case of. See FRAUD—IMPUTATION OF.*

(1839) 2 **M.I.A.** 181 (246).

DRED—(Contd.)**Fraudulent concealment of—Theory of.**

—Registration of deed—Effect of. See LIMITATION ACT OF 1908,—S. 18—DEED—FRAUDULENT CONCEALMENT OF. (1881) 8 I.A. 143 (156) = 3 M. 384 (398).

Genuineness of.

See also DEED—EXECUTION OF.

—Admission by executant not *inter partes*—Decision in favour of genuineness based solely on—Propriety. See ADMISSION—DEED—GENUINENESS OF.

(1869) 12 M.I.A. 289 (333-4).

—Decision in favour of—Basis proper of—Admission of executant not *inter partes* by itself if. See ADMISSION—DEED—GENUINENESS OF.

(1869) 12 M.I.A. 289 (333-4).

—Forgery of—Proofs of—Quantum—Distinction.

The proof which is necessary to establish that a document is genuine may well be far short of that which is necessary to establish that it is a forgery, and the defect of proof must of course fall on the party who propounds the document (111-2). MUSSAMUT HARMUT-OOL-NISSA BEGUM v. ALLADIA KHAN. (1871) 17 W.R. 108 =

2 Suth. 525.

—Inspection of deed—Opinion as to genuineness formed from—Weight due to—Native trial judge—European appellate judges—Difference in opinion between—Deed in native language. See HINDU LAW—WILL—EXECUTION OF—TRIAL JUDGE'S DECISION ON ISSUE AS TO.

(1871) 14 M.I.A. 67 (83-4).

—Issue as to—Finding proper on—Forgery—Finding of, neither necessary nor proper. See DEED—EXECUTION OF—ISSUE AS TO—FINDING PROPER ON.

—Onus of proof of—Release from demand—Deed relied upon as.

Where, in answer to a demand made against him by the respondent, the appellant relied upon a deed of release the effect of which would be to exonerate the appellant from the demand against him, the onus of proving the genuineness of the deed would be on the appellant (155). (Dr. Lushington.) BUNWAREE LAL v. MAHARAJAH HET-NARAIN SINGH. (1858) 7 M. I. A. 148 = 4 W. R. 128 =

1 Suth. 307 = 1 Sar. 610.

—Order admitting—What amounts to—Treatment of deed subsequently as forged—Propriety. See EVIDENCE—DOCUMENT—ADMISSION IN EVIDENCE.

(1843) 3 M. I. A. 198 (216).

—Presumption against—Attestation by same persons of deeds executed at short intervals if a ground of.

That the same witnesses, fourteen in number, who attested the kubalah should be obtained to attest the ikrar, two months later, is a circumstance which gives rise to very grave suspicions. No valid reason is given for this peculiarity; the collection of exactly the same fourteen persons who had attested an instrument two months before, for the purpose of attesting another instrument, must have occasioned both difficulty and delay, and it is not pretended that the circumstance of the witnesses who attested both instruments being the same could confer additional validity on the ikrar (469-70). (Sir John Romilly.) MUSSUMAT KRIPOMOYE DEBIA v. GERISHCHUNDER LAHOREE.

(1861) 8 M. I. A. 467 = 2 W. R. 1 = 1 Suth. 448 = 1 Sar. 805.

DEED—(Contd.)**Genuineness of—(Contd.)**

—Presumption against—Attestors—List of, in handwriting of writer of deed—Effect.

In a case in which the genuineness of a deed was in question, their Lordships observed:—"The list of witnesses in the handwriting of the writer of the instrument is unusual" (186). (Sir James W. Colvile.) SRI RAGHUNADHA v. SRI BROZO KISHORO. (1876) 3 I.A. 154 = 1 M. 69 = 25 W. R. 291 = 3 Sar. 583 = 3 Suth. 263.

—Presumption against—Attestors—Signatures of, above that of executant—Effect.

In a case in which the genuineness of a deed was in question, their Lordships observed that it was unusual for the witnesses to sign before the executing party, and to write their signatures immediately above his (186). (Sir James W. Colvile.) SRI RAGHUNADHA v. SRI BROZO KISHORO. (1876) 3 I.A. 154 = 1 M. 69 = 25 W. R. 291 = 3 Sar. 583 = 3 Suth. 263.

—Presumption against—Date of deed sued upon—Mistake in plaint as to.

We cannot but consider it a matter also open to suspicion that, in so important a matter, as the statement in the plaint of the ikrar, on which the whole of the plaintiff's case depended, an erroneous date should have been assigned to that instrument (470). (Sir John Romilly.) MUSSUMAT KRIPOMOYE DEBIA v. GERISHCHUNDER LAHOREE.

(1861) 8 M. I. A. 467 = 2 W.R. 1 = 1 Suth. 448 = 1 Sar. 805.

—Presumption against—Defence to suit—Deed which is a complete—Introduction in pleadings of, belated and only incidental—Effect. See LEASE—REGISTERED DEED OF—CANCELLATION OF—DEED HAVING EFFECT OF.

(1865) 10 M. I. A. 386 (400).

—Presumption against—Fabrication of deeds—Scheme of—Deed in question forming part of a.

Where a deed set up is, by its tenor, almost as closely linked to deeds previously fabricated, as each of those deeds is to the others, it is not easy to reject the inference that the same tissue of frauds runs through them all, and connects the deed set up with its predecessors (25). (Lord Watson.) COOMARI RODESHWAR v. MANROOP KOER.

(1885) 13 I. A. 20 = 4 Sar. 689.

—Presumption against—Pen and ink—Differences in appearance produced by same—Argument against genuineness based on.

In a case in which the question was whether a deed of authority to adopt was in fact executed by a deceased person or was a forgery, it was contended that the appearance of the document was inconsistent with the evidence which represented that all the signatures were written at the same time, and with the same pen, and the same ink. With reference to this contention, their Lordships observed as follows:—"Very different appearances may certainly be produced by the same pen and ink when used by different hands; and this is more likely to happen with the coarse ink that is used by the natives of India (187). (Sir James W. Colvile.) SRI RAGHUNADHA v. SRI BROZO KISHORO.

(1876) 3 I. A. 154 = 1 M. 69 = 25 W. R. 291 = 3 Sar. 583 = 3 Suth. 263

—Presumption against—Registration—Absence of—Presumption from—Other evidence satisfactory—Effect.

In a case in which there was satisfactory evidence of the execution of a deed, held, that the fact of the non-registration of the deed was not sufficient to overbalance that evidence (432-3). BABOO GANGA PRASAD v. MAWJI LAL. (1871) 9 B. L. R. 426 = 16 W. R. 30 = 2 Suth. 471 = 6 M. J. 431.

DEED—(Contd.)**Genuineness of—(Contd.)**

—Presumption against—Registration—Absence of—Presumption from—Registered deed—Cancellation of, in certain events—Deed having effect of—Non-registration of. *See* LEASE—REGISTERED DEED OF—CANCELLATION OF, IN CERTAIN EVENTS—DEED HAVING EFFECT OF.

(1865) 10. M. I. A. 386 (398)

—Presumption against—Stamp papers with different dates purchased neither by vendor nor by persons claiming under deed and not immediately before date of deed—Effect of.

In deciding against the genuineness of a deed, the trial Court relied upon the fact that the deed, instead of being executed on a paper bearing one stamp, purchased immediately before the date of the deed and purchased by the persons who propounded the deed, or purchased by the vendor, had been engrossed upon two stamped papers purchased by different persons, and at different dates within a month of the execution of the deed. *Held*, that the stamped papers under all the circumstances of the case did not raise any strong argument against the validity of the deed (502). KURALI PRASAD MISSEER *v.* ANANTARAM HAJRA.

(1871) 8 B.L.R. 490 = 16 W. R. 16 = 2 Sar. 695 = 2 Suth. 454.

—Presumption in favour of—Possession held under deed with assent of executant—Value of.

In a case in which the question was as to the genuineness of an ikrarnamah, which was alleged by the respondents to have been duly executed in their favour, on the 13th of December, 1852, by the deceased husband of the original appellant, *held*, that the evidence of possession by the respondents of the properties alleged to have been conveyed to them by the ikrarnamah in question was of some importance in the case, and that there could be no doubt that, if the respondents were able to show that, before the respondents instituted the suit, they had, with the assent of the original appellant, obtained, and had thereafter continued in possession of the said properties, under and in virtue of the said ikrarnamah, that would go a long way towards establishing the validity of the deed, in any question between them and the appellant (29). (*Lord Watson.*) COOMARI RODESHWAR *v.* MANROOP KOER.

(1885) 13 I. A. 20 = 4 Sar. 689.

Incorporation of one, in another.

—Mookhtarnamah executed by a person authorising defence of suit—Written statement filed by mookhtar under, if incorporated in, so as to make it part of the document signed by the principal. *See* LIMITATION ACT OF 1859, S. 1, CL. 15—MORTGAGE WITH POSSESSION—ACKNOWLEDGMENT OF, ETC. (1873) 2 Suth. 897 (898).

Inequitable bargain—Test.

—Circumstances existing at the time—Subsequent events—Consideration of—Propriety.

In a suit by a donor against a donee to have the deed of gift declared to be illegal and null and void, and to have a decree for possession of the property given by it, the Court below, which held that the transaction was not an equitable one, observed:—"I say at once that the transaction was not a wise one judging from subsequent events."

Their Lordships expressed their surprise at the Court below making that observation and apparently acting upon that view (160).

Whether the transaction was one that should be set aside as inequitable would depend upon the circumstances at the time when it was made, not upon subsequent events (160). (*Sir Richard Couch.*) GANGA BAKSH *v.* JAGAT BAHADUR SINGH. (1895) 22 I. A. 153 = 23 C. 15 (25) = 5 Sar. 643.

—*See* CONTRACT ACT, S. 16—DEBTOR—BORROWING BY. (1918) 35 M. L. J. 614.

DEED—(Contd.)**Intended execution by several—Actual execution by some only.**

—Validity of deed as regards actual executants. *See* DEED—VALIDITY—INTENDED EXECUTION, ETC.

(1922) 44 M. L. J. 396 (404-5).

Interest in.

—Meaning of. *See* REGISTRATION ACT OF 1877, S. 69—RULE 174 OF RULES UNDER.

(1920) 47 I. A. 224 (230) = 42 A. 609 (616).

Mistake in—Description of property—Mistake as to.

—Evidence—Later deeds in favour of third parties by same executant—Rectification of, at their instance—Evidence of—Admissibility. *See* SPECIFIC RELIEF ACT, S. 31—MORTGAGE—RECTIFICATION—MISDESCRIPTION OF PROPERTY. (1914) 41 I. A. 110 (119-20) = 41 C. 972 (988).

Name given by parties to.

—Construction or nature of deed if affected by.

An instrument, which was called a deed of assignment (tamliknamah) by its executant, was nevertheless *held*, on its true construction, to be a will and not to be a transfer operating *inter vivos* (141-2). (*Sir Arthur Hobhouse.*) THAKUR ISHRI SINGH *v.* BALDEO SINGH.

(1884) 11 I. A. 135 = 10 C. 792 (801) = 13 C. L. R. 418 = 4 Sar. 528 = R. & J.'s No. 79 (Oudh).

The only words contained in the document which would support its being regarded as a document of a testamentary character are that in some places it styles itself a will. But calling a document a will does not make it so (663). (*Lord Moulton.*) TIRUGNANAPAL *v.* PONNAMMAI NADATHI. (1920) 12 L. W. 660 = 28 M. L. T. 190 = (1920) M. W. N. 559 = 25 C.W. N. 511 = 58 I. C. 228.

Nature of.

—Decision as to, between parties to deed—Effect of, as against creditors of executant. *See* C. P. C. OF 1908, S. 11—CASES UNDER—GIFT DEED.

—Plea of—No estoppel as to. *See* LITIGATION—INCONSISTENT POSITIONS IN—ESTOPPEL.

(1911) 38 I. A. 104 (111) = 38 A. 344 (355-6).

Notice of.

—*See* TRANSFER OF PROPERTY ACT, S. 3.

Operative character of.

—Decision as to, between parties to deed—Effect of, as against creditors of executant. *See* C. P. C. OF 1908, S. 11—CASES UNDER—GIFT DEED.

—Right to dispute—Deed subsequent modifying its operation—Party relying upon—Right of.

In this case the plaintiff sued to set aside their ikrarnamahs, on the allegation that they were forged. Those ikrars, which had been executed by the plaintiff in favour of the defendant, his father, if genuine, modified the operation of certain hibbanamahs, purporting to have been executed by the defendant in favour of the plaintiff. The defendant set up in his defence to the suit those ikrars as valid instruments. *Held*, that he could not therefore be allowed to aver that the hibbas to which they related were intended to have no operation and effect (104). (*Sir Montague E. Smith.*) AMEEROONISSA KHATOON *v.* ABEDOONISSA KHATOON. (1875) 2 I. A. 87 = 15 B. L. R. 67 = 23 W. R. 208 = 3 Sar. 423 = 3 Suth. 87.

Operation of.

—Cutting down extent of, to portion covered by stamp in fact affixed—Permissibility. *See* STAMP ACT (II OF 1899), S. 35. (1871) 14 M. I. A. 24 (39).

DEED—(Contd.)

Real transaction—Unreal transaction not intended to operate according to its tenor.

—*Evidence.*

D, who was said to be wishing to raise money, sent for *M*, and on his coming an agreement was made by which he was to pay her Rs. 12,000, and to receive in return a putni of her estate, with the exception of the house in which she lived, and about 20 bighas of land. He was also to have a kobala or deed of sale of the house and premises, and the Rs. 12,000 were equally distributed between the putni and the kobala. It was apparent from the evidence that that was one transaction. The putni was executed on the 3rd of August, 1876, and the kobala on the following day.

Held, on the evidence, affirming the Court below, that the deeds were not intended to operate according to their tenor.

The defect in the transaction is that the intention on her part was not that which is apparent on the face of the deeds—in fact, that the deeds do not represent really what was intended. (*Sir Richard Couch.*) *JIBUN NISSA v. ASGAR ALI.* (1890) 17 C. 937 = 5 Sar. 574.

Recitals in.

—*Admissibility in evidence of—Parties—Strangers—Distinction.*

Under ordinary circumstances and apart from statute recitals in deeds can only be evidence as between the parties to the conveyance and those who claim under them (252). (*Lord Buckmaster, L. C.*) *BANGA CHANDRA DHUR BISWAS v. JAGAT KISHORE CHOWDHURY.*

(1916) 43 I. A. 249 = 44 C. 186 (195-6) = 20 M. L. T. 335 = (1916) 2 M. W. N. 336 = 4 L. W. 448 = 18 Bom. L. R. 868 = 24 C. L. J. 487 = 14 A. L. J. 1103 = 21 C. W. N. 225 = 1 Pat. L. W. 1 = 36 I. C. 420 = 31 M. L. J. 563.

—The recitals in a deed are, strictly speaking, evidence only as against the parties to the deed and those claiming through or under them. (*Lord Parker.*) *SHRINIVASDAS BAVRI v. MEHERBAR.* (1916) 44 I. A. 36 = 41 B. 300 =

(1917) M. W. N. 258 = 19 Bom. L. R. 151 = 21 M. L. T. 236 = 21 C. W. N. 558 = 25 C. L. J. 311 = 39 I. C. 627 = 32 M. L. J. 175.

—Consent of family—Execution with—Recital as to—Common in Indian deeds, though unnecessary and meaningless. *See BENAMI—BENAMIDAR—TITLE OF—INQUIRY INTO—CIRCUMSTANCE EXCITING—CONSENT OF FAMILY.* (1872) Sup. I. A. 40 (45).

—Consideration—Receipt of—Recital as to. *See ADMISSION—CONSIDERATION.*

—*Effect of—Evidence—Admission operating as estoppel—Hindu widow—Sale-deed by—Recital in, that property conveyed was debutter property in her possession as shebait.*

A deed of sale executed by a Hindu widow stated that the property conveyed thereby was the *debuttor* property of an idol, which was in her possession and enjoyment as shebait of the idol.

Quære, whether the statement in the deed was to be used as evidence only, or whether it could be relied upon as an admission which estopped the parties to the deed from asserting that the property conveyed was not *debuttor* (62). (*Sir Montague E. Smith.*) *KONWUR DOORGANATH ROY v. RAM CHUNDER SEN.* (1876) 4 I. A. 52 =

2 C. 341 (350) = 3 Sar. 681 = 3 Suth. 375.

—Hindu Law—Widow—Alienation by—Necessity for—Recitals in deed of alienation as to—Value of. *See HINDU LAW—WIDOW—ALIENATION BY—NECESSITY FOR—RECITALS IN DEED OF ALIENATION AS TO.*

—Meaningless recitals—Practice of inserting. *See*

DEED—(Contd.)

Recitals in—(Contd.)

BENAMI—BENAMIDAR—TITLE OF—INQUIRY INTO—CIRCUMSTANCES EXCITING—CONSENT OF FAMILY. (1872) Sup. I. A. 40 (45-6).

—Minor—Adoptive mother of—Bond by—Consideration for—Recital as to—Admissibility in evidence of, against minor. *See HINDU LAW—ADOPTION—ADOPTED SON—ADOPTIVE MOTHER—BOND BY.*

(1861) 8 M. I. A. 319 (322-3).

—Minor—Guardian of—Sale-deed by—Recitals in, as to purpose of—Admissibility in evidence of—Value of. *See HINDU LAW—MINOR—GUARDIAN OF—SALE-DEED BY RECITALS IN, AS TO PURPOSE OF.*

(1888) 16 I. A. 96 (102) = 16 C. 627 (634).

—Mortgage deed—Recitals in. *See MORTGAGE DEED—RECITALS IN.*

Rectification of.

—*See SPECIFIC RELIEF ACT, S. 31.*

Registration of

—*See REGISTRATION AND REGISTRATION ACTS.*

Revocation of.

—*Alternative inconsistent disposition of property not valid or effectual—Revocation by.*

An alternative inconsistent disposition which is not valid or effectual in itself does not revoke an earlier disposition of the same property. This principle is applicable to the case of wills also (25). (*Lord Wrenbury.*) *VENKATA-NARAYANA PILLAI v. SUBBAMMAL.*

(1915) 43 I. A. 20 = 39 M. 107 =

18 Bom. L. R. 372 = 20 C. W. N. 234 =

(1916) 1 M. W. N. 97 = 3 L. W. 177 = 19 M. L. T. 147 =

12 A. L. J. 178 = 32 I. C. 373 = 23 C. L. J. 366 =

29 M. L. J. 851.

—Attempt at—Undue influence—Execution of deed under—Evidence of, if and when. *See DEED—EXECUTION OF—UNDUE INFLUENCE—EVIDENCE OF.*

(1884) 11 I. A. 135 (143-4) = 10 C. 792 (803-4).

Seal on.

—*See SEAL.*

Setting aside of.

—Colorable transaction—Setting aside on ground of deed being a mere—Propriety—Evidence strong of execution of deed and of its being acted upon. *See HINDU LAW—RELIGIOUS ENDOWMENT—DEDICATION—DEED OF—SETTING ASIDE OF, ETC.* (1875) 3 Suth. 127 (131) =

23 W. R. 369.

—*Declaration that it does not affect plaintiff's rights—Distinction—Decree proper.*

Where in a suit for a declaration that under certain wills of one *B*, deceased, the 1st appellant took no interest in the property of her late husband, and that an assignment by her to the 2nd appellant was invalid, the court found that the 1st appellant took no interest under the said wills and had, therefore, no interest which could be assigned to the 2nd, *held*, that the court ought not to declare that the conveyance by the 1st appellant to the 2nd was void, and that the said conveyance be cancelled and retained in court.

It is not because a man conveys property to which he is not entitled that the conveyance is absolutely void or ought to be cancelled or retained by the court. It is unnecessary to do more after declaring the plaintiff's right than to declare that the 1st appellant had no right to take possession of, or to transfer any part of the property mentioned in the will, and that the deed passed no right in any part of such property to the 2nd appellant (49-50). (*Sir Barnes Peacock.*) *RAI KISHORI DAS v. DEBENDRANATH SIRCAR.*

(1887) 15 I. A. 37 = 15 C. 409 (421) = 5 Sar. 100.

—The sale of October, 1884, is not set aside, but is found not to affect the rights of the plaintiff. The sale

DEED—(Contd.)**Setting aside of—(Contd.)**

does not purport to pass the rights of *M* or of the plaintiff, but those of the mortgagee, *A*, and the mortgagors, *Y* and *N*, against whom *M* established his prior rights. Between setting aside a sale and holding that the plaintiff's rights are not affected by it, there is a wide difference (176). (*Lord Hobhouse.*) **MOTI LAL v. KARRAB-UL-DIN.**

(1897) 24 I. A. 170 = 25 C. 179 (186) = 1 C. W.N. 639 = 7 Sar. 222.

———See DECEASED—DEED BY. (1874) 1 I.A. 192 (205)

———See LIMITATION ACT OF 1908, ART. 12 (a).

———Entire Deed—Setting aside of—Avoidance of a particular provision in it in favour of person in fiduciary position—Distinction.

There is a distinction between setting aside a whole deed and merely avoiding a particular provision in a deed which benefits a person under a fiduciary relation to the maker of it. (*Lord Sumner.*) **MIRZA FIDA RASUL v. MIRZA YAKUB BEG.** (1924) 87 I. C. 702 = 12 O. L. J. 98 = A. I. R. 1925 P. C. 101 = 6 L. R. P. C. 55 = 27 O. C. 346.

———Forgery—Setting aside on ground of. See UNDER DEED—FORGERY OF.

———Fraud—Consideration—Absence of—Setting aside on grounds of. See DEED—FRAUD IN REGARD TO—CONSIDERATION.

———Fraud—Duress—Setting aside on grounds of. See DEED—FRAUD IN REGARD TO—DURESS.

———Suit for—Declaration that it does not affect plaintiff's rights—Grant of—Power of court—Consent of parties—Effect. See HINDU LAW—WILL—SETTING ASIDE OF—SUIT FOR—DECLARATION THAT IT DOES NOT AFFECT PLAINTIFF'S RIGHTS. (1873) Sup. I. A. 212 (218).

———Suit for—Insanity of executant—Suit on foot of—Helplessness and weakness of executant—Relief on foot of—Grant of. See DEED—EXECUTANT OF—INSANITY OF. (1904) 31 I. A. 235 = 27 A. 1.

———Suit for—Insanity of executant—Suit on foot of—Undue influence—Relief on foot of—Grant of. See DEED—EXECUTANT OF—INSANITY OF.

(1906) 33 I. A. 86 = 33 C. 773 (782-3)

———Suit for—Laches in instituting—Presumption adverse from.

In a suit to set aside a deed of sale on the ground that it had been executed by the plaintiff under duress, *held*, that the fact that the plaintiff delayed to bring the suit for nearly six years, was a circumstance which, if unaccounted for, would raise a strong inference against the truth of his case (57). (*Sir James Colville.*) **GUTHRIE v. ABOOL MOZUFFER.**

(1871) 14 M. I. A. 53 = 15 W. R. P. C. 50 = 7 B. L. R. 630 = 2 Suth. 429 = 2 Sar. 660.

———One of the obvious consequences of a long delay in bringing a suit to impeach a deed on the ground that it is not a genuine one is, that after the lapse of years witnesses disappear, and the recollection of those who survive becomes dimmed and less accurate than it might have been if the enquiry had taken place at an earlier period (583). (*Sir Montague E. Smith.*) **GOSSAIN LUCHMI NARAIN POORI v. POKHRAJ SINGH DIN DAYAL LAL.**

(1879) 3 Suth. 581 = Bald. 189 = 3 I. J. 220.

———Suit for—Onus of proof in.

In a suit for setting aside deeds, some evidence ought to be given by the plaintiff, in order to impeach the deeds he seeks to set aside (206). (*Sir Montague E. Smith.*) **TACORDEEN TEWARY v. NAWAB SYED ALI HOSSEIN KHAN.** (1874) 1 I. A. 192 = 21 W. R. 340 = 13 B. L. R. 427 = 3 Sar. 368.

———In a suit by the plaintiff attacking two transfers of property, one purporting to be by herself in favour of *C*,

DEED—(Contd.)**Setting aside of—(Contd.)**

and one by *C* in favour of *R*, *held*, that the burden was on the plaintiff of establishing both attacks. (*Lord Phillimore.*) **BAL KISHEN v. RAM CHARAN.** (1928) 29 A.L.J. 579 (2) =

113 I. C. 479 = I. D. 1929 P. C. 39 = 56 M. L. J. 172.

———Undue influence—Setting aside on ground of—Proof of undue influence required in. See DEED—EXECUTION OF—UNDUE INFLUENCE—PROOF OF—SUIT TO SET ASIDE DEED ON THAT GROUND.

Stamp on, insufficient.

———Admissibility of deed in evidence—Effect on. See STAMP ACT (II OF 1899), S. 35.

(1871) 14 M. I. A. 24 (38-9).

———Admission of deed in evidence—Rejection of it subsequently—Permissibility. See STAMP ACT II OF 1899, S. 36. (1871) 14 M. I. A. 24 (38-9).

———Amount recoverable under deed—Effect on—Payment of deficient stamp duty and penalty—Recovery of entire amount in case of—Right of. See STAMP ACT (II OF 1899), Ss. 35, PROVISIO (a), 26. (1924) 51 I. A. 332 = 4 P. 34.

———Operation of deed—Cutting down extent of, to portion covered by stamp in fact affixed. See STAMP ACT OF 1899, S. 35. (1871) 14 M. I. A. 24 (38-9).

Stranger to.

———Right of, to question validity of deed. See CONTRACT—STRANGER.

Striking out portions of, to make deed valid.

———Propriety. See HINDU LAW—JOINT FAMILY—FATHER—LEASE IN EFFECT COLLATERAL SECURITY, ETC. (1922) 44 M. L. J. 728 (730-1).

Suit to set aside.

———See DEED—SETTING ASIDE OF—SUIT FOR.

Undue influence.

———Execution of deed under. See DEED—EXECUTION OF—UNDUE INFLUENCE.

Validity of.

———Fraud and intimidation—Deed obtained by. See DEED—EXECUTION OF—FRAUD AND INTIMIDATION.

(1864) 10 M. I. A. 60 (76).

———Intended execution by several—Actual execution by some only—Validity of deed as against latter.

The suit was instituted by the respondents on the basis of an agreement dated 5th January, 1916, executed by defendants 1 and 2 in favour of the respondents, and the question for decision was whether it was not binding on them because the 3rd defendant did not join in executing it.

Defendants 1 to 3, together with their youngest brother, who was a minor and was not a party to the suit, constituted a joint Hindu family which carried on various businesses. The agreement in question was signed in the name of the family firm of the defendants, and also by the 1st defendant, the eldest brother, for himself and as guardian for his minor brother, not a party to the suit, and by the 2nd defendant. The contention of defendants 1 and 2 was that the intention of the parties was that the agreement was not to be regarded as a completed transaction until the 3rd defendant joined in executing it, and that as he did not do so, it could not be enforced even as against the parties who executed it, *viz.*, defendants 1 and 2. The High Court held on the evidence, overruling the plea, that the intention of the parties was that the parties who executed the agreement, defendants 1 and 2, were to be bound by it, whether or not the 3rd defendant joined in executing it. Their Lordships affirmed the High Court. (*Sir John Edge.*) **SADA-SIVA MUDALIAR v. HAJEE FAKIR MAHOMED SAIT.**

(1922) 17 L. W. 288 = 32 M. L. T. (P. C.) 99 =

DEED—(Contd.)**Validity of—(Contd.)**

27 C. W. N. 677 = 37 C. L. J. 569 = 72 I. C. 48 =
A. I. R. 1922 P. C. 397 = 44 M. L. J. 396 (404-5).

—Intention of executant—Effect contrary to—Giving of, to make deed—Valid—Permissibility. *See* DEED—CONSTRUCTION OF—INTENTION OF EXECUTANT—EFFECT CONTRARY TO. (1884) 11 I. A. 197 (209) = 11 C. 186 (199).

—Issue as to—Plea of undue influence if covered by. *See* DEED—EXECUTION OF—UNDUE INFLUENCE—PLEA OF—ISSUE AS TO VALIDITY OF DEED IF COVERS. (1875) 2 I. A. 87 (107).

—Issue as to—Propriety—Forgery—Setting aside of deed on ground of—Suit for. *See* DEED—FORGERY OF—SETTING ASIDE OF DEED ON GROUND OF—SUIT FOR—UNDUE INFLUENCE. (1888) 15 I. A. 81 (86) = 15 C. 684 (692).

—Nature real of—Right to contest—Execution of deed—Admission of—Effect. *See* DEED—EXECUTION OF—ADMISSION OF—EFFECT. (1872) 19 W. R. 118 (121).

—Stranger's right to question. *See* CONTRACT—STRANGER TO.

—Striking out portions of deed to give it validity—Propriety. *See* HINDU LAW—JOINT FAMILY—FATHER—LEASE IN EFFECT—COLLATERAL SECURITY, ETC. (1922) 44 M. L. J. 728 (730-1).

Vernacular deed.

—Translation of. *See* DEED—CONSTRUCTION OF—VERNACULAR DEED.

Words in.

—Meaning of. *See* DEED—CONSTRUCTION OF—WORDS.

Written statement—Deed set up in.

—Relief to plaintiff as against—Grant of. *See* SPECIFIC RELIEF ACT—S. 42—CASES UNDER—DEED—WRITTEN STATEMENT. (1878) 5 I. A. 87 (113) = 1 A. 688 (707).

DEFAMATION.

—Character—Defamation of—Suit for—Malicious prosecution—Action for—Suit if may be treated as. *See* MALICIOUS PROSECUTION—ACTION FOR—DEFAMATION OF CHARACTER. (1872) 11 B. L. R. 321 (329).

—Contempt of Court by publication of libel—Offence amounting to defamation—Punishment summary for—Jurisdiction. *See* PENAL CODE—S. 499.

(1883) 10 I. A. 171 (177) = 10 C. 109 (130).

—Truth of imputation—Plea of—Discovery of untruth in course of trial—Duty of accused in case of. *See* PENAL CODE—S. 499—DEFAMATION.

(1914) 41 I. A. 149 (167-8) = 41 C. 1023 (1061).

—Witness—Deposition of—Defamation of character in—Liability for.

A suit cannot be maintained for damages for defamation of character when it is substantially a suit for damages against witnesses in respect of evidence given by them upon oath in a judicial proceeding.

Witnesses cannot be sued in a Civil Court for damages in respect of evidence given by them upon oath in a judicial proceeding. This maxim is based upon public policy. The ground of it is this,—that it concerns the public, and the administration of justice, that witnesses giving their evidence on oath in a Court of Justice should not have before their eyes the fear of being harassed by suits for damages; but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury. *BABOO GUNESH DUTT SINGH v. MUGNEERAM CHOWDHRY.* (1872) 11 B. L. R. 321 (328-9) = 17 W. R. 283 = 2 Suth. 547 = 3 Sar. 179.

DELHI, EX-KING OF.

—Debts of—Government's liability for—Circular Order, No. 112, of Judicial Commissioner of Punjab—Effect—Circular Order if a law—24 & 25 Vict. c. 67.

The Circular Order, No. 112, issued by the Judicial Commissioner of the Punjab, does not amount to a law. It was not enacted as a law, nor did it purport to be a law; and it does not fall within the meaning of 24 & 25 Vict. c. 67 (129).

The circular was merely a circular from the Judicial Commissioner, forwarding, for the information and guidance of the Commissioners of the several divisions of the Punjab a copy of correspondence between the Government of the Punjab and the Government of India, on the question of the liability of Government for the debts of rebels whose estates had been confiscated for rebellion (129).

It is clear from the whole tenor of the correspondence, which originated out of certain questions referred by the Judicial Commissioner of the Punjab for the decision of the Lieutenant-Governor of the Province, that the Government did not intend to lay down any rule of law for the breach of which redress might be obtained in a Court of Law, or "to submit the conduct of its officers, in the execution of a political measure, to the judgment of a legal tribunal" (129). (*Sir Barnes Peacock.*) *RAJAH SALIG RAM v. SECRETARY OF STATE FOR INDIA.*

(1872) Sup. I. A. 119 = 12 B. L. R. 167 = 18 W. R. 389 = 3 Sar. 191 = 2 P. R. 1872 = 2 Suth. 726.

—Deposition and confiscation of property of—Legality of—Jurisdiction to question—Municipal Courts. *See* ACT OF STATE—ACTS AMOUNTING TO AN OR NOT—EX-KING OF DELHI (1872) Sup. I. A. 119 (126-9).

—Estate of—Claim for payment out of, made against Government of India—Duties and rights of Government of India in case of.

Where claims are made against the Government of India, under the order of the Governor-General of India in Council, dated the 21st February, 1860, for payment out of the assets of the ex-King of Delhi, the Government does no more than what is incumbent upon it, when it narrowly and jealously scrutinises claims which are made; it being within the experience of all that where the claim is against, not the person who originally contracted the debt, but those who have taken upon themselves the duty of satisfying it, exaggerated and sometimes unfounded demands are made. If in those circumstances a claim were made which was found to be barred by the letter of any Regulation or Act of Limitation, the Government of India might well say, that they had not taken upon themselves to provide for the payment of state demands, and that they were entitled to the benefit of any rule of limitation of that kind. Subject, however, to these observations, any claim which justly and fairly, in equity and conscience, could be made and substantiated against the ex-King, is a claim to be allowed in the investigation which the Government has instituted before its judicial officers, irrespective of technical difficulties which might have attended legal proceedings against the King during his sovereignty, leaving, of course, the question of the payment of that claim, when established to be dealt with in reference to the assets out of which the payment is to be made.

Held, that the evidence satisfactorily established the *factum* and the existence of the bond upon which the claim was made in the case before their Lordships (292-3). (*Lord Cairns.*) *LALLA NARAIN DOSS v. ESTATE OF THE EX-KING OF DELHI.* (1867) 11 M. I. A. 277 =

10 W. R. P. C. 55 = 2 Suth. 76 = 2 Sar. 297 = Punjab P. C. J. (1868).

—Estate of—Claim against—Limitation.

Even if there were any doubt as to the claim being within time, there is amply sufficient reason, from the position

DELHI, EX-KING OF—(Contd.)

of the ex-King, to account for an action not having been maintained against him within the period prescribed (293). (*Lord Cairns.*) **LALLA NARAIN DOSS v. ESTATE OF THE EX-KING OF DELHI.** (1867) 11 M.I.A. 277 =

10 W.R. P.C. 55 = 2 Suth. 76 = 2 Sar. 297 = Punjab P.C.J. (1868).

—Maintenance of—Properties assigned for—Tenure in—Nature of—Charges created on property by him—Binding nature of, on his successors.

Shah Alum and his successors had no ownership or power of disposition over the revenues and territories which were assigned in 1804 for the maintenance of Shah Alum and his household. The tenure of *Shah Alum* and his successors, in those properties and revenues, was (so far as it was a tenure at all) *durante regno*, and on his deposition his estate and interest ceased, and all charges and incumbrances created by him out of that estate itself. The territories were assigned to him for the support of his royal dignity and the due maintenance of himself and family in their high position. If he had died or abdicated his successor would have taken the property in the same way, free from all charges (128-9). (*Sir Barnes Peacock.*) **RAJAH SALIG RAM v. SECRETARY OF STATE FOR INDIA.**

(1872) Sup. I.A. 119 = 12 B.L.R. 167 = 18 W.R. 389 = 3 Sar. 191 = 2 P.R. 1872 = 2 Suth. 726.

—Status of—Sovereign or Jagirdar.

The status of the ex-king of Delhi was that of a king. He was treated and recognised by the British Government as a king and not merely as a jagirdar holding under an ordinary grant from the British Government. He was the grandson of *Shah Alum*, and neither he nor any of his ancestors had ever been deposed by his own subjects or by the British Government or by any other power (127). (*Sir Barnes Peacock.*) **RAJAH SALIG RAM v. SECRETARY OF STATE FOR INDIA.** (1872) Sup. I.A. 119 =

12 B.L.R. 167 = 18 W.R. 389 = 3 Sar. 191 = 2 P.R. 1872 = 2 Suth. 726.

DEMAND.

—On demand—Meaning of. See **DEED—CONSTRUCTION—PAYABLE “ON DEMAND”.**

(1855) 6 M.I.A. 211 (229).

—Truth of—Admission of—What amounts to. See **BOMBAY REGULATIONS—CIVIL COURT SURAT REGULATION OF 1800—S. 13.** (1837) 1 M.I.A. 155 (170-2).

DEMURRER

—Plea in. See **PRACTICE—PLEADINGS—DEMURRER.**

DEPOSIT.

—Several items of—Suit for one or some of—Subsequent suit for other or others—Maintainability. See **C. P. CODE OF 1908,—O 2, R. 2—CASES UNDER—ITEMS OF DEMAND.** (1867) 11 M.I.A. 551 (605-6).

DESAI.

—Hereditary office of—Allowance in money payable to holder of, out of land revenue of *pergunnah*—Charge on immoveable property if a—Resumption by Government of—Right of—Prescriptive title to such allowance.

The question was whether the respondent had an hereditary right to receive out of the public revenues of the Presidency of Bombay, an annual allowance of Rs. 1,274-4-2, notwithstanding an order of the Government, dated 28-11-1861, which declared it to be a mere personal allowance, and as such resumable; and that it was to cease on the death of the then recipient—the respondent's father.

The respondent was Desai of the *Pergunnah* of Broach. The office was admitted to be held by him, together with

DESAI—(Contd.)

an Enam village enjoyed with it, by hereditary right. The allowance in question was, however, not a necessary incident to the office of Desai, nor was it held by the same title as the village. His case as to it was, that upwards of a century before the then native ruler of Guzerat conferred upon one of his ancestors, and predecessors in the office of Desai as a reward for distinguished service, the grant of a *Palkhi* or *Palanquin*, together with the allowance in question, the latter being the sum fixed for the *Palkhi* expenses, and charged on the land revenues of the *Pergunnah* of Broach.

He alleged that the grant was confirmed by the different dynasties who had since ruled in Guzerat, and finally by the British Government in 1808; and he insisted that the allowance thus enjoyed was hereditary in his family, and irrevocable by the Government.

The case made by the Government was that the *Palkhi* right was not granted for *Desaiship* service; that it was not of the nature of an ordinary Enam; that it was granted to the original holder personally, and was liable to cease on his death; and that to allow, or not to allow, such a right depended on the pleasure of Government.

Held, on the documentary and other evidence in the case, that, under the native rulers, the allowance in question was treated as permanently annexed to the office of Desai, and was confirmed in 1808 by the British Government as appurtenant to the office, that the respondent was entitled to the said allowance as holder of the said office, and that the allowance was, therefore, not resumable by Government (569).

The High Court allowed the claim of the respondent on two grounds—(1) that the long enjoyment of the plaintiff's ancestors, during four generations successively, and for a period of more than a century, created a legitimate presumption that the allowance was conferred on the original grantee and his heirs; and (2) that the uninterrupted enjoyment of the plaintiff's grandfather and father, under the order made by the Government of Bombay on 7-2-1802, which extended from that date to 1856, gave to the plaintiff a statutory and indefeasible title.

With regard to the first ground their Lordships were unable to find any document which imported, by express words of inheritance, that the *Palkhi* privilege with its allowance was to be enjoyed from generation to generation by the original grantee and his heirs (568).

Their Lordships were also unable to concur in the conclusion that, upon the facts stated, the respondent had, under the provisions of the Bombay Regulation V of 1827, cl. 1, S. 1, acquired a title by prescription, which enabled him successfully to maintain his suit, whatever might have been the original title of his ancestors to the *Palkhi* allowance (563).

Their Lordships are by no means satisfied that the allowance, though payable out of the Government revenue of a particular *Pergunnah*, can properly be said to be “immoveable property,” within the meaning of the clause in question. It did not constitute a charge which could be enforced against the land, or, since the year 1808, against the revenues of the land prior to the claim of Government. The utmost right of the plaintiff's grandfather after 1808, or his descendants, was to receive, after the perception of the revenues by Government, a certain annual sum of money out of the Collector's Treasury (563-4). (*Sir James W. Colvile.*) **GOVERNMENT OF BOMBAY v. DESAI KULLIANRAI HAKOOMUTRAI** (1872) 14 M.I.A. 551 = 3 Sar. 103.

—Inam village of—Minor inams in—Kadim or Jadid—Evidence.

Held, on the evidence, that the defendant's inams were *jadid* or modern and not *kadim* or ancient. (*Sir John Wallis.*) **LAKHAMGOWDA v. APPANNA,**

DESAI—(Contd.)

(1928) 56 I.A. 44 = 53 B. 222 = 31 Bom. L.R. 235 =
I.D. (1929) P.C. 27 = 113 I.C. 467 =
29 L. W. 617 = A. I. R. 1929 P. C. 30 =
56 M. L. J. 429 (432).

———*Inam village of—Minor inams in—Resumption of—Right of—Kadim and Jadid inams—Distinction.*

In the case of a village held in inam the right of resumption of lesser inams in the village which were *Kadim* or in existence at the date when the village itself was granted in inam would be vested in the Government and not in the inamdar. (*Sir John Wallis.*) LAKHAMGOWDA v. APPANNA.

(1928) 56 I.A. 44 = 53 B. 222 = 31 Bom. L.R. 235 = I.D. (1929) P.C. 27 = 113 I.C. 467 = 29 L. W. 617 = A. I. R. 1929 P. C. 30 = 56 M.L.J. 429 (432).

———*Inam village of—Shet Sanadis in—Services to be rendered to Desai by—Personal services generally or services connected with administration of inam village—Evidence.*

There is nothing in the definition of a *shet sanadis* (as given in Wilson's Glossary) to support the view that the services which were to be rendered by the person who held lands on that tenure were to be rendered in the village itself in which the lands so held were situate or were to be services connected with the administration of that village.

Held, on the evidence, reversing the High Court, that the defendants (*shet sanadis*) who held minor inams created by the plaintiff's ancestors in the inam village of the plaintiff, a Desai, were liable to render to the plaintiff personal services generally. (*Sir John Wallis.*) LAKHAMGOWDA v. APPANNA.

(1928) 56 I.A. 44 = 53 B. 222 = 31 Bom. L. R. 235 = I. D. (1929) P.C. 27 = 113 I. C. 467 = 29 L. W. 617 = A. I. R. 1929 P. C. 30 = 56 M.L.J. 429.

———*Policy of Government in regard to—Legislation in respect of.*

It appears to have been the policy of the Indian Government that Desaiships should be maintained, and that the Desai himself should be enabled to perform the functions of his office, be they greater or less, properly and in a manner suitable to his position as a subordinate officer, and to some extent a representative of the Government. This policy has been recognised and enforced by various Acts of the Legislature, the latest being apparently Act No. III of 1874 (Bombay). (*Sir Robert P. Collier.*) ADRISHAPPA BIN GADGIAPPA v. GURUSHIDAPPA.

(1880) 7 I. A. 162 (166) = 4 B. 494 (502-3) = 7 C. L. R. 1 = 4 Sar. 154 = 3 Suth. 757.

———*Property appertaining to office of—Alienability of—Summary settlement—Quit-rent—Bombay Act II of 1863, S. 12—Effect.*

The deceased was the last of a series of Desais whose title came into existence in the time of the Bijapur monarchy in the 17th century. During the tenure of office of the family to which the deceased belonged many inam grants of villages had been made to the Desai for the time being. The services of the Desai as a revenue officer were not made use of during the British rule, and he was informed in 1848 by the Collector, under the provisions of S. 2 of the Bombay Act II of 1843, that his services as a revenue official would not be required. In 1862 the offer of a settlement was made to the Desai, and was accepted on the terms that the commutation payment should be in the nature of a *nazrana* or quit-rent. By S. 12 of Bombay Act II of 1863 all settlements of the above character made in the District were expressly validated. The deceased, the last Desai, died in 1906 without co-parceners, having disposed of the lands by will and a codicil.

DESAI—(Contd.)

On a question arising as to whether the lands were inalienable and whether the disposition thereof by him by the will and the codicil were invalid, *held*, affirming the High Court, that they were alienable and passed under the will and the codicil. (*Sir John Edge.*) SUNDERBAI v. COLLECTOR OF BELGAUM.

(1918) 46 I.A. 15 (23) = 43 B. 376 (385) = 21 Bom. L.R. 1148 = 23 C. W. N. 753 = (1919) M. W. N. 254 = 52 I. C. 897.

———*Property appertaining to office of—Impartibility of—Presumption—Onus of proof.*

There is no general presumption that property appertaining to a Desaiship is impartible; and it lies upon the party setting up that a village, admitted to be a *deshgat watan*, is impartible to give evidence of the special tenure of the watan, or of either family custom or of district or local custom sufficiently strong to rebut the operation of the ordinary rule of succession, according to the Hindu law (163-4).

(*Sir Robert P. Collier.*) ADRISHAPPA bin GADGIAPPA v. GURUSHIDAPPA. (1880) 7 I. A. 162 = 4 B. 494 (500) = 7 C. L. R. 1 = 4 Sar. 154 = 3 Suth. 757.

———It may be worth while to refer to the case reported in L. R. 7 I. A. 162, the head-note of which is that "Deshgat watan or property held as appertaining to the office of Desai is not to be assumed *prima facie* to be impartible. The burden of proving impartibility lies upon the Desai; and on his failing to prove a special tenure, or a family or district or local custom to that effect, the ordinary law of succession applies" (80). (*Lord Macnaghten.*) VINAYAK WAMAN JOSHI RAYARIKAR v. GOPAL HARI JOSHI RAYARIKAR. (1903) 30 I. A. 77 = 27 B. 353 (357) = 7 C. W. N. 409 = 5 Bom. L. R. 408 = 8 Sar. 453.

———*Property appertaining to office of—Partition of—Decree for—Emoluments or allowances for performance of duties of office—Reservation in decree in respect of—Necessity.*

In a suit for partition of a village, admitted to be a *deshgat watan*, or property held as appertaining to the office of Desai, *held*, modifying the decree of the High Court which directed the partition of the property unconditionally, that there should be a declaration that the decree was to be without prejudice to the defendant's right to such emoluments or allowances for the performance of the duties of the Desaiship as he might be entitled to under any law in force (166). (*Sir Robert P. Collier.*) ADRISHAPPA bin GADGIAPPA v. GURUSHIDAPPA.

(1880) 7 I. A. 162 = 4 B. 494 (503) = 7 C.L.R. 1 = 4 Sar. 154 = 3 Suth. 757.

DESHGAT WATAN.

———*See* DESAI—PROPERTY APPERTAINING TO OFFICE OF.

DESHMUKH.

———*Functions of—Allowance payable to—Nature of.*

The functions of the Deshmukhs were those of a Collector of Revenue of the Government. They were authorised to retain out of what they received from the ryots, a certain percentage upon that which was fixed as the Government revenue for themselves, paying the balance to the Government. It is difficult to see how the Government could impose upon the ryots the obligation of paying these allowances to their officers, except by the exercise of their sovereign right of imposing and receiving a revenue from all lands which were not in their nature rent-free (124-5). (*Sir James W. Colville.*) VASUDEV SADASHIV MODAK v. COLLECTOR OF RATNAGIRI.

(1877) 4 I. A. 119 = 2 B. 99 (108) = 3 Sar. 701 = 3 Suth. 391.

———*Gomastah hereditary of—Dismissal of—Power of.*

The plaintiff-appellant was hereditary deshmukh of Karepathar, and as such was entitled to various fees and

DESHMUKH—(Contd.)

emoluments issuing out of villages in that district. The respondent and his ancestors had for a long series of years acted as gumastah in respect of the fees and emoluments to which the appellant and his ancestors had been entitled, and collected the same. The question raised by the appeal was whether the appellant was entitled to dismiss the respondent from his position as gumastah, and to put an end to his tenure of that office.

Their Lordships observed that if the case of the defendant had rested merely on the fact that the office of gumastah which he held had been hereditary from generation to generation, and had been recognised as hereditary by the desh-mukh of that day, nearly a century and a half before, they would have had to consider what rights were inherent in such an hereditary gumastah, and whether the desh-mukh could, and if so, under what circumstances, put an end to the relation between him and the gumastah, and either collect the revenues himself or appoint some other gumastah to perform the duties for him (44). (*Lord Herschell.*) **RAMCHANDRA NARSINGRAJ v. TRIMBAK NASAGAR EKBOTE.** (1891) 19 I. A. 39 = 16 B. 374 (385-6) = 6 Sar. 122.

———*Gumastah hereditary of—Dismissal of—Power of—Rights of gumastah derived under or recognised and confirmed by, same sovereign power as desh-mukh's.*

The plaintiff-appellant was hereditary desh-mukh of Karepathar, and as such was entitled to various fees and emoluments issuing out of villages in that district:—The respondent and his ancestors had for a long series of years acted as gumastah in respect of the fees and emoluments to which the appellant and his ancestors had been entitled, and collected the same. The sole question raised by the appeal was whether the appellant was entitled to dismiss the respondent from his position as gumastah, and to put an end to his tenure of that office. The defendant's case was that his ancestors held the office of gumastah from the same authority as that from which the desh-mukh derived his rights, that is to say, the sovereign power to which they were both subject, or that at all events the hereditary right to act as gumastah had been so recognised and confirmed by that authority, that the desh-mukh could not claim to treat him as deriving his right merely from an ancestor of the desh-mukh, and as subject therefore to dismissal according to the law ordinarily regulating the relations between principal and agent.

Held, on the evidence affirming the Court below, that the right of the gumastah to act as such, and receive the payments, had been either granted, or else so recognised and confirmed by an authority binding on the appellant that he could not oust the defendant, and deprive him of an office and function which the Government had conferred upon him, and allowed him to enjoy, and, that being so, had not the right as against him to collect the allowance himself directly, either from the village officers or from the treasury (48). (*Lord Herschell.*) **RAMCHANDRA NARSINGRAJ v. TRIMBAK NASAGAR EKBOTE.** (1891) 19 I. A. 39 = 16 B. 374 (388-9) = 6 Sar. 122.

DETERMINATION.

———*Meaning of.* See JUDGMENT—DETERMINATION—MEANING OF.

DETINUE.

———*Action of.* See ACTIONS—DETINUE.

DHARAM.

———*Meaning of.*

Dharam is defined in Wilson's Dictionary to be law, virtue, legal or moral duty. (*Sir Richard Couch.*) **RUNCHOODAS VANDRAWANDAS v. PARVATHIBHAI.**

(1899) 26 I. A. 71 (81) = 23 B. 725 (735) = 3 C. W. N. 621 = 1 Bom. L. R. 607 = 7 Sar. 543.

DHARDHURA CUSTOM.

———*See CUSTOM—DHARDHURA CUSTOM.*

DHARMADAYA INAM.

———*Grant of—Nature of.* See INAM—DHARMADAYA INAM. (1923) 50 I. A. 308 (322) = 48 B. 1.

DHUSARS OF DISTRICT OF GURGAON.

———*Adoption—Orphan—Adoption of—Custom of—Validity—Proof—Quantum.*

Held, that the Dhusars of the District of Gurgaon were governed by a custom and not by the law of the Mitakshara, as recognised by the School of Benares, and that according to that custom the adoption of an orphan was valid (413).

Their Lordships have come to that conclusion for the following reasons. Adoptions which would be invalid if not permitted by that customary law are by that customary law permitted, as, for example, a brother can be adopted, a daughter's son can be adopted, there is no limit as to the age of the person who may be adopted, a married man who has had children may be adopted, and a guardian may give a boy in adoption. Besides the case of the adoption the validity of which is in question, there is clear evidence of one who had been present at the adoption, that another orphan had been adopted, and there is evidence that two other persons, who were orphans had been adopted.

The adoption in the present case took place openly. There was no concealment. Every one knew that the boy adopted was an orphan. For years after that adoption every one treated the boy adopted as a lawfully adopted son, and no one suggested that he had not been validly adopted. The person, who was most interested to dispute the adoption, acknowledged that the adoption was valid, and admitted the boy adopted as a validly adopted son to the share of his adoptive father in the family property which a naturally born son of his, if there had been one, would have enjoyed (413-4). (*Sir John Edge.*) **RAMKISHORE v. JAINARAYAN.** (1921) 48 I. A. 405 = 49 C. 120 (130-1) = 20 A. L. J. 857 = 15 L. W. 144 = (1922) M. W. N. 125 = 30 M. L. T. 144 = 26 C. W. N. 881 = A. I. R. 1922 P. C. 2 = 64 I. C. 782 = 42 M. L. J. 80.

———*Agricultural class—If an.*

It has been found by the Courts below that the Dhusars are not an agricultural class, although many of them are owners of land (410). (*Sir John Edge.*) **RAMKISHORE v. JAINARAYAN.** (1921) 48 I. A. 405 = 49 C. 120 (127) = 20 A. L. J. 857 = 15 L. W. 144 = (1922) M. W. N. 125 = 30 M. L. T. 144 = 26 C. W. N. 881 = A. I. R. 1922 P. C. 2 = 64 I. C. 782 = 42 M. L. J. 80.

———*Caste of—If Brahmins.*

The members of the Dhusar caste claim to be Brahmins, but that claim is not admitted, nor is it proved in this suit (408). (*Sir John Edge.*) **RAMKISHORE v. JAINARAYAN.** (1921) 48 I. A. 405 = 49 C. 120 (124-5) = 20 A. L. J. 857 = 15 L. W. 144 = (1922) M. W. N. 125 = 30 M. L. T. 144 = 26 C. W. N. 881 = A. I. R. 1922 P. C. 2 = 64 I. C. 782 = 42 M. L. J. 80.

———*Custom among—Evidence of—Code of Tribal Custom of Gurgaon District—Value of.*

The Code of Tribal Custom of the Gurgaon District was a record of the customs of the Gurgaon District, which was prepared at various dates in 1878 and 1879 by Mr. Wilson, who was the assistant Settlement Officer in the revision of the settlement of the District of Gurgaon; it was prepared from the answers of the village headmen of each of the principal land-owning tribes of the district to a series of questions put to them with the approval of the Punjab Government. Some of those answers show that the Dhusars had by their customs materially departed from the rules of the

DHUSARS OF DISTRICT OF GURGAON—(Contd.)

Mitakshara as recognised by the school of Benares (411). (*Sir John Edge.*) *RAMKISHORE v. JAINARAYAN.*

(1921) 48 I. A. 405 = 49 C. 120 (128) = 20 A. L. J. 857 = 15 L. W. 144 = (1922) M. W. N. 125 = 30 M. L. T. 144 = 26 C. W. N. 881 = A. I. R. 1922 P. C. 2 = 64 I. C. 782 = 42 M. L. J. 80.

—*Law governing—Hindu Law—Custom.*

Their Lordships are satisfied that the parties to this suit, who are Hindus of the Dhusar caste, are governed, not by the mitakshara as recognised by the school of Benares, but are governed by the customary law of the Dhusars of the District of Gurgaon (413). (*Sir John Edge.*) *RAMKISHORE v. JAINARAYAN.*

(1921) 48 I. A. 405 = 49 C. 120 (130) = 20 A. L. J. 857 = 15 L. W. 144 = 1922 M. W. N. 125 = 30 M. L. T. 144 = 26 C. W. N. 881 = A. I. R. 1922 P. C. 2 = 64 I. C. 782 = 42 M. L. J. 80.

DIGNITY.

—*Adavi palki—Suit to establish exclusive right of and to restrain rival claimant from exercising such right—Maintainability of.*

Appellant, as Swami, or Chief Priest of a College of the Smartava sect of Brahmans, claimed, by grant from the supreme power of the State, the privilege of *adavi palki*, of being carried, on ceremonial occasions, in a palanquin borne crossways, so that the poles traversed the line of march. The respondent claimed the like privilege, as Chief Priest of the Lingayats. The plaint was filed by the appellant, asserting his own right, complaining of the usurpation of the respondent, claiming damages, and praying an order in the nature of an injunction that, in future, the respondent should not be carried in a palanquin crossways. In support of his claim the appellant produced sunnuds or grants by the Rajah of Anagoondy, whereby the *adavi palki* was granted to the High Priest, under whom the appellant claimed.

Quære, whether such a suit was maintainable in the Civil Courts, according to the law of Bombay.

Points to be considered in the decision of such a suit. (*Lord Campbell.*) *SRI SUNKER BHARTI SWAMI v. SIDHA LINGAYAH CHARANTI.* (1843) 3 M. I. A. 198 = 6 W. R. 39 (P. C.) = 1 Suth. 142 = 1 Sar. 266.

—*Usurpation of—Suit by aggrieved party in respect of—Maintainability—England and India.*

In England, although an action may be maintained for the disturbance of an office or franchise, an action could not be maintained by the grantee of a dignity from the Crown against a person who, without a grant, should assume the like dignity; but it does not necessarily follow that such is the law in Bombay. The usurper of the dignity is guilty of a wrong which is, to a certain degree, prejudicial to every one who has a just title to the dignity, and the manner in which such a wrong is to be redressed must depend upon the Municipal law of each particular country. There may be no remedy except by application to the Executive Government to punish the usurpation, or there may be a remedy to every one whose dignity is lowered by the usurpation in right of action against the usurper. Even in this country, it would appear that in ancient times, when armorial bearings were assumed without authority, the family who had a right to bear them might sue in the Court of the Earl Marshal, and might obtain an inhibition (217). (*Lord Campbell.*) *SRI SUNKER BHARTI SWAMI v. SIDHA LINGAYAH CHARANTI.* (1843) 3 M. I. A. 198 = 6 W. R. 39 (P. C.) = 1 Suth. 142 = 1 Sar. 266.

DIGWAR.

—*Minerals—Right to—Evidence of—Ghatwal in different place with different rights—Right of—Evidence of—Admissibility.*

DIGWAR—(Contd.)

From the fact that mineral rights were vested in the ghatwals of pergunnah Sarhat in the north-western part of the Birbhum Zemindari, no inference can be drawn that the digwars in Manbhum had similar rights or powers, when the positions and the rights of the two tenure-holders are different (141). (*Lord Macnaghten.*) *DURGA PRASAD SINGH v. BRAJA NATH BOSE.* (1912) 39 I. A. 133 = 39 C. 696 = 16 C. W. N. 482 = (1912) M. W. N. 425 = 11 M. L. T. 337 = 9 A. L. J. 462 = 15 C. L. J. 461 = 14 Bom. L. R. 445 = 15 I. C. 219 = 23 M. L. J. 26.

DIGWARI TENURE.

—*Lands in permanently settled estate held on—Minerals underlying—Right to, of Digwar and of Zemindar. See ZEMINDAR—DIGWARI TENURE.*

(1912) 39 I. A. 133 (141) = 39 C. 696 (702-3)

—*Lands in permanently settled estate held on—Minerals underlying—Right of Zemindar to—Suit by him to establish—Parties—Government if one. See ZEMINDAR—DIGWARI TENURE.* (1912) 39 I. A. 133 (141) = 39 C. 696.

—*Nature and incidents of.*

Digwari tenure is similar to Ghatwali tenure. It was granted originally in consideration of the performance of military service, to which police duties were attached. The tenure is hereditary and inalienable. The digwar is appointed by the Government and liable to be dismissed by the Government for misconduct. On dismissal the next male heir, if fit for the office, is appointed. (*Lord Macnaghten.*) *DURGA PRASAD SINGH v. BRAJA NATH BOSE.* (1912) 39 I. A. 133 (140) = 39 C. 696 =

16 C. W. N. 482 = (1912) M. W. N. 425 = 11 M. L. T. 337 = 9 A. L. J. 462 = 15 C. L. J. 461 = 14 Bom. L. R. 445 = 15 I. C. 219 = 23 M. L. J. 26.

DISCRETION.

—*Abatement of appeal—Setting aside of—Discretion as to—P. C.'s interference in appeal with. See C. P. C. OF 1908, O. 22, RR. 9 AND 11. (1919) 12 L. W. 311 (313-4).*

—*Absolute discretion—Arbitrary exercise of—Propriety.*

It was suggested that an absolute discretion was the equivalent of a right to make a purely arbitrary demand. It is not so. A discretion, although absolute, is none the less a discretion to be exercised with reference to the true position and with perhaps even a greater sense of responsibility in that it is within limits final. (*Lord Blanesburgh.*) *DIWAN CHAND KIRPA RAM & CO. v. WELD & CO.*

88 I. C. 54 = A. I. R. 1925 P. C. 150 (154) = (1925) M. W. N. 459.

—*Absolute discretion—Exercise of—Review of.*

Where the discretion vested in a party is "absolute" its exercise in the absence of fraud is not open to review. (*Lord Blanesburgh.*) *DIWAN CHAND KIRPA RAM & CO. v. WELD & CO.* 88 I. C. 54 =

A. I. R. 1925 P. C. 150 (154) = (1925) M. W. N. 459.

—*Appeal—Abatement of—Setting aside of—Discretion as to—P. C.'s interference in appeal with. See C. P. C. OF 1908, O. 22, RR. 9 AND 11—APPEAL.* (1919) 12 L. W. 311 (313-4).

—*Appeal—Security for costs of—Time for furnishing—Extension of—Discretion as to—P. C.'s interference in appeal with. See C. P. C. OF 1908, O. 41, R. 10—SECURITY FOR COSTS—TIME FOR FURNISHING—EXTENSION OF—DISCRETION OF HIGH COURT AS TO.*

—*Appeal—Trial Judge's discretion—Interference with—P. C. or second appeal from appellate decision—Interference in, with discretion of appellate court—Propriety.*

DISCRETION—(Contd.)

Their Lordships feel much difficulty in interfering with the exercise by the court below of a discretionary jurisdiction such as this. Nevertheless, when the lower court (the first appellate court) has overruled the discretion of the Primary Judge, and has altered his decree, an ulterior Court of Appeal can hardly refuse to examine the grounds on which the alteration is made (148). (*Lord Hobhouse.*) **PRINCE MIRZA SULEMAN KADR v. NAWAB MEHDI BEGAM SURREYA BAHU.** (1893) 20 I. A. 144 = 21 C. 135 = 6 Sar. 347 = R. & J.'s No. 132.

—It is opposed to sound practice for an appellate court to substitute its discretion for that of the Court from which an appeal has been preferred. But when an appellate Court does substitute its discretion for that of the original Court, a Court of further appeal will and must consider whether there was any justification for questioning or disturbing the discretion exercised by the original Court, and if it finds that the original Court did not act capriciously or in disregard of any legal principle in the exercise of its discretion, the Court of further appeal will restore the decision of the original Court. (*Sir Lawrence Jenkins.*) **RAHMAT-UN-NISSA BEGAM v. PRICE.** (1917) 45 I. A. 61 (66) = 42 B. 380 (389) = 23 M. L. T. 400 = 22 C. W. N. 601 = 16 A. L. J. 513 = 27 C. L. J. 623 = 8 L. W. 53 = 5 Pat. L. W. 25 = 20 Bom. L. R. 714 = 45 I. C. 568 = 35 M. L. J. 262.

—C. P. C. of 1908, O. 23, R. 1—Liberty to bring fresh suit—Withdrawal with—Costs on—Discretion as to—P. C.'s interference in appeal with. See C. P. C. OF 1908, O. 23, R. 1—LIBERTY TO BRING FRESH SUIT—WITHDRAWAL WITH—COSTS ON. (1909) 37 I. A. 39 (45) = 32 A. 148 (151).

—C. P. C. of 1908, O. 41, R. 10—Security for costs—Time for furnishing—Extension of—Discretion as to—P. C.'s interference in appeal with. See C. P. C. OF 1908, O. 41, R. 10—SECURITY FOR COSTS—TIME FOR FURNISHING—EXTENSION OF—DISCRETION OF HIGH COURT AS TO.

—Company—Liquidator—Compromise with contributories or alleged contributories—Sanction of—Discretion as to—P. C.'s interference in appeal with. See COMPANY—LIQUIDATOR—COMPROMISE WITH CONTRIBUTORIES, ETC. (1869) 13 M. I. A. 15 (34).

—Contract—Discretion vested in Government by, involving question of construction of contract—Opinion of Government on question—Court's interference with—Power of. See CONTRACT—DISCRETION VESTED IN GOVERNMENT BY, ETC. (1915) 20 C. W. N. 457 (460-1).

—Contract—Recission of—Compensation on—Grant of—Discretion as to—P. C.'s interference in appeal with. See CONTRACT—MINOR—MORTGAGE BY. (1903) 30 I. A. 114 (125) = 30 C. 539 (549).

—Costs—Discretion as to—P. C.'s interference in appeal with. See P. C.—APPEAL—COSTS—DISCRETION OF COURT BELOW AS TO.

—Costs—Interest on—Award of—Discretion as to. See COSTS—INTEREST ON. (1877) 4 I. A. 137 (143) = 3 C. 161 (169-70).

—Damages—Measure of—Discretion as to—P. C.'s interference in appeal with. See P. C.—APPEAL—DAMAGES—MEASURE OF.

—Declaratory decree—Persons expressly recognised by law as entitled to—Refusal of relief to—Grounds. See SPECIFIC RELIEF ACT, S. 42—DECLARATORY DECREE—DISCRETION OF COURT—PERSONS EXPRESSLY RECOGNISED, ETC. (1883) 10 I. A. 150 (156-7) = 10 C. 324 (333).

—Declaratory decree—Grant of—Discretion as to. See SPECIFIC RELIEF ACT, S. 42—DECLARATORY DECREE—

DISCRETION—(Contd.)

GRANT OF—DISCRETION AS TO—INDIAN COURTS.

(1904) 31 I. A. 67 = 26 A. 238 (243).
—Exercise of—Implication of, though point not expressly dealt with. See INTEREST—SUIT—INTEREST AFTER DATE OF—AWARD OF—DISCRETION AS TO—P. C.'S INTERFERENCE WITH.

(1913) 40 I. A. 68 (73-4) = 37 B. 326 (339).
—Exercise of—Mode of—Guide to—Mode pointed out by statute vesting discretion. See C. P. C. OF 1908, S. 34—DISCRETION UNDER—JUDICIAL NOT ARBITRARY.

(1898) 25 I. A. 179 (182) = 26 C. 39 (45).
—Execution sale—Time fixed for—Postponement of—Discretion as to—P. C.'s interference in appeal with. See EXECUTION SALE—TIME FIXED FOR—POSTPONEMENT OF. (1884) 12 I. A. 7 (10) = 11 C. 244 (248).

—Husband and wife—Separation between—Discretion as to—Appeal—Right of, given by statute itself. See HUSBAND AND WIFE—SEPARATION BETWEEN—DISCRETION OF INDIAN COURT.

(1922) 31 M. L. T. 302 (P. C.)
—Interest—Costs—Interest on—Award of—Discretion as to. See INTEREST—COSTS—INTEREST ON.

(1877) 4 I. A. 137 (143) = 3 C. 161 (169-70).
—Interest—Period for which and rate at which, allowed—Discretion as to—Interference in appeal with. See INTEREST—(1) PERIOD AND RATE OF; (2) RATE OF.

—Interest after date of suit—Award of—Discretion as to—P. C.'s interference in appeal with. See INTEREST—SUIT—INTEREST AFTER DATE OF.

—Interest between dates of suit and decree—Rate of—Discretion as to—Interference in appeal with. See INTEREST—SUIT AND DECREE. (1922) 43 M. L. J. 66.

—Interest Act of 1839—Discretion as to allowing or refusing of interest under—P. C.'s interference in appeal with. See INTEREST ACT OF 1839—INTEREST UNDER DISCRETION AS TO, ETC. (1859) 7 M. I. A. 263 (281-2).

—Judicial not arbitrary. See C. P. C. OF 1908, S. 34—DISCRETION UNDER, JUDICIAL NOT ARBITRARY.

(1898) 25 I. A. 179 (182) = 26 C. 39 (45).
—Judicial not arbitrary. (*Lord Dunedin.*) **BRIJ INDAR SINGH v. KANSI RAM.**

(1917) 44 I. A. 218 (225-6) = 45 C. 94 = 26 C. L. J. 572 = 22 C. W. N. 169 = 19 Bom. L. R. 866 = 126 P. W. R. 1917 = 104 P. R. 1917 = 3 Pat. L. W. 313 = 22 M. L. T. 362 = 6 L. W. 392 = 15 A. L. J. 777 = 42 I. C. 43 = 33 M. L. J. 486.

—See DISCRETION—ABSOLUTE DISCRETION—ARBITRARY EXERCISE OF. (1925) 88 I. C. 54.

—Law—Discretion in particular matter vested by, not to be interfered with on light grounds. (*Sir James W. Colville.*) **SADUT ALI KHAN v. KHAJAH ABDOL GUNNEE.** (1873) Sup. I. A. 165 (171) = 11 B. L. R. 203 = 19 W. R. 171 = 3 Sar. 229 = 2 Suth. 785.

—Law—Error of—Exercise of discretion under.

If the judge who purports to exercise the discretion does so under the view that there is no general rule, when in fact there is one, if he has misdirected himself as to the law to be applied to the case, he cannot exercise a judicial discretion and the superior court must either remit the case or exercise the discretion themselves. (*Lord Dunedin.*) **BRIJ INDAR SINGH v. KANSI RAM.**

(1917) 44 I. A. 218 (225-6) = 45 C. 94 = 26 C. L. J. 572 = 22 C. W. N. 169 = 19 Bom. L. R. 866 = 126 P. W. R. 1917 = 104 P. R. 1917 = 3 Pat. L. W. 313 = 22 M. L. T. 362 = 6 L. W. 392 = 15 A. L. J. 777 = 42 I. C. 43 = 33 M. L. J. 486.

—Maintenance—Amount or rate of—Discretion as to—Interference in appeal with. See HINDU LAW—MAINTENANCE—AMOUNT OF—DISCRETION AS TO.

DISCRETION—(Contd.)

——Mesne profits—Interest on—Award of—Discretion as to—Interference in appeal with. *See* MESNE PROFITS—INTEREST ON—AWARD OF.

(1884) 11 I. A. 88 (93) = 10 C. 785 (791-2).

——Minor—Mortgage by—Cancellation of, at instance of minor—Money received by minor under mortgage—Refund of—Order for—Discretion as to—Privy Council's interference in appeal with. *See* CONTRACT—MINOR—MORTGAGE BY. (1903) 30 I. A. 114 (125) = 30 C. 539 (549).

——Municipality—Discretion of—Court's interference with. *See* CALCUTTA MUNICIPAL ACT OF 1899, SS. 14 (xi) AND 556. (1922) 49 I. A. 255 (261) = 49 C. 838 (844).

——Partnership—Partner deceased — Legal representatives of—Suit for accounts against surviving partner by—Assets in hands of latter—Deposit into Court of—Order for—Discretion as to—Interference in appeal with. *See* PARTNERSHIP—PARTNER — LEGAL REPRESENTATIVES OF DECEASED—ACCOUNTS. (1915) 42 I. A. 91 (96) = 42 C. 914 (925).

——Pleadings—Amendment of—Discretion as to—Interference in appeal with. *See* PRACTICE—PLEADINGS—AMENDMENT OF—DISCRETION AS TO.

——Presidency Towns Insolvency Act of 1909, S. 22—Stay of proceedings under—Discretion as to—Privy Council's interference in appeal with. *See* PRESIDENCY TOWNS INSOLVENCY ACT OF 1909, S. 22. (1927) 53 M. L. J. 114.

——Privy Council appeal—Appellate Court's discretion—Interference with—Propriety—Interference by that Court with that of trial Judge. *See* DISCRETION—APPEAL—TRIAL JUDGE'S DISCRETION.

——Receiver — Interim application for—Order on—Interference in appeal with. *See* RECEIVER — INTERIM APPLICATION FOR—ORDER ON. (1927) 55 I. A. 131 = 55 C. 720.

——Restitution—Order for, under S. 144 of C. P. C. of 1908—Rate of interest fixed by High Court in—Discretion as to—Privy Council's interference in appeal with. *See* C. P. C. OF 1908, S. 144—DECREE REVERSED ON APPEAL—AMOUNT RECOVERED UNDER—INTEREST ON—RATE OF, TO BE ALLOWED. (1921) 48 I. A. 150 (154) = 44 M. 570 (574).

——Second appeal—Appellate Court's discretion—Interference with—Propriety—Interference by that Court with that of trial Judge. *See* DISCRETION—APPEAL—TRIAL JUDGE'S DISCRETION.

——Statute—Discretion vested by—Exercise of—Mode of—Guide to—Mode pointed out by Statute. *See* C. P. C. OF 1908, S. 34—DISCRETION UNDER, JUDICIAL NOT ARBITRARY. (1898) 25 I. A. 179 (182) = 26 C. 39 (45).

——Statute—Discretion vested by—Interference in appeal with. *See* HUSBAND AND WIFE—SEPARATION ON GROUND OF OUTRAGE, ETC. (1922) 31 M. L. T. 302 (P. C.)

——Statute—Discretion vested by—Judicial not arbitrary. *See* DISCRETION—JUDICIAL NOT ARBITRARY.

——Statute—Discretion vested by, in a body or Government—Arbitrary or colourable exercise of—Interference with—Jurisdiction of Civil Court. *See* NEW SOUTH WALES PUBLIC SERVICE SUPERANNUATION ACT OF 1903, S. 4. (1911) 21 M. L. J. 641.

——Statute—Power confined by—Exercise of—Discretionary or obligatory—Words—Shall—May—Shall and May—Think fit—Meaning of. *See* STATUTE—STATUTORY BODY—POWER CONFINED BY STATUTE ON—EXERCISE OF—DISCRETIONARY OR OBLIGATORY. (1847) 3 M. I. A. 488 (492-3).

DISCRETION—(Contd.)

——Statute—Right to relief granted by—Refusal of—Grounds. *See* SPECIFIC RELIEF ACT, S. 42—DECLARATORY DECREE—DISCRETION OF COURT — PERSONS EXPRESSLY RECOGNISED, ETC.

(1883) 10 I. A. 150 (156-7) = 10 C. 324 (333).

——Statutory body—Discretion vested in—Court's interference with. *See* CALCUTTA MUNICIPAL ACT OF 1899, SS. 14 (XI) AND 556. (1922) 49 I. A. 255 (261) = 49 C. 838 (844).

——Trial Judge—Discretion of—Interference in appeal with—Appellate Court's discretion in case of—Interference with, in Privy Council or Second Appeal—Propriety. *See* DISCRETION—APPEAL—TRIAL JUDGE'S DISCRETION.

——Trustee—Person to be appointed as—Discretion as to—Interference in appeal with. *See* TRUST—TRUSTEE—APPOINTMENT OF—CHOICE OF PERSON FOR. (1867) 11 M. I. A. 517 (548).

——Submission to—Effect—Interest—Award of—Discretion as to. *See* INTEREST—AWARD OF—DISCRETION OF COURT. (1877) 4 I. A. 137 (146) = 3 C. 161 (173).

DISHONESTY.

——Person of good credit and reputation—Suspicion of dishonesty in—Propriety.

No one is bound to suspect dishonesty in a person of good credit and reputation with whom he is dealing merely because that person occupies a position which would enable him to act dishonestly if he were a rogue. (*Lord Macnaghten.*) *BANK OF BOMBAY v. NANDLAL THACKERSEYDAS.* (1912) 40 I. A. 1 (9) = 37 B. 122 (138) = 17 C. L. J. 146 = 17 C. W. N. 358 = 12 M. L. T. 646 = (1913) M. W. N. 29 = 15 Bom. L. R. 1 = 24 M. L. J. 176.

DIVORCE.

——(*See also* MAHOMEDAN LAW—DIVORCE).

——Divorce *a vinculo*—Suit for—Limitation—Limitation Acts of 1859 and 1871—Applicability of. *See* LIMITATION ACT OF 1859—DIVORCE A VINCULO—SUIT FOR. (1872) Sup. I. A. 106 (111-2).

——Suit for—Adultery with co-respondent—Proof of.

In an appeal brought against a judgment of the Chief Court of the Punjab, confirming a judgment of the Additional Commissioner at Umballa, whereby the respondent obtained a dissolution of his marriage with his wife on the ground of her adultery with the appellant, and the appellant was ordered to pay the costs of the suit, *held*, reversing the courts below, that there was no sufficient evidence on which the divorce could be supported, and that the suit should have been dismissed as against the appellant, with the costs in the Court below and the costs of the appeal to the Privy Council. (*Sir Robert P. Collier.*) *HAY v. GORDON.* (1872) Sup. I. A. 106 = 10 B. L. R. 301 = 18 W. R. 480 = 3 Sar. 185 = 9 Moo. P. C. (N. S.) 102 = 2 Suth. 721.

——Suit for—Co-respondent—Evidence of—Necessity—Denial by him in affidavit—Not enough.

In an appeal brought by the appellant against a judgment of the Chief Court of the Punjab, confirming a judgment of the Additional Commissioner at Umballa, whereby the respondent before their Lordships obtained a dissolution of his marriage with his wife on the ground of her adultery with the appellant, and the appellant was ordered to pay the costs of the suit, *held*, that it would have been desirable and proper for the Chief Court to have acceded to the appellant's application for a commission to examine him, and that his general denial in his affidavit was not equivalent to what might have been a circumstantial denial or explanation of the facts alleged against him (114). (*Sir Robert P. Collier.*) *HAY v. GORDON.* (1872) Sup. I. A. 106 = 10 B. L. R. 301 = 18 W. R. 480 = 3 Sar. 185 = 9 Moo. P. C. (N. S.) 102 = 2 Suth. 721.

DIVORCE—(Contd.)

—*Suit for—Evidence—Respondent—Statements of—Admissibility against co-respondent of.*

Held, in a suit by a person for a dissolution of his marriage with his wife (the respondent) on the ground of her adultery with the co-respondent, that, according to well-known principles of law, no statements of the respondent, written or verbal, were admissible against the co-respondent (115). (*Sir Robert P. Collier*) *HAY v. GORDON*.

(1872) *Sup. I. A.* 106 = 10 *B. L. R.* 301 = 18 *W. R.* 480 = 3 *Sar.* 185 = 9 *Moo. P. C. (N. S.)* 102 = 2 *Suth.* 721.

—*Suit for—Jurisdiction of District and High Courts in—Law applicable to—Divorce Act of 1869—Effect.*

Before the year 1869, the Courts in India had only power to decree divorces *a mensa et thoro*. The power of the Court of divorce in this country of granting divorces *a vinculo*, was first introduced into India by Act IV of 1869, which by S. 7, enacts, that subject to its provisions "the High and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which in the opinion of the said Courts are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief." There is a power given in S. 62 to make rules and regulations not inconsistent with the Act and the Code of Civil Procedure in India. But it appears that no rules or regulations have been made, and, therefore, the principles and rules which obtain in the Divorce Court in this country are, as nearly as may be, to be applied in India. Power is given to district Judges, in the first instance, to hear divorce causes, but their decisions are not final, or, indeed, operative at all, until confirmed by the decree of the High Court, which Court is empowered to direct further inquiry to be made or additional evidence to be taken (111). (*Sir Robert P. Collier*.) *HAY v. GORDON*. (1872) *Sup. I. A.* 106 =

10 *B. L. R.* 301 = 18 *W. R.* 480 = 3 *Sar.* 185 = 9 *Moo. P. C. (N. S.)* 102 = 2 *Suth.* 721.

—*Suit for—Law applicable to. See DIVORCE—SUIT FOR—JURISDICTION OF DISTRICT AND HIGH COURTS.*

(1872) *Sup. I. A.* 106 (111).

DIVORCE ACT IV OF 1869.

—*Ss. 7 and 62—Divorce suit—Jurisdiction of High and District Courts in—Law applicable to. See DIVORCE—SUIT FOR—JURISDICTION, ETC.*

—*S. 17—Divorce suit—Judgment of High Court in—Only operative judgment.*

In a suit instituted under the Divorce Act IV of 1869, it can scarcely be said that there are two separate judgments, one of the District Court, and the other of the High Court, inasmuch as the Legislature has not thought it safe to entrust the court below with the power of pronouncing decisions which would be binding if not appealed against, but have made these decisions operative only on confirmation by the High Court, whose confirmatory judgment is practically the judgment in the suit (118). (*Sir Robert P. Collier*.) *HAY v. GORDON*. (1872) *Sup. I. A.* 106 =

10 *B. L. R.* 301 = 18 *W. R.* 480 = 3 *Sar.* 185 = 9 *Moo. P. C. (N. S.)* 102 = 2 *Suth.* 721.

DOMICIL.

—*Change or retention of—Proof of.*

In the case of a claim in prize for the condemnation of a ship, it appeared that the decree of condemnation was pronounced upon the ground that the claimant had, at the time of the capture and continuously thereafter, a commercial domicile in Constantinople, and that he had never formed any intention, or taken any steps, which had the effect of divesting him of that commercial domicile and adopting some other. It was conceded that if the decision that he had not done so, and had therefore retained his

DOMICIL—(Contd.)

Turkish commercial domicile, was correct, the condemnation was properly pronounced.

Every act of the claimant at the time of the breaking of the war was consistent with the intention to retain his commercial domicile at Constantinople, and was inconsistent with any intention to divest himself of it. He did his best to continue the voyage of the ship to a Turkish port, although he was not able to show that there was any particularly pressing commercial object, in sending her to Busra, where no cargo was engaged, where no agent had been appointed, and where there was no trade to be expected. He continued to act exactly as before.

Held, that the claimant had not discharged the burden of proof, which lay upon him, of showing that he was no longer commercially domiciled in Turkey, as he had been before. (*Lord Sumner*.) *SOCRATES ARYCHIDES v. SECRETARY OF STATE FOR INDIA*. (1922) 18 *L. W.* 664 =

32 *M. L. T. (P. C.)* 81 = 27 *C. W. N.* 557 =

(1923) *M. W. N.* 846 = 25 *Bom. L. R.* 116 =

84 *I. C.* 737 = *A. I. R.* 1922 *P. C.* 371.

—*Enemy country—Commercial domicile in—Alteration of—Proof of. See PRIZE PROCEEDINGS—COMMERCIAL DOMICIL IN ENEMY COUNTRY.* (1922) 46 *B.* 857.

—*Evidence of—Alteration of domicile—Proof of. See PRIZE PROCEEDINGS—COMMERCIAL DOMICIL IN ENEMY COUNTRY.* (1922) 46 *B.* 857.

DUTY.

—*Sudden emergency—Duty of a man who finds himself in a—Negligence on his part—What amounts to. See CONTRACT ACT, S. 151—SUDDEN EMERGENCY.*

(1917) 8 *L. W.* 4 (8-9).

—*Test of—Profession or calling of person not a.*

Duty is always a question of circumstance. It cannot be defined by ticketing a man as belonging to a certain profession or calling, and then going to authorities to show what the duties of that profession or calling are (106). (*Lord Dunedin*.) *THORNES v. BROWN*. (1922) 31 *M. L. T.* 104 (*P. C.*).

EASEMENT.

—*Co-owners—Joint estate—Easement in—Acquisition by one of—Proof of—Quantum. See CO-SHARERS—JOINT ESTATE—FERRY ON—SETTING UP OF, ETC.*

(1891) 19 *I. A.* 48 (56-7) = 19 *C.* 253 (263-4).

—*Enjoyment of—Acquiescence of servient owner in—Proof of—Proof of knowledge on part of agent of servient owner collecting rents for him if amounts to.*

Quare, whether knowledge on the part of an agent, who collects rent for the owner of the servient tenement, and is entrusted with the authority of fixing the amount, is not constructive knowledge on the part of the owner sufficient to satisfy the exigency of proof on the part of the plaintiffs to establish the servient owner's acquiescence in their user in such a case (179). (*Sir Robert P. Collier*.) *ELLIOTT v. BHOOBUN MOHUN BONNERJEE*. (1873) *Sup. I. A.* 175 = 12 *B. L. R.* 406 = 19 *W. R.* 194 =

3 *Sar.* 236 = 2 *Suth.* 801.

—*Grant—Easements passing under—River and contiguous land through which irrigation channel supplied with water from river passes—Owner of—Grant by, of contiguous land with channel.*

The owner of a river and of contiguous land through which passes a channel constructed for irrigation purposes and supplied with water from the river grants the contiguous land together with the channel. Obviously some right or easement of taking water from the river must pass. This right must be measured by the physical condition such as the size of the channel, or the nature and extent of the sluices and weirs governing the amount of water which enters the channel, and not by the purposes for which the grantor or his tenants have been accustomed to use water

EASEMENT—(Contd.)

from the channel prior to the date of the grant. The case would be different if the contiguous land had been granted reserving the channel. In that case, if any easement passed it would be an easement in respect of which the channel and not the river was the servient tenement and if no water had been or were being used by the grantor or his tenants, it may well be that there were no existing physical conditions by which the principle of continuous and apparent easements could be brought into play. In such a case no easements or right to use water from the channels would pass under the grant. (*Lord Parker.*) **KANDUKURI BALASURYA RAO v. SECRETARY OF STATE FOR INDIA.**

(1917) 44 I. A. 166 = 40 M. 886 = 19 Bom. L. R. 751 =

2 Pat. L. W. 260 = 26 C. L. J. 290 = 22 M. L. T. 76 =

21 C. W. N. 1089 = 15 A. L. J. 697 =

(1917) M. W. N. 536 = 6 L. W. 340 = 41 I. C. 98 =

33 M. L. J. 144.

———*Grant of—Presumption of, from existence of incorporeal right in nature of easement to be exercised in alieno solo.*

The existence of an incorporeal right in the nature of an easement to be exercised *in alieno solo* implies a grant to the owner of the easement from the owner of the soil. **COURT OF WARDS v. RAJA LEELANUND SING.**

(1875) 3 Suth. 225 (232) = 25 W. R. 157 = 5 Sar. 722.

———*Legal origin for—Presumption of—Pasturage right of village cultivators over waste lands of village and of adjoining villages. See EASEMENT—VILLAGE.*

(1904) 31 I. A. 75 = 31 C. 503.

———*Legal origin for—Presumption of—Watercourse—Artificial watercourse constructed on neighbour's land—Water flowing to one's own land through—Right to—Legal origin for. See WATERCOURSE—ARTIFICIAL WATERCOURSE CONSTRUCTED ON NEIGHBOUR'S LAND.*

(1878) 6 I. A. 33 (40) = 4 C. 633 (641-2) and

(1880) 7 I. A. 240 (246-7) = 6 C. 394 (403-4).

———*Light—Ancient lights—Right acquired by—Extent of—Infringement of—When actionable.*

The easement acquired by ancient lights is not measured by the amount of light enjoyed during the period of prescription, and there is no infringement unless that which is done amounts to a nuisance. The owner of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind.

[*N. B.* This is not a decision with reference to the Indian Easements Act.] (*Lord Moulton.*) **PAUL v. ROBSON.**

(1914) 41 I. A. 180 = 42 C. 46 = 18 C. W. N. 933 =

(1914) M. W. N. 631 = 16 M. L. T. 204 =

12 A. L. J. 1166 = 1 L. W. 561 = 20 C. L. J. 353 =

16 Bom. L. R. 803 = 24 I. C. 300 = 27 M. L. J. 117.

———*Light—Right to—Acquisition by prescription of—Letting of servient tenement at monthly rent from commencement of accruing of right—Effect.*

Quere whether the fact of the servient tenement being let to tenants at a monthly rent on the commencement of the accruing of the right to the light claimed in respect to it, would have any bearing upon the rights of the parties (179-80). (*Sir Robert P. Collier.*) **ELLIOT v. BHOOBUN MOHUN BONNERJEE.**

(1873) Sup. I. A. 175 =

12 B. L. R. 406 = 19 W. R. 194 = 3 Sar. 236 =

2 Suth. 801.

———*Light and air—Easement of—Acquisition by prescription of—Agreement with servient owner not to claim right—Effect.*

EASEMENT—(Contd.)

Held, on a construction of the correspondence between the parties, that there was an agreement in pursuance of which the appellant was allowed to enjoy the access of light and air through the widows on the south side of his house in return for which he promised that he would not raise any objection to those windows being blocked when the respondent should rebuild and raise his house and that appellant could not therefore acquire an easement in respect of those windows under S. 15 of the Easements Act. (*Sir Richard Couch.*) **SULTAN NAWAZ JUNG v. RUSTUMJI NANABHOY BYRAMJI JIJIBHOY.**

(1899) 26 I. A. 184 =

24 B. 156 = 2 Bom. L. R. 518 = 7 Sar. 609.

———*Lost grant of—Presumption of, from long possession—Artificial channel—Right to take water from, for irrigation purposes.*

A right of easement to receive and utilise for irrigation purposes from an artificial channel a supply of water may be created by grant. The grant of such a right may also be presumed from long possession although the actual transaction of making such a grant cannot be discovered or proved. (*Lord Shaw.*) **SECRETARY OF STATE FOR INDIA**

v. **MAHARAJA OF BOBILI.** (1919) 46 I. A. 302 (311) =

43 M. 529 (538) = 27 M. L. T. 1 = (1919) M. W. N. 775 =

11 L. W. 204 = 18 A. L. J. 1 = 24 C. W. N. 416 =

22 Bom. L. R. 498 = 54 I. C. 154 = 37 M. L. J. 714.

———*Right of—Prescription—Acquisition by—Interruption—Notice of, given within 20 years, though actual interruption only later—Effect of.*

In a case in which the plaintiffs claimed the right to light in respect to certain windows, it appeared that the defendants gave the plaintiffs notice, within 20 years of the accrual of the right, of their intention of erecting a building which would undoubtedly obstruct the plaintiffs' lights, and that the building was actually commenced by the defendants within the 20 years, though it was not raised to such a height as to actually amount to an obstruction until some days after the 20 years had elapsed.

Held, that under the English law prior to the Prescription Act, 2 & 3 Will. 4, C. 71, which was applicable to the case, the plaintiffs had to show an uninterrupted user of at least 20 years, with the acquiescence of the defendants, and that they had failed to establish such an uninterrupted user of the lights in question (179-80.)

It is quite impossible to presume enjoyment for 20 years with the acquiescence of the owners of the servient tenement, when before the expiration of those 20 years, the owner not merely gave notice of his intention to interfere with that enjoyment and to raise an obstruction, but in pursuance of that notice actually commenced the erection of that obstruction which was completed a few days before the expiration of the time in question (180.) (*Sir Robert P. Collier.*) **ELLIOTT v. BHOOBUN MOHUN BONNERJEE.**

(1873) Sup. I. A. 175 = 12 B. L. R. 406 =

19 W. R. 194 = 3 Sar. 236 = 2 Suth. 801.

———*Right of—Proprietary possession—Evidence of—Distinction—Forest and jungle land. See POSSESSION—JUNGLE AND FOREST LAND—PROPRIETARY POSSESSION.*

(1891) 18 I. A. 149 (156-7) = 15 M. 101 (109.)

———*Right of—Servient tenement—Forfeiture to Crown of—Effect of, on right. See MADRAS ACTS—IRRIGATION CESS ACT (VII OF 1865 AS AMENDED BY ACT V OF 1900), S. 1, PROVISIO.*

(1919) 46 I. A. 302 (313) =

43 M. 529 (539-40).

———*Village—Waste lands of, and of adjoining villages—Pasturage right of village cultivators over—Presumption of legal origin for, from immemorial enjoyment—Decree declaring right—Reservation in, of owners' right to cultivate and improve lands.*

EASEMENT—(Contd.)

The plaintiffs were cultivators by occupation belonging to nine villages appertaining to *turuf P* held by the respondent company in *patni* right. They averred that from time immemorial they and their predecessors had enjoyed the right of pasturage over the waste lands of the villages to which they belonged, and, in some cases, over waste lands of adjoining villages. They sued on behalf of themselves and the other persons entitled to the right claimed, in accordance with S. 30 of C. P. C. of 1882, and prayed for a declaration of their right to graze their cattle on the lands in question, and for a permanent injunction restraining the defendant company from interfering with the exercise of their rights.

Held, that the right claimed was not a right in gross, and that on proof of the fact of enjoyment from time immemorial there could be no difficulty in the way of the court finding a legal origin for the right claimed.

The evidence in the case having established the enjoyment alleged by the plaintiffs, a decree was made declaring their right with a provision that the decree was not to prevent the defendants or their successors in title from cultivating or executing improvements upon the waste lands in question so long as sufficient pasturage was left for the plaintiffs and the other persons entitled to the right of pasturage claimed.

Their Lordships reserved liberty to the parties from time to time, in case of difference, to apply to the Subordinate Judge, as they might be advised. (*Lord Macnaghton.*) **BHOLA NATH NUNDI v. MIDNAPORE ZEMINDARY CO., LTD.** (1904) 31 I.A. 75 = 31 C. 503 = 8 C. W. N. 425 = 8 Sar. 611 = 14 M. L. J. 152.

—Watercourse—Artificial watercourse constructed on neighbour's land—Water flowing to one's own land through — Right to — Legal origin for — Presumption of. See **WATERCOURSE — ARTIFICIAL WATERCOURSE CONSTRUCTED ON NEIGHBOUR'S LAND.**

(1878) 6 I. A. 33 (40) = 4 C. 633 (641-2) and (1880) 7 I. A. 240 (246-7) = 6 C. 394 (403-4).

—Way—Right of, across railway—Possibility in law of.

The appellants further based their claim to compensation partly on a right of way, which they alleged to exist over the railway between their property situated on the east side of the railway and that situated on the west side.

Quere whether such a right could be established across the railway (63.) (*Lord Parmoor.*) **SISTERS OF CHARITY OF ROCKINGHAM v. KING.** (1922) 32 M.L.T. 62 (P.C.)

EASEMENTS ACT V OF 1882.

—See **EASEMENT.**

EAST INDIA COMPANY.

—Position of, legal and constitutional, up to 1858 — Governors of Provinces during that period—Position and powers of.

During the period up to 1858, the East India Company exercised a delegated sovereignty over the territories under its Government, with all the powers in connection with the external relations of those territories incidental to the exercise of that sovereignty, subject of course, to such restrictions as were imposed by Charter or Statute.

It is obvious that the sovereign power thus delegated to the company could be exercised by it in India only through its agents and officers in the country. Before the Regulating Act of 1773 the three Presidencies in India were wholly independent of one another, in the government of each, and in the dealings of each with the Native States in its neighbourhood, the company acted through its officers charged with the administration of that Presidency. By the Regulating Act the Governments of Madras and Bombay were placed under

EAST INDIA COMPANY—(Contd.)

the superintendence and control of the Governor-General of Bengal (since become Governor-General of India) and his Council, and close restrictions were placed upon their power of making war or peace or concluding treaties without the approval of the Central Government. Subsequent statutes expressed with greater clearness the subordination of the lesser Governments, and repeated the restrictions upon the exercise by them of various sovereign powers. But subject to that subordination and to those restrictions, those statutes never took away these powers, but, on the contrary, repeatedly recognised their existence. And accordingly in 7 M. I. A. 555 this Board held that a treaty entered into by the Government of Madras, after compliance with the statutory conditions, was a valid exercise of sovereignty, (*Sir Arthur Wilson.*) **HEMCHAND DEVCHAND v. AZAM SAKARLAL CHHOTAM LAL.** (1905) 33 I. A. 1 =

33 C. 219 (242-3) = 10 C. W. N. 361 =

8 Bom. L. R. 129 = 3 A. L. J. 250 = 3 C. L. J. 395 =

1 M. L. T. 115 = 9 Sar. 5 = 16 M. L. J. 115.

—Promissory notes on behalf of—Authority to make and issue—Delegation of—Practice—Governor-General in Council—Delegation of authority to — Delegation to any other department—Validity.

The promissory notes in question purport to have been made for and on behalf of the East India Company by the Governor-General in Council, and to have been signed, by his authority, by the Secretary to the Government; and this appears from the evidence to have been the invariable form of all promissory notes issued by the company in India.

Quere, whether it was competent for the company to have made such a contract through the agency of any other persons. *Held*, in the absence of evidence of the company having ever exercised such a power, looking at the Company simply as a commercial firm, the Governor-General in Council must be considered as the only agent authorized to make and issue promissory notes on behalf of the Company in India, and the Secretary to the Government as the only agent appointed to sign them (247-8.)

Quere, whether the company could authorise another department to pledge the company's responsibility upon notes not originally made and issued by the Governor-General in Council (248.) (*Hon. Thomas Erskine.*) **BANK OF BENGAL v. EAST INDIA COMPANY.**

(1834) 2 Knapp. 245 = 1 Sar. 46..

—Promissory notes issued by Governor-General in Council on behalf of—Forged imitations of—Liability of Company on—Certificate of authenticity of notes by inferior officer of Company—Effect—Liability of Company by reason of—Authority of clerk to so certify—Proof of—Onus—Quantum.

The appeal arose out of an action of *assumpsit* brought by the Bank of Bengal against the East India Company, to recover the interest alleged to be due to the plaintiffs, as indorsees and holders of three promissory notes, made and issued by the Governor-General in Council as agent for the defendants.

It was proved at the trial that the instruments declared on were forged imitations of genuine notes, issued by order of the Governor-General in Council, to secure to the holders the repayment of monies raised by way of loan for the public service of the Company, and the payment of interest quarterly in the meantime; that upon these notes being brought to the plaintiffs for discount, they sent them to the office of the Accountant-General, where the Company's notes were prepared and registered, for the purpose of ascertaining whether they were genuine, and that O, a clerk in the Accountant-General's office, whose duty it was to make and keep the register of the Company's notes, examined the notes in question, and wrote his initials on the margin to indicate

EAST INDIA COMPANY—(Contd.)

that they were genuine, and that the plaintiffs, relying upon *O*'s certificate, discounted the notes. The appellants therefore contended that such certificate amounted to an acknowledgment by the Company that the notes had been issued by their authority; and that, as the appellants advanced their money upon the faith of that acknowledgment, they were entitled to recover against the defendants, as the makers of the notes, whether they had been originals issued by their authority or not.

Held, on the evidence, that the only authority given, or intended to be given, to *O* was, to certify that the notes brought for examination corresponded with the entries in the register, and he had no power of vouching in any way for the authenticity of the notes examined; that the Company were not responsible for any erroneous opinion formed by *O* or the Bank of Bengal as to the extent of his authority; and that the Company were not bound by the acknowledgment of the notes as genuine by *O* (254).

Clear and cogent evidence would be necessary to prove the improbable fact that the Company had reposed in an inferior officer the power of involving them in unlimited responsibility by certifying the authenticity of notes submitted to his examination (248). (*Hon. Thomas Erskine*). **BANK OF BENGAL v. THE EAST INDIA COMPANY**

(1834) 2 Knapp. 245 = 1 Sar. 46.

——Settlement in Bengal by—Nature of—Inhabited and uninhabited districts—Distinction. See **BENGAL SETTLEMENT BY EAST INDIA CO.** (1836) 1 M. I. A. 175.

——Sovereign powers of—Acts done in execution of—Propriety of—Municipal Courts—Jurisdiction to enquire into.

Acts done by the East India Company in the execution of the Sovereign powers vested in them are not subject to the control of the Municipal Courts, either of India or Great Britain (531). (*Lord Kingsdown*). **SECRETARY OF STATE IN COUNCIL OF INDIA v. KAMACHEE BOYE SAHABA.**

(1859) 7 M. I. A. 476 = 13 Moo. P. C. 22 = 7 W. R. (Eng) 722 = 4 W. R. P. C. 42 = 1 Suth. 373 = 1 Sar. 684.

——Sovereignty—Powers of—Law in 1839.

It was said that the East India Company did not stand in the position of an independent Sovereign, and that such powers of Sovereignty as were exercised on behalf of the Company were vested, not in the Company, but in the Governor-General and Council, who are protected by legislative enactments for what they may do in that character. The law, as it stood in the year 1839, is accurately stated in the following passage in the Judgment of Chief Justice Tindal in the case of *Gibson v. The East India Co.*:—"It is manifest that the East India Company have been invested with powers and privileges of a two fold nature, perfectly distinct from each other; namely, powers to carry on trade as merchants and (subject only to the prerogative of the Crown, to be exercised by the Board of Commissioners for the affairs of India), power to acquire and retain and govern territory, to raise and maintain armed forces by sea and land, and to make peace or war with the Native powers of India." Statute, 3rd and 4th Will IV, C. 85, in no degree diminishes the authority of the East India Company to exercise, on behalf of the Crown of Great Britain, and subject to the control thereby provided, these delegated powers of sovereignty. (*Lord Kingsdown*). **SECRETARY OF STATE IN COUNCIL OF INDIA v. KAMACHEE BOYE SAHABA.**

(1859) 7 M. I. A. 476 (530-1) = 13 Moo. P. C. 22 = 7 W. R. (Eng) 722 = 4 W. R. P. C. 42 = 1 Suth. 373 = 1 Sar. 684.

EAST INDIANS.

——See UNDER CONVERTS.

ECCLESIASTICAL COURTS IN ENGLAND.

——Alimony—Power to decree—Scope and limit of.

The Ecclesiastical Court has no power to decree alimony, except *pendente lite*, or after a decree for separation by reason of cruelty or adultery. It is wholly contrary to the first principles on which the Ecclesiastical Courts proceed, to allow alimony under any other circumstances, for the Ecclesiastical Court cannot contemplate any separation of husband and wife, except where cohabitation is prevented by adultery, or rendered impracticable by cruelty (389). (*Dr. Lushington*). **ARDASEER CURSETJEE v. PEROZEBOYE.** (1856) 6 M. I. A. 348 = 4 W. R. 91 = 10 Moo. P. C. 375 = 1 Suth. 265 = 1 Sar. 548.

——Decrees of—Mode of enforcing.

Till of late days, the only mode of enforcing the decrees of Courts Christian was by process of ex-communication, the imprisonment which followed taking place under the authority of the Civil Courts. Ex-communication in ordinary cases is now superseded; instead of that proceeding, the Ecclesiastical Courts pronounce the party to be in contempt, and signify the same to the Court of Chancery, which issues the authority to imprison (387). (*Dr. Lushington*). **ARDASEER CURSETJEE v. PEROZEBOYE.**

(1856) 6 M. I. A. 348 = 4 W. R. 91 = 10 Moo. P. C. 375 = 1 Suth. 265 = 1 Sar. 548.

——Jurisdiction of—Nature of—Civil or religious.

It is true that a considerable part of the Jurisdiction of the Ecclesiastical Court is in its nature, though not in its origin, purely Civil, and has no proper connection whatever with any religious matters. We advert to the grant of probate and administration (387) (*Dr. Lushington*). **ARDASEER CURSETJEE v. PEROZEBOYE.** (1856) 6 M. I. A. 348 = 4 W. R. 91 = 10 Moo. P. C. 375 = 1 Suth. 265 = 1 Sar. 548.

ECCLESIASTICAL LAW.

——Alteration of, to suit circumstances—Impossibility of.

The Civil Courts in India can bend their administration of Justice to the laws of the various suitors who seek their aid. They can administer Mahomedan law to Mahomedans, Hindoo law to Hindus; but the Ecclesiastical law has no such flexibility. Change it in its essential character, and it ceases to be Ecclesiastical law altogether (390). Proceedings might be conducted on the civil side with such adaptation to the circumstances of the case as Justice might require, though on the Ecclesiastical side such modification would be wholly irreconcilable with Ecclesiastical law (391). (*Dr. Lushington*). **ARDASEER CURSETJEE v. PEROZEBOYE.**

(1856) 6 M. I. A. 348 = 4 W. R. 91 = 10 Moo. P. C. 375 = 1 Suth. 265 = 1 Sar. 548.

——England—Law in—Foundation of.

The English Ecclesiastical Law is founded exclusively on the assumption that all the parties litigant are Christians; indeed originally, more strictly speaking, Christians professing the doctrine of the Church (387). (*Dr. Lushington*). **ARDASEER CURSETJEE v. PEROZEBOYE.**

(1856) 6 M. I. A. 348 = 4 W. R. 91 = 10 Moo. P. C. 375 = 1 Suth. 265 = 1 Sar. 548.

——England—Law in—Restitution of conjugal rights—Decree in wife's suit for—Remedy of wife under.

Under the Ecclesiastical Law, if the wife succeed in a suit for the restitution of conjugal rights, the sole remedy is to compel the husband to take her home (389). (*Dr. Lushington*). **ARDASEER CURSETJEE v. PEROZEBOYE.** (1856) 6 M. I. A. 348 = 4 W. R. 91 = 10 Moo. P. C. 375 = 1 Suth. 265 = 1 Sar. 548.

EFFECTS.

——Meaning of. See **HINDU LAW—WILL—CONSTRUCTION—EFFECTS.** (1927) 54 I. A. 276 (284-6) = 5 B. 247.

EJECTMENT SUIT.

APPEAL IN.
 BOUNDARY DISPUTE.
 CO-DEFENDANTS.
 CONTRACT BY PLAINTIFFS' PREDECESSOR TO TRANSFER SUIT PROPERTY TO DEFENDANT—PLEA BY DEFENDANT OF.
 DECISION IN—PERSONS NOT PARTIES TO SUIT.
 DECREE IN.
 DEFENCES IN—ALTERNATIVE DEFENCES.
 DISMISSAL OF—DECLARATION OF RIGHTS OF PARTIES IN CASE OF.
 ESCHEAT—CLAIM BY.
 HINDU LAW—RELIGIOUS ENDOWMENT—SHEBAIT OF.
 HINDU LAW—REVERSIONER.
 HINDU LAW—WIDOW.
Jus tertii—PLEA BY DEFENDANT OF.
 LANDLORD.
 LEGITIMACY.
 MAGISTRATE'S ORDER—DEFENDANT IN POSSESSION UNDER.
 MAHOMEDAN LAW.
 MAINTAINABILITY OF.
 MORTGAGE.
 ONUS ON PLAINTIFF IN.
 PARAMOUNT TITLE.
 PARTITION DECREE IN.
 PERSONS NOT PARTIES TO.
 PLAINTIFF WITHOUT TITLE—DECREE TO.
 PLAINTIFF'S TITLE.
 POSSESSION LONG WITH DEFENDANT—ADMISSION BY PLAINTIFF OF—ONUS ON PLAINTIFF IN CASE OF.
 RIGHT OF—DEED BARRING.
 SUCCESSION—RIVAL CLAIMANTS TO.
 TRESPASS ON PROPERTY.
 ZEMINDAR.

Appeal in.

—Defendant's appeal—Decree in, in event of plaintiff having executed decree below pending appeal—Restoration of possession to defendant—Direction for—Necessity.

In an appeal by the defendant in an ejectment suit from the decree in favour of the plaintiff therein, *held*, that the decree in appeal reversing the decree below ought, if the plaintiff had executed his decree and recovered possession pending the appeal, to direct that the defendant ought to be restored to possession (58).

The defendant ought not, by reason of his having been turned out under an erroneous judgment, to be placed in the position of having to seek to recover possession himself and to prove his title (58). (*Sir Barnes Peacock*.) **ACHAL RAM v. UDAI PARTAB.** (1883) 11 I.A. 51 = 10 C. 511 (520) = 4 Sar. 507 = R. & J.'s No. 47 (Oudh).

—*Jus tertii*—Plea of—New ground of—Permissibility. See EJECTMENT SUIT—*Jus tertii*—PLEA BY DEFENDANT OF—DECREE TO PLAINTIFF, ETC.

(1878) 5 I.A. 61 (67-9) = 1 M. 312 (323-4).

—Partition—Decree for—Grant of. See EJECTMENT SUIT—PARTITION—DECREE FOR.

(1898) 25 I.A. 195 (207-8) = 21 A. 53 (69-70).

—Possession—Decree conditional for—Grant of. See POSSESSION—DECREE UNCONDITIONAL FOR.

(1913) 40 I.A. 105 (111) = 35 A. 211 (220-1).

Boundary dispute.

—Onus of proof in—Rule applicable to ejectment suits—Inapplicability of. See BOUNDARY DISPUTE—POSITION OF PARTIES IN.

(1893) 21 I.A. 39 (43-4) = 21 C. 504 (511).

EJECTMENT SUIT—(Contd.)**Co-defendants.**

—Plaintiff without title—Suit by—Co-defendant with title—Agreement between plaintiff and, to divide suit property—Decree to plaintiff in case of—Validity—Possessory title with contesting defendant. See EJECTMENT SUIT—DECREE IN—PLAINTIFF WITHOUT TITLE.

(1866) 10 M.I.A. 511 (528-9).

—Plaintiff without title—Suit by—Person with title made a defendant—Petition filed by, in suit admitting plaintiff's right and consenting to a decree in his favour—Decree to plaintiff on foot of—Validity—Conveyance or disclaimer of title by that defendant—Case of—Distinction. See EJECTMENT SUIT—DECREE IN—PLAINTIFF WITHOUT TITLE.

(1875) 2 I.A. 113 (130).

—See EJECTMENT SUIT—DECREE IN—PLAINTIFF WITHOUT TITLE.

(1866) 10 M.I.A. 511 (528-9).

—Question between—Decision of—Propriety.

Plaintiff, as the Committee, and in right of his wife (a lunatic), sued to recover property which admittedly belonged to her father and was in the possession of her mother till her death. His case was that his wife became a lunatic only after her mother's death, when the succession to her father opened, and that she was not therefore excluded from inheritance. The lunatic's sons, who were made defendants in the suit, alleged that their mother had become a lunatic before the death of her mother and therefore before the succession to their grandfather opened, that she was therefore excluded from inheritance, and that they therefore succeeded to their grandfather's estate to the exclusion of their mother. They conveyed the suit property by an *ikrarnamah* to the appellants, who were also made defendants in the suit, and who were in possession of the suit property on its date.

Held, that the question as to the *ikrarnamah* could not be disposed of in that suit, that it was a question which could only be determined between the appellants and the sons of the lunatic who were named as their co-defendants on the record (522-3).

Their Lordships accordingly dealt with the case as being only an action in the nature of an ejectment for the recovery of the lands in question from the appellants (523). (*Sir James W. Colville*.) **BABOO BODHNARAIN SINGH v. BABOO OMRAO SINGH.** (1870) 13 M.I.A. 519 = 15 W.R. (P.C.) 1 = 6 B.L.R. 509 = 2 Suth. 371 = 2 Sar. 607.

—See PRIVY COUNCIL—APPEAL—CO-DEFENDANTS. (1904) 31 I.A. 175 = 31 C. 901 (908).

Contract by plaintiffs' predecessor to transfer suit property to defendant—Plea by defendant of.

—Allegation and proof by him of existence of contract and that it was for valuable consideration—Necessity. (*Lord Hobhouse*.) **IMMUDIPATTAM THIRUGNANA v. PERIYA DORASAMI.** (1900) 28 I.A. 46 (53-4) = 24 M. 377 (384-5) = 5 C.W.N. 217 = 7 Sar. 811.

Decision in—Persons not parties to suit.

—Effect on.

Decision cannot give those persons any rights or impose upon them any liabilities. (*Sir Robert P. Collier*.) **TIERY v. KRISTODHUN BOSE.**

(1873) 1 I.A. 76 (83) = 3 Sar. 312.

Decree in.

—*Jus tertii*—Plea by defendant of—Decree to plaintiff subject to reservation of rights of other persons, if any, with better title—Validity. See EJECTMENT SUIT—*Jus tertii*—PLEA BY DEFENDANT OF—DECREE TO PLAINTIFF, ETC. (1878) 5 I.A. 61 (67-9) = 1 M. 312 (323-4).

EJECTMENT SUIT—(Contd.)**Decree in—(Contd.)**

——Partition—Decree for, in appeal—Grant of. *See* EJECTMENT SUIT—PARTITION—DECREE FOR.

(1898) 25 I.A. 195 (207-8) = 21 A. 53 (69-70).

——Possession — Conditional decree for, in appeal—Grant of. *See* POSSESSION—DECREE UNCONDITIONAL FOR.

(1913) 40 I.A. 105 (111) = 35 A. 211 (220-1).

——Plaintiff without title—Decree to—Validity—Co-defendant with title—Agreement between plaintiff and, to divide suit property—Decree in case of—Possessory title with contesting defendant.

The suit was brought by *A* and *G*, claiming to be the heirs of one *T* deceased, to recover with mesne profits possession of a talook, appertaining to the estate of *T*, and to cancel and invalidate a deed of sale of that talook, which had been executed by the widow of *T* in favour of the appellant's father. The appellant denied that *A* and *G* were the heirs of *T* as alleged by them. One *R*, a niece of the widow of *T*, was added as a supplemental defendant to the suit, and it appeared that the plaintiffs had entered into a solenamah or deed of compromise with *R* agreeing to divide the estate with *R*. The judgment of the Sudder Court, which decreed possession to the plaintiffs, assumed that the title set up by the plaintiffs might be wholly bad; but it said, if they were not entitled to recover the estate on showing that the appellant's title was bad, *R* would be so entitled; and as they had agreed to divide the spoils with her, it mattered not on which title the property was recovered.

Held, that the course of proceeding adopted by the Sudder Court was in violation of legal principles, as well as of substantial principles of justice, and that its decree could not, therefore, be sustained (528-9).

The title of *R* could not be tried between her and the appellant in this suit. The effect, therefore, of the judgment of the Sudder Court is to defeat the appellant's possessory title, without giving him an opportunity of contesting the title of the party by whom he is turned out of possession. Their Lordships cannot give their sanction to this course of proceeding, which appears to them to be in violation of the legal principles which protect possession, as well as of the substantial principles of justice which regulate the joinder of parties and union of titles to sue in one suit. The decision, in effect, sustains an union of titles indirectly, which could not have been directly advanced in union against the appellant's possession. It is difficult to estimate the full weight of the grave dangers to which so irregular a course might expose possession (528-9). (*Sir Edward V. Williams.*) *JAWALA BUKSH v. DHARUM SINGH.*

(1866) 10 M.I.A. 511 = 2 Sar. 189.

——Plaintiff without title—Decree to—Validity—Long possession with him—Defendant also without title. *See* EJECTMENT SUIT—MAINTAINABILITY—TITLE.

(1864) 10 M.I.A. 47.

——Plaintiff without title—Decree to—Validity—Person with title made a defendant—Petition filed by, in suit admitting plaintiff's right and consenting to a decree in his favour—Decree on foot of—Conveyance or disclaimer of title by that defendant—Case of—Distinction.

The only son of one of the deceased daughters of *R*, a deceased Hindu, sued for the recovery of *R*'s property from his brothers. Two other daughters of *R* were alive and were added as defendants in the suit. They were entitled to the property of *R*, and the plaintiff had no right to it during their lifetime. More than six months after the filing of the plaint, the surviving daughters of *R* presented a petition stating that they had no objection against the suit of the plaintiff; that their father's rights continued in the plaintiff

EJECTMENT SUIT—(Contd.)**Decree in—(Contd.)**

as the real heir; and that they agreed in the said suit of the plaintiff.

Held, that the petition of the surviving daughters did not amount to a conveyance or to a disclaimer of title, that it amounted to no more than an admission by them that the plaintiff was the real heir, that such a petition would not warrant a judgment in favour of the plaintiff even against his aunts, when upon investigation it appeared that the plaintiff was not the real heir, and that the suit must, therefore, have been dismissed against all the defendants, including the aunts (130). (*Sir Barnes Peacock.*) *AU-MIRTOLALL BOSE v. RAJONEEKANT MITTER.*

(1875) 2 I.A. 113 = 15 B.L.R. 10 = 23 W.R. 214 = 3 Sar. 430 = 3 Suth. 94.

——Unconditional decree—Claim in Courts below to—Decree conditional on payment of binding debts—Claim in Privy Council appeal to—Permissibility. *See* POSSESSION—DECREE UNCONDITIONAL FOR.

(1913) 40 I.A. 105 (111) = 35 A. 211 (220-1).

Defences in—Alternative defences.

——Omission to put forward one or some of—Effect. *See* C.P. CODE OF 1908, S. 11, EXPL. IV—EJECTMENT SUIT.

Dismissal of—Declaration of rights of parties in case of.

——Propriety.

As a rule relief not founded on the pleadings should not be granted. But where, in a suit in ejectment, the substantial matters which constituted the title of all the parties were touched, though obscurely, in the issues, where they had been fully put in evidence and had formed the main subject of discussion and decision in all the courts below, and where the High Court, in the exercise of its discretion, granted a declaration declaring the rights of all the parties, though the suit itself was dismissed, *held*, by the Privy Council that the case was an exception to the rule and that the High Court were right in granting the declaration (207). (*Lord Hobhouse.*) *SRI MAHANT GOVIND RAO v. SITA RAM KESHO.* (1898) 25 I.A. 195 = 21 A. 53 (69) = 2 C.W.N. 681 = 7 Sar. 370.

Escheat—Claim by.

——Ejectment suit in right of. *See* ESCHEAT—CLAIM BY—EJECTMENT SUIT IN RIGHT OF.

Hindu Law—Religious Endowment—Shebait of.

——Person claiming to be—Suit by, to recover property of endowment—Defendant general attorney and storekeeper under previous shebait—Onus of proof in. *LAHAR PURI v. PURAN NATH.*

(1915) 42 I. A. 115 = 37 A. 298 (304-5) = 19 C.W.N. 718 = 21 C. L. J. 499 = 18 M.L.T. 39 = (1915) M.W.N. 526 = 2 L.W. 589 = 17 Bom. L.R. 475 = 29 I.C. 724 = 29 M.L.J. 76.

——Person claiming to be *de jure*—Suit by, to recover office and properties of endowment—Defendant in possession and acting as shebait—Onus of proof in. (*Lord Romilly.*) *GREEDHAREE DOSS v. NUNDOKISSORE DOSS.*

(1867) 11 M. I. A. 405 (430 1) = 8 W. R. (P.C.) 25 = 2 Suth. 86 = 2 Sar. 306.

——Suit by, for recovery of idol and its property—Onus of proof in. (*Sir Richard Couch.*) *SRIMATI JANOKI DEBI v. SRI GOPAL ACHARJIYA.*

(1882) 10 I. A. 32 (38) = 9 C. 766 (772) = 13 C.L.R. 30 = 4 Sar. 48 = 7 I. J. 218.

Hindu Law—Reversioner.

——Assignee from—Suit by—Reversioner held in prior litigation to be nearest—Defendant putting forward alleged nearer reversioners but failing to prove same—Decree to plaintiff in case of.

EJECTMENT SUIT—(Contd.)**Hindu Law—Reversioner—(Contd.)**

The plaintiff sued for the recovery of certain properties alleging that he had obtained an assignment of them from certain persons who had in a prior litigation been held to be preferentially entitled to the properties as reversionary heirs of their last male owner on the death of his widow.

On appeal from the decree in plaintiff's favour the defendant contended that he was in possession and in order to eject him the plaintiff must show that there was no other reversionary heir in the same degree or nearer than his assignors whose title he (the defendant) could urge against the plaintiff's claim for ejectment; in other words, that the action being one of ejectment the defendant was entitled to plead in defence the right of some one else equally entitled with the plaintiff's vendors. The defendant, however, failed to prove satisfactorily that the parties whom he had put forward were entitled to the property in preference to the plaintiff's vendors.

Held, that there was no reason to interfere with the decree below. (*Mr. Ameer Ali.*) **MAHABIR PRASAD TEWARI v. JAMUNA SINGH.**

(1925) 23 L.W. 75 = 92 I.C. 31 =

(1925) M.W.N. 738 = A.I.R. 1925 P.C. 234.

—Suit by, against person claiming to be adopted son of last male owner—Each denying relationship of other—Onus in case of. (*Sir Barnes Peacock.*) **KALI KISHORE DUTT GUPTA MOZUMDAR v. BHUSHAN CHUNDER.**

(1890) 17 I.A. 159 (162) = 18 C. 201 (205-6) = 5 Sar. 607.

—Suit by, against person claiming to be adopted son of last male owner—Onus on plaintiff—Defendant's title—Inquiry into, unnecessary.

In a suit in ejectment brought by a person claiming to be the nearest heir of the last male owner against a person claiming to be the adopted son of the last male owner, *held*, that the plaintiff had to prove his title before any inquiry was made into the defendant's title. (*Lord Phillimore.*) **RAJAH KEESARA VENKATAPPAYYA v. RAJAH NAYANI VENKATARANGA RAO.**

(1928) 56 I. A. 21 = 52 M. 175 = 29 L. W. 118 =

(1929) M. W. N. 47 = 33 C. W. N. 261 = 27 A.L.J. 41 =

49 C. L. J. 148 = 31 Bom. L. R. 299 = 114 I. C. 17 =

I. D. (1929) P. C. 57 = A. I. R. 1929 P. C. 24 =

56 M. L. J. 218 (229).

—Suit by, for possession of last male owner's property—Reversionary character of plaintiff—Proof of. (*Lord Sumner.*) **MEWA SINGH v. BASANT SINGH.**

(1918) 9 L.W. 416 (421-2) = 24 M.L.T. 429 =

28 C. L. J. 530 = 48 C. L. J. 540 = 1 P. W. R. 1919 =

21 Bom. L. R. 232 = 28 P. L. R. 1919.

—Suit by, for possession of last male owner's property—Widow of last male owner—Defendant claiming to be—Onus of proof in case of.

(1) (*Sir Edward V. Williams.*) **JOWALA BUKSH v. DHARUM SINGH.** (1866) 10 M. I. A. 511 (528) = 2 Sar. 189.

(2) (*Lord Davey.*) **BAHADUR SINGH v. MOHAR SINGH.** (1901) 29 I. A. 1 = 24 A. 94 (107) =

6 C. W. N. 169 = 4 Bom. L. R. 233 = 8 Sar. 152 =

12 M. L. J. 56.

Hindu Law—Widow.

—Gift deed by—Plaintiff claiming under—Defendant heir-at-law of last male owner.

Defence of defendant—(1) that property in suit was part of last male owner's estate and not alienable by widow so as to endure beyond her lifetime, and (2) that gift deed set up was a forgery and not operative.

EJECTMENT SUIT—(Contd.)**Hindu Law—Widow—(Contd.)**

Held, onus was on plaintiff, who was seeking to disturb the possession of the appellant, to establish both that the property was the property of M, and that she had effectually conveyed by this deed of gift (423). (*Sir James W. Colville.*) **GERESH CHUNDER LAHOREE v. MUSUMAT BHUGOO-BUTTY DEBIA.** (1870) 13 M.I.A. 419 =

14 W. R. (P. C.) 7 = 2 Suth. 339 = 2 Sar. 579.

—Suit by last male owner's—Onus of proof in. (*Dr. Lushington.*) **REWUN PERSAD v. MUSST. RADHA BEEBY.** (1847) 4 M. I. A. 137 (167) = 7 W. R. 35 (P. C.) =

1 Suth. 172 = 1 Sar. 329.

Jus tertii—Plea by defendant of.

—Appeal—New ground of *jus tertii* in—Permissibility. See EJECTMENT SUIT—*Jus tertii*—PLEA BY DEFENDANT OF—DECREE TO PLAINTIFF, ETC.

(1878) 5 I. A. 61 (67-9) = 1 M. 312 (323-4).

—Decree to plaintiff, subject to reservation of rights of other persons, if any, with better title—Validity—Appeal—New ground of *Jus tertii* in—Permissibility.

The suit was to recover from the defendants seven villages alleged by them to have been purchased for value under different titles from the last poligar of Padamattur. The defence was that the plaintiff was not the heir of the last poligar, and had, therefore, no right to sue.

Before the Sub-Judge, the defendants alleged that the widow of the last poligar, who was alive, was his heir. The Sub-Judge held against that contention and decreed the suit. On appeal to the High Court, they urged for the first time that descendants of an elder branch of the family, whose existence was admitted by the plaintiff himself in his deposition given in the suit, were preferential heirs, and that, therefore, the plaintiff was not competent to sue. The High Court declined to allow that objection to be raised for the first time, and affirmed the decree below, observing:—"If there are other and nearer heirs, their rights will remain unaffected, and any decree to be now given may make reservation of such rights. The plaintiff for the purposes of the present suit may be regarded as entitled to the succession."

Held, that the courts below were wrong in not deciding the question whether plaintiff was the nearest heir as claimed by him and in not dismissing his suit if it was found that he was not (67-9).

The action is one in ejectment in which the plaintiff must recover only by force of his own title. It would be in the highest degree unjust to allow the defendants, who had been for nearly the whole time of prescription in possession of villages of which they claimed to be purchasers for value, to be turned out of possession by any person other than one who had established a clear title to present possession. To allow this on the ground that if there should turn out to be other persons with a higher title than the plaintiff those persons might recover over against him, is obviously to deprive the defendants of their undoubted right, to defend their possession by setting up the *jus tertii*, and it is further to be remarked that those persons might possibly have been unable themselves to recover from the defendants by reason of having by lapse of time or acts of confirmation or acquiescence lost the right to question their title (68-9). (*Sir James W. Colville.*) **PERIASAMI v. PERIASAMI.**

(1878) 5 I.A. 61 = 1 M. 312 (323-4) = 2 C.L. R. 81 =

3 Suth. 508 = 3 Sar. 795.

—Escheat—Crown's claim by—Ejectment suit in right of—Plea in. See ESCHEAT—CROWN'S CLAIM BY—EJECTMENT SUIT IN RIGHT OF.

—Procedure in case of—Persons whose right is basis of plea—Investigation of right of—Direction for—Propriety.

EJECTMENT SUIT—(Contd.)***Jus tertii*—Plea by defendant of—(Contd.)**

In a suit in ejectment by the Government claiming by escheat, the defendant (who was in possession) contended that he was entitled to succeed to the property of the propositus as his heir, and that the Government's claim by escheat was unsustainable. By an alternative plea, he set up a *jus tertii*, alleging that there were other persons who, failing himself, would be the heirs of the propositus, and that the Government could, therefore, in no event claim by escheat.

The High Court decreed the suit, but stated in their judgment that the same, though final as against the defendant, was not to become absolute until the claims of the persons referred to in defendant's plea were inquired into. The decree of the High Court, therefore, remitted the cause to the court below, in order to allow those persons who had intervened as objectors, to litigate their title with Government. *Held*, that the decree of the High Court was not right inasmuch as it deprived the defendant of his right to defend his possession, on the ground of an existing *jus tertii* (469). (*Sir James W. Colville.*) GRIDHARI LALL ROY *v.* GOVERNMENT OF BENGAL.

(1868) 12 M.I.A. 448 = 10 W. R. (P. C.) 31 =

1 B. L. R. (P. C.) 44 = 2 Suth. 159 = 2 Sar. 382.

——Right of. (1) (*Sir James W. Colville.*) GRIDHARI LALL ROY *v.* GOVERNMENT OF BENGAL.

(1868) 12 M.I.A. 448 (469) = 10 W. R. (P. C.) 31 =

1 B. L. R. (P. C.) 44 = 2 Suth. 159 = 2 Sar. 382.

——(2) (*Sir James W. Colville.*) RAJAH VELLANKI VENKATA KRISHNA RAO *v.* VENKATA RAMA LAKSHMI NARASAYYA.

(1876) 4 I.A. 1 (8) = 1 M. 174 (185) = 26 W. R. 21 = 2 Sar. 669 = 3 Suth. 353.

——(3) (*Sir Arthur Wilson.*) SHEO SHANKAR LAL *v.* DEBI SAHAI.

(1903) 30 I. A. 202 (204) = 25 A. 468 (471) = 7 C. W. N. 831 = 5 Bom. L. R. 828 = 8 Sar. 465 = 13 M. L. J. 330.

Landlord.

——Ejectment suit against tenants by. *See* LANDLORD AND TENANT—EJECTMENT SUIT BY LANDLORD.

Legitimacy.

——Plaintiff's title based on his—Onus of proof of legitimacy in case of.

Suit by the alleged paternal uncle of a deceased Hindu to recover from the daughter of the deceased property owned and enjoyed by the deceased during his lifetime and taken possession of on his death by the Court of Wards on behalf of the daughter. Defence disputing legitimacy of plaintiff.

Held, that, plaintiff being out of possession, the onus of establishing his legitimacy was on him (923). MUSST. SHEO SOONDOOREE *v.* PIRTHEE SINGH. (1873) 2 Suth. 922 = 21 W. R. 89.

Magistrate's order—Defendant in possession under.

——Suit against—Onus on plaintiff in. *See* CRIMINAL PROCEDURE CODE, S. 145—ORDER UNDER—PARTY IN POSSESSION UNDER.

Mahomedan Law.

——Inheritance—Sect of deceased—Right of inheritance depending on proof of—Defendant in possession and registered as owner in revenue books.

The appellants (plaintiffs) would be the legal heirs of the deceased lady, if she was a Shia, while, if she was a Sunni, the respondent would admittedly be entitled to take her estate to the exclusion of the appellants. The onus of proving that the deceased was a Shia rests in the first instance with the appellants, because they are seeking to eject the respondent, who is in possession, and has been

EJECTMENT SUIT—(Contd.)**Mahomedan Law—(Contd.)**

duly registered as owner in the books of the revenue authorities (75). (*Lord Watson.*) MUSSAMMAT HAYAT-UN-NISSA *v.* SAYYID MUHAMMAD ALI KHAN.

(1890) 17 I. A. 73 = 12 A. 290 (295) = 5 Sar. 521.

——Residuary heir—Person claiming as—Suit by, against widow in possession for over 11 years prior to suit.

Suit in nature of ejectment by person claiming as residuary heir according to Mahomedan law of a deceased person to recover from deceased's widow three-fourths of estate of deceased, of the whole of which the widow had been in possession for over 11 years prior to suit.

Held, that a very heavy onus lay upon the plaintiff, not only by the nature of the case, but by the strong presumption arising from his acts and conduct (530). HURMUTOOL-NISSA BEGUM *v.* ALLABDIA KHAN AND HAJI HIDAYAT. (1871) 2 Suth. 525 = 17 W. R. 108.

Maintainability of.

——Title—Plaintiff and defendant without—Long possession with plaintiff—Relief on foot of.

Disputes respecting the boundaries of the Zemindaries of Yettiapooram and Ramnad, in the district of Madura, having led to acts of violence by the ryots, the Government, in 1836, to preserve the public peace, attached the disputed lands and took possession for the benefit of the party to whom the lands should be judicially awarded. At and before the time of the Government taking such possession, the Zemindar of Yettiapooram was in possession of certain lands adjacent to and taken as a part of the lands in dispute. The lands remained under attachment by Government for a period of nearly twenty years; no steps had been taken regarding them till the year 1885, when the Zemindar of Yettiapooram brought a suit against the Collector of Madura and the Zemindar of Ramnad, to recover possession of the land so formerly occupied by him and for the mesne profits thereof while in the possession of the Government. Although no clear title in this suit was proved by either Zemindar, it was held by the Courts in India, and affirmed on appeal by the Judicial Committee, that the fact of possession of the lands by the Zemindar of Yettiapooram before and at the time of the attachment by the Government was, in the circumstances, evidence of title, and the Government was ordered to restore the lands to him.

The facts go to show that in 1836, at the time when the lands were attached by Government and long prior thereto, the lands in dispute were in the possession of the Zemindar of Yettiapooram. We think that the title of the respondent must be preferred. (*Lord Kingsdown.*) ZEMINDAR OF RAMNAD *v.* ZEMINDAR OF YETTIAPOORAM.

(1864) 10 M. I. A. 47 = 2 Sar. 65.

Mortgage.

——Foreclosure under Reg. XVII of 1806 of—Title based on—Ejectment suit by mortgagee founded on, against execution purchaser pursuant to attachment pending which mortgage was made—Invalidity of attachment on ground of non-observance of formalities therefor—Plea by mortgagee of—Onus of proof of. *See* MORTGAGE—FORECLOSURE—REG. XVII OF 1806—FORECLOSURE UNDER—TITLE BASED ON. (1880) 7 I. A. 157 (160) = 6 C. 129 (134).

Onus on plaintiff in.

——(*Mr. Baron Parke.*) MEER USUD-OOLLAH *v.* MUSST. BEEBY IMAMAN. (1836) 1 M. I. A. 19 (39) = 5 W. R. 26 = 1 Suth. 46 = 1 Sar. 89.

——(*Mr. Pemberton Leigh.*) MUSST. IMAM BANDI *v.* HURGOVIND GHOSE. (1848) 4 M. I. A. 403 (405) = 7 W. R. 67 (P. C.) = 1 Suth. 208 = 1 Sar. 371.

EJECTMENT SUIT—(Contd.)**Onus on plaintiff in—(Contd.)**

—(Lord Romilly.) GUNGA GOBIND MUNDUL v. COLLECTOR OF THE TWENTY-FOUR PERGUNNAHS.

(1867) 11 M. I. A. 345 (359)=7 W. R. (P. C.) 21=1 Suth. 676=2 Sar. 284.

—(Sir James W. Colville.) GRIDHARI LALL ROY v. GOVERNMENT OF BENGAL.

(1868) 12 M. I. A. 448 (469)=10 W. R. (P. C.) 131=1 B. L. R. (P. C.) 44=2 Suth. 159=2 Sar. 382.

—(Sir James W. Colville.) PERIASAMI v. PERIASAMI. (1878) 5 I. A. 61 (68)=1 M. 312 (323)=2 C. L. R. 81=3 Suth. 508=3 Sar. 795.

—(Lord Robertson.) RAI JAGATPAL SINGH v. RAJA JAGESHAR BAKSH SINGH. (1902) 30 I. A. 27 (31)=25 A. 143 (151)=7 C. W. N. 209=8 Sar. 367.

—The suit is one for the ejectment of persons who, admittedly, were at the date of suit in possession of the land from which it is sought to eject them. It lay upon the plaintiffs to prove not only a title as against the defendants to the possession, but to prove that the plaintiffs had been dispossessed or had discontinued to be in possession of the lands within the 12 years immediately preceding the commencement of the suit. (Sir John Edge.) DHARANI KANTA LAHIRI v. GARBAR ALI KHAN.

(1912) 13 M. L. T. 185=(1913) M. W. N. 157=17 C. W. N. 389=17 C. L. J. 277=15 Bom. L. R. 445=18 I. C. 17=25 M. L. J. 95 (100).

—(Mr. Ameer Ali.) RAMACHANDRA MARTAND WAIKAR v. VINAYAK VENKATESH KOTHEKAR.

(1914) 41 I. A. 290 (313)=42 C. 384 (421)=18 C. W. N. 1154=16 M. L. T. 447=10 N. L. R. 112=(1914) M. W. N. 835=16 Bom. L. R. 863=12 A. L. J. 1281=20 C. L. J. 573=25 I. C. 290=27 M. L. J. 333.

—(Sir John Edge.) CHANDRIKA BAKHSH SINGH v. INDAR BIKRAM SINGH. (1916) 43 I. A. 179=38 A. 440=14 A. L. J. 1024=20 C. W. N. 1149=24 C. L. J. 291=18 Bom. L. R. 846=19 O. C. 141=(1916) 2 M. W. N. 120=20 M. L. T. 164=4 L. W. 288=35 I. C. 958=31 M. L. J. 505.

—(Sir John Edge.) ADIT NARAYAN SINGH v. MAHABIR PRASAD TEWARI. (1921) 48 I. A. 86 (91)=2 Pat. L. J. 97=14 L. W. 20=25 C. W. N. 842=23 Bom. L. R. 692=6 Pat. L. J. 140=19 A. L. J. 208=(1921) M. W. N. 153=33 C. L. J. 263=60 I. C. 251=40 M. L. J. 270.

—(Sir John Edge.) BINDESHWARI PRASAD SINGH v. MAHARAJAH KESHO PRASAD SINGH.

(1926) 53 I. A. 164 (165-6)=5 Pat. 634=7 Pat. L. T. 553=31 C. W. N. 74=44 C. L. J. 86=A. I. R. 1926 P. C. 79=95 I. C. 1025=51 M. L. J. 587.

—The defendant was in possession of the lands in suit, and the plaintiffs had to prove their title in order to support their claim to the whole of the lands. (Sir Lancelot Sander-son.) JAIGOBIND PANDEY v. RAMANANDAN SAHAI. (1928) 32 C. W. N. 650=48 C. L. J. 1=109 I. C. 392=30 Bom. L. R. 1343=12 R. D. 537=28 L. W. 807=A. I. R. 1928 P. C. 130=55 M. L. J. 56 (64).

—Alluvial land—Suit to recover—Reformation in situ—Defendants' claim on ground of. (Sir James W. Colville.) RADHA PROSHAD SINGH v. RAM COOMAR SINGH. (1877) 3 C. 796 (800)=1 C. L. R. 259=3 Suth. 485=3 Sar. 776.

—Churs detached formed in middle of a navigable river—Purchaser bona fide of—Suit against. See RIVER—NAVIGABLE RIVER—CHURS DETACHED, ETC. (1868) 12 M. I. A. 136 (141-2).

EJECTMENT SUIT—(Contd.)**Onus on plaintiff in—(Contd.)**

—Criminal Procedure Code, S. 145—Order under—Party in possession under—Suit against. See CRIMINAL PROCEDURE CODE OF 1898, S. 145—ORDER UNDER—PARTY IN POSSESSION UNDER.

—Defendant being a mere trespasser immaterial.

The action, which was one in ejectment, was brought by persons who claimed to have purchased the suit property under a sale-deed purporting to have been executed by one Z on behalf of herself and as guardian of her two minor children. Z claimed to be herself the lawfully wedded wife of a deceased Mahomedan, and that her children were his legitimate issue. The defendants in the action were the two admitted widows of the deceased and their minor children, and Z and her children (minors). The admitted widows, who were in possession and who were the contesting defendants, pleaded that the sale by Z of the interest of her minor children was invalid under the Mahomedan Law. The learned Judges of the High Court, however, over-ruled the objection on the ground that the question did not arise in the case before them, because the contesting defendants were in the position of trespassers.

Held, that the High Court erred in over-ruling the objection of the contesting defendants (82).

This is an action in ejectment; the defendants are in possession; the plaintiffs, if they are to obtain possession, must do so on the strength of their own title (82).

Under the Mahomedan Law a person who has charge of the person or property of a minor without being his legal guardian has no power to convey to another any right or interest in immoveable property which the transferee can enforce against the infant; nor can such transferee, if let into possession of the property under such unauthorised transfer, resist an action in ejectment on behalf of the infant as a trespasser. It follows that, being himself without title, he cannot seek to recover property in the possession of another equally without title (92-3). (Mr. Ameer Ali.) IM-AMBANDI v. MUTSADDI. (1918) 45 I. A. 73=

45 C. 878 (891, 903)=23 C. W. N. 50=28 C. L. J. 409=20 Bom. L. R. 1022=16 A. L. J. 800=(1919) M. W. N. 91=24 M. L. T. 330=5 P. L. W. 276=47 I. C. 513=35 M. L. J. 422.

—Defendant's title—Weakness of, immaterial. (Mr. Baron Parke.) YACHEREDDY CHINNA BASSAVAPPA v. YACHEREDDY GOWDAPPA.

(1835) 5 W. R. 114 (P. C.)=1 Suth. 41 (43)=1 Sar. 84.

—(Lord Chelmsford.) NOELKISTO DEB BURMONO v. BEERCHUNDER THAKOOR.

(1869) 12 M. I. A. 523 (537)=12 W. R. (P. C.) 21=3 B. L. R. (P. C.) 13=2 Suth. 243=2 Sar. 523.

—RANEE SURNOMOYEE v. JADINE, SKINNER & CO. (1869) 20 W. R. 276=2 Suth. 891=4 Sar. 815.

—ARUMUGAM CHETTY v. PERIYANNAN SERVAL. (1875) 3 Suth. 218 (219)=25 W. R. 81.

—(Sir Richard Couch.) SRIMATI JANOKI DEBI v. SRI GOPAL ACHARJIYA. (1882) 10 I. A. 32 (38)=9 C. 766 (772)=13 C. L. R. 30=4 Sar. 411=7 I. J. 218.

—(Sir Barnes Peacock.) ACHAL RAM v. UDAI PARTAB. (1883) 11 I. A. 51 (57)=10 C. 511 (519)=4 Sar. 507=R. & J.'s No. 47 (Oudh).

—(Sir Richard Couch.) GENDA PURI v. CHHATER PURI. (1886) 13 I. A. 100 (105)=9 A. 1 (8)=4 Sar. 726.

—(Lord Davey.) MUSAMMAT SHAFIQ-UN-NISA v. KHAN BAHADUR RAJA SHABAN ALI KHAN.

(1904) 31 I. A. 217 (221)=26 A. 581 (588)=6 Bom. L. R. 750=9 C. W. N. 105=7 O. C. 290=8 Sar. 674.

EJECTMENT SUIT—(Contd.)**Onus on plaintiff in—(Contd.)**

—(Lord Atkinson.) BASANT SINGH v. MAHABIR PERSHAD. (1913) 40 I.A. 86 (94) = 35 A. 273 (281) = 11 A. L. J. 469 = (1913) M.W.N. 481 = 17 C.W.N. 669 = 16 Bom. L. R. 525 = 17 C. L. J. 566 = 16 O. C. 136 = 14 M.L.T. 64 = 19 I. C. 340 = 25 M.L.J. 301.

—(Mr. Amcer Ali.) MOHAN LALJI v. GORDHAN LALJI MAHARAJ. (1913) 40 I.A. 97 (104) = 35 A. 283 (289) = 17 C. W. N. 741 = 11 A. L. J. 548 = 17 C. L. J. 612 = 15 Bom. L. R. 606 = (1913) M. W. N. 536 = 19 I. C. 337 = 14 M. L. T. 27.

—(Viscount Haldane.) UMED MAL v. CHAND MAL. (1926) 53 I. A. 271 (275) = 25 A.L.J. 61 = 25 L. W. 90 = 36 C. W. N. 989 = (1927) M. W. N. 84 = 38 M. L. T. (P. C.) 43 = A.I.R. 1926 P. C. 142 = 99 I. C. 749 = 52 M. L. J. 368

—Defendant's title—Weakness of, immaterial—Hindu Law—Daughter's son—Suit by, to recover deceased maternal grandfather's property from brothers of deceased. (Sir Barnes Peacock.) AUMIRTOLALL BOSE v. RAJONEE-KANT MITTER. (1875) 2 I.A. 113 (124) = 15 B. L. R. 10 = 23 W. R. 214 = 3 Suth. 94 = 3 Sar. 430.

—Defendant's title—Weakness of, immaterial—Hindu Law—Religious endowment—Shebait—Suit by. See EJECTMENT SUIT—HINDU LAW—RELIGIOUS ENDOWMENT—SHEBAIT.

—Defendant's title—Weakness of, immaterial—Hindu Law—Reversioner—Suit by. See EJECTMENT SUIT—HINDU LAW—REVERSIONER.

—Dispossession by defendant—Suit based on.

The appeal arose out of a suit brought by the appellants to recover possession of certain lands in the possession of the respondents. The question was whether, assuming the plaintiffs to have been at some time lawfully in possession, the plaint which was filed on the 30th of July, 1883, was filed within 12 years as required by Art. 142 of the Limitation Act of 1877, from the date of their dispossession or discontinuance of possession.

It was conceded by the plaintiffs that in fact they were dispossessed, or their possession was discontinued from the year 1875, a period of 8 or 9 years prior to the bringing of the suit, and that the defendants had ever since been in undisturbed possession; but they alleged that they were in possession within four years or more immediately prior to that date.

Held, that the onus was upon the plaintiffs to prove their possession prior to the time when they were admittedly dispossessed, and at some time within twelve years before the commencement of the suit, namely, for the two or three years prior to the year 1875, or 1874, and that it did not lie upon the defendants to show that in fact the plaintiffs were so dispossessed (26). (Mr. Stephen Woulfe Flanagan.) MOHIMA CHUNDAR MOZOOMDAR v. MOHESH CHUNDAR NEOGI. (1888) 16 I. A. 23 = 16 C. 473 (479) = 5 Sar. 321.

—Dispossession by defendant—Suit based upon alleged—Failure of plaintiff to prove trespass.

Plaintiff entitled to recover in such a case, only by proving distinctly a superior title, since defendant's possession was not shown to have commenced in wrong. ARUMUGAM CHETTY v. PERIVANNAN SERVAL.

(1875) 3 Suth. 218 (219) = 25 W. R. 81.

—Heir-at-law—Suit to recover inheritance by. See DECEASED—HEIR-AT-LAW—PROPERTY OF DECEASED.

—Heir-at-law—Suit to recover inheritance by—Admission by plaintiff of defendant's equal title with himself acted upon for many years.

EJECTMENT SUIT—(Contd.)**Onus on plaintiff in—(Contd.)**

Where the plaintiffs claimed possession of the property alleging themselves to be entitled to it on the ground that they were nearer in degree to the deceased than the defendants and as such entitled to succeed to him under the Hindu Law, but it appeared that, on the opening of the succession, the plaintiffs had admitted the rights of the defendants and acted upon that admission by permitting the names of the defendants to be registered in the Collector's office, and by carrying on suits with them in the joint names of all without disputing their title for eleven years after the opening of the succession.

Held, that the plaintiffs' conduct, though not amounting to an estoppel imposed upon them the burden of proving that the defendants had not an equal title with themselves. (Sir Robert P. Collier.) AJRAWAL SINGH v. FOUJDAR SINGH. (1880) Bald. 388 (391).

—Navigable river—Churs detached formed in middle of a—Purchaser bona fide of—Suit against. See RIVER—NAVIGABLE RIVER—CHURS DETACHED, ETC.

(1868) 12 M. I. A. 136 (141-2).

—Possession long with defendant—Admission by plaintiff of. See EJECTMENT SUIT—POSSESSION LONG WITH DEFENDANT.

—Rule as to—Boundary dispute—Inapplicability to. See BOUNDARY DISPUTE—POSITION OF PARTIES IN.

(1893) 21 I.A. 39 (43-4) = 21 C. 504 (511).

—Share of property in defendant's possession—Suit for. (Sir Barnes Peacock.) PRINCE MIRZA JEHAN KUDR BAHADUR v. NAWAB AFSUR BAHU BEGAM.

(1878) 6 I. A. 76 (83) = 4 C. 727 (732) = 3 Sar. 865 = R. & J.'s No. 54.

—Succession—Rival claimants to—Rule as to onus if applicable in case of. See EJECTMENT SUIT—SUCCESSION—RIVAL CLAIMANTS TO.

—Succession Property Protection Act XIX of 1841—Defendant in possession under, claiming to be lawful son of last male owner—Plaintiffs alleging to be themselves heirs of last male owner, and denying that defendant was an heir—Onus on plaintiffs to prove not only their relationship, which was not disputed, but their heirship, which depended upon the illegitimacy of the defendant—Onus on plaintiffs to give sufficient general evidence which would throw upon the defendant the onus of proving his legitimacy. (Lord Kingsdown.) KHAJAH MOHAMED GOUHUR ALI KHAN v. ASHRUFOONISSA. (1863) 9 M. I. A. 492 (503) = 2 W. R. (P. C.) 13 = 1 Suth. 519 = 2 Sar. 45 (46).

—Thakbust or survey proceeding—Party in possession under—Suit by unsuccessful party in. See THAKBUST PROCEEDING—POSSESSION.

(1869) 12 M. I. A. 292 (340).

Paramount title.

—Person claiming under, applying to be impleaded in appeal—Strict proof of plaintiffs' title especially necessary in case of. (Sir Robert P. Collier.) TIERY v. KRISTODHUN BOSE. (1873) 1 I. A. 76 (81, 83) = 3 Sar. 312.

Partition decree in.

—Grant in appeal of—Rights of parties fully tried out—Limitation—Danger of fresh suit being barred by.

In a case in which the High Court, while dismissing a suit in ejectment, made a declaration of rights in favour of the plaintiffs on the ground that they formed the main subject of discussion and decision in all the Courts, the Privy Council held, on an appeal by the defendant for the purpose of getting rid of the declaration, that, instead of dismissing the suit, the better course was to direct an inquiry who were the persons then entitled to the suit property, and to reserve further directions, under which it would probably be found

EJECTMENT SUIT—(Contd.)**Partition decree in—(Contd.)**

possible to place them in legal possession, and so to terminate the litigation (207-8).

The circumstances which weighed with the Privy Council in so holding are indicated in the following passage of their judgment:—

Neither the defendant nor his son has shown any disposition to yield anything which the law does not exact. If the title of the plaintiffs is still disputed, they must bring a new suit, which would certainly increase expense, and in which considering the peculiar nature of the grant (of the suit property), the lapse of time, and the uncertainty whether a declaration in a dismissed suit can supply a fresh starting ground, the plaintiffs would run substantial risks of miscarriage (208). (*Lord Hobhouse.*) **SRI MAHANT GOVIND RAO v. SITA RAM KESHO.** (1898) 25 I. A. 195 =

21 A. 53 (69-70) = 2 C. W. N. 681 = 7 Sar. 370.

Persons not parties to.

—Effect of decision in suit on. See EJECTMENT SUIT—DECISION IN—PERSONS NOT PARTIES TO SUIT.

(1873) 1 I. A. 76 (83).

Plaintiff without title—Decree to.

—Validity. See EJECTMENT SUIT—DECREE IN—PLAINTIFF WITHOUT TITLE.

Plaintiff's title.

—Evidence of—Co-defendants—Conveyance of suit property by one of, in plaintiff's favour—Admissibility of, against other defendants—Conveyance prior to suit—Plaintiff without title otherwise. See EVIDENCE—CO-DEFENDANTS. (1875) 2 I. A. 113 (129).

—Proof of—Quantum—Title-deeds—What amount to. See TITLE-DEEDS. (1914) 27 M. L. J. 20.

Possession long with defendant—Admission by plaintiff of—Onus on plaintiff in case of.

—Where, in a suit for possession of land instituted in 1856, it appeared that the defendant had admittedly been in possession since 1845 and was in possession at the date of the institution of the suit, *held*, that the onus was on the plaintiff to prove (1) possession within 12 years before his suit; and (2) title to possession. **BEER CHUNDER JOBRAJ v. DY. COLLECTOR OF BHULLOOAH.**

(1870) 2 Suth. 305 = 13 W. R. (P. C.) 23 = 4 Sar. 778.

—(*Lord Hatherley, L. C.*) **FORESTER v. SECRETARY OF STATE FOR INDIA.** (1872) Sup. I. A. 10 (18-9) =

12 B. L. R. 120 = 18 W. R. 349 = 3 Sar. 1 = 1 P. R. 1872 = 2 Suth. 628.

—Adverse possession—Plea by defendant of.

The appellant is seeking to disturb the possession, admitted to have existed for about 11 years, of defendants, who insist on a possession of much longer duration as a statutory bar to the suit. It clearly lies on him to remove that bar by satisfactory proof that the cause of action accrued to him (for that is the way in which S. 16 of Bengal Regulation III of 1793 puts it) on a dispossession within 12 years next before the commencement of the suit; and, therefore, that he, or some other person through whom he claims, was in possession during that period. No proof of anterior title can relieve him from this burden, or shift it upon his adversaries by compelling them to prove the time and manner of their dispossession (220-1). (*Lord Justice Turner.*) **MAHARAJAH KOOWUR BABOO NITRASUR SINGH v. BABOO NUND LOLL SINGH.** (1860) 8 M. I. A. 199 = 1 W. R. 51 =

1 Suth. 420 = 1 Sar. 744.

—Claim of title—Defendant's possession under. (*Mr. Stephen Woulfe Flanagan.*) **MOHIMA CHUNDER MOZOOMDAR v. MOHESH CHUNDER NEOGI.**

(1888) 16 I. A. 23 (26) = 16 C. 473 (479) = 5 Sar. 321.

EJECTMENT SUIT—(Contd.)**Possession long with defendant—Admission by plaintiff of—Onus on plaintiff in case of—(Contd.)**

—Plaintiff's title admitted by defendant—Adverse possession—Plea by defendant of.

The suit was in substance one of ejectment at the instance of the appellant. The case of the respondent is rested on possession. Even on the showing of the appellant, the respondent at the date of the plaint had been in possession for 11 years, and the respondent says for 12 years (the period of limitation) and longer. The difference between the admitted possession and the period of limitation being so narrow (one year) the question of *onus* is important; and their Lordships adhere to the principle that it is for the appellant, as plaintiff in a suit of ejectment, to prove possession prior to the dispossession which she alleges. At the same time, their Lordships consider that in this question of evidence, the initial fact of the appellant's title comes to her aid, with greater or less force according to the circumstances established in evidence. (*Lord Robertson.*) **RANI HEMANTA KUMARI DEBI v. MAHARAJA JAGADINDRA NATH ROY BAHADUR.** (1906) 10 C. W. N. 630 = 1 M. L. T. 135 = 3 A. L. J. 363 = 8 Bom. L. R. 400 = 16 M. L. J. 272 (273).

—Plaintiff's title admitted by defendant—Adverse possession—Plea by defendant of—Commencement of defendant's possession—Onus of proof of, if on plaintiff. (*Sir Edward Fry.*) **INNASIMUTHU UDAYAN v. UPAKARATHUDAVAN.** (1899) 26 I. A. 210 (211-2) = 23 M. 10 (12) = 7 Sar. 620.

—Plaintiff's title admitted by defendant—Adverse possession—Plea by defendant of—Documentary evidence consistent with defendant's possession for statutory period.

In a suit in ejectment brought in 1892, it was admitted that the plaintiff (respondent) had a title to maintain the suit if she could get over the case made under the statute of limitations by the defendant (appellant). The plaintiff, on the other hand, admitted that the defendant had been in possession for seven years before suit. The admitted fact of possession was accompanied by a series of documents of the kind usually given to and received by the possessor of an estate, and bearing the appellant's name as the possessor of the estate, and that series of documents did not commence with the seventh year before suit, but from dates covering the entire statutory period.

Held, that the case might be decided on the short ground that the documentary evidence of possession, exactly similar in character to that which accompanied the admitted possession, went back far behind the twelve years in question, that that threw on the plaintiff the burthen of rebutting the inference arising from the fact of possession accompanied by those documents, and that the burthen had not been sustained by the plaintiff.

Quære, whether the mere fact of possession for seven years before suit threw on the plaintiff the burthen of showing when that possession began. (*Sir Edward Fry.*) **INNASIMUTHU UDAYAN v. UPAKARATHUDAVAN.**

(1899) 26 I. A. 210 (211-2) = 23 M. 10 (11-2) = 7 Sar. 620.

—Succession—Rival claimants to—Dispute between—Possession admittedly with defendant for nearly 36 years from date of death of deceased up to date of Privy Council decision—Very strong case held to be required to overturn that possession under such circumstances. (*Mr. Pemberton Leigh.*) **BABOO KASI PERSAD NARAIN v. MUSSAMAT KAWALBASI KOER.** (1851) 5 M. I. A. 146 (165) =

1 Suth. 225 = 1 Sar. 412.

Right of—Deed barring.

—Fraudulent and inoperative nature of—Plea of—Maintainability.

Quære, whether a plaintiff, supporting his case against those in possession whom he seeks to evict, is not estopped

EJECTMENT SUIT—(Contd.)**Right of—Deed barring—(Contd.)**

from alleging the inoperative character of an instrument by which his recovery would otherwise be barred, on the ground of a fraud in its concoction, to which all from whom he derives title are parties (28). *SRIMATI SUKHIMANI DASI v. MOHENDRA NATH DUTT.*

(1869) 4 B.L.R. 16 (28)=13 W.R. (P.C.) 14=
2 Sar. 530=2 Suth. 297.

Succession—Rival claimants to.

———*Letters of Administration to defendant—Order granting, refusing to adjudicate upon rival claims—Onus in case of.*

Upon the death of a Burman Buddhist and his wife, a contest arose between the claims of a nephew of the husband and a nephew of the wife, each claiming to be the sole adopted child and to succeed to the exclusion of the other. The husband's nephew applied for administration and his application was resisted by the wife's nephew who set up his rival claim. The District Judge granted letters of administration to the wife's nephew, and, on appeal by the husband's nephew, the Chief Court refused to hear the case upon the merits or to interfere with the order, stating that the decision as to administration would not operate as *res judicata*, and that it would be open to the husband's nephew to establish his rights in other proceedings. Thereupon the husband's nephew instituted a suit against the wife's nephew as administrator, the plaintiff setting forth his title as an adopted son and sole heir to the estate, complaining that the defendant wrongfully refused to deliver the estate to him, and praying for a declaration that he was the sole heir and for consequential relief.

The Chief Court found that the plaintiff had not proved his adoption, and that it became therefore unnecessary to decide whether the defendant had or had not proved his adoption, as he was in possession and the plaintiff had failed to prove a title against him.

Held, that the Chief Court ought to have enquired into the rival claim of the defendant, because the parties were in the position of competitors, starting upon an equal footing.

The previous decision of the same court had in substance decided that when the merits of the respective claimants to the beneficial interest in the estate came to be considered, neither was to have an advantage by reason of his having previously obtained administration. And yet, in the present case, the Chief Court treated the defendant as if he were in possession and in a position to win his case without any proof of title, upon the mere weakness of the title of the other claimant. The only way to handle the case after the previous decision was to treat the two parties as competitors, starting upon an equal footing. (*Sir Walter Phillimore.*) *MAUNG THWE v. MAUNG TUN PE.*

(1917) 44 I.A. 251=45 C. 1 (6-7)=22 M.L.T. 411=
22 C.W.N. 97=27 C.L.J. 68=(1918) M.W.N. 9=
20 Bom. L. R. 69=11 Bur. L. T. 28=42 I.C. 863.

———*Separate suits by. for recovery of inheritance—Dismissal of suits of all but one and no appeals preferred therein.*

Appeal by remaining claimant against decree dismissing his suit. Claim to a decree by him, on the ground that, as the heirship of the other rival claimants had been negatived, his must be taken to be established as against the defendants. *Held* unsustainable.

The defendants, though without title, are in possession, and the plaintiff can only recover that possession by establishing her own title as against them, regardless of what has been determined in the other suits (176). (*Sir Lawrence Jenkins.*) *HASHMAT ALI v. MT. NASIB-UL-NISA.*

(1924) 52 I. A. 172=6 Lah. 117=30 C.W.N. 196=
26 P.L.R. 192=88 I.C. 114=A.I.R. 1925 P.C. 99.

EJECTMENT SUIT—(Concl'd.)**Trespass on property.**

———Ejectment suit remedy of real owner in case of. (*Mr. Pemberton Leigh.*) *MUSADEE MAHOMED CAZEEM SHERAZEE v. MEERZA ALLY MD. KHAN.*

(1854) 6 M.I.A. 27 (44)=8 Moo. P.C. 110=
1 Sar. 489.

Zemindar.

———Ejectment suit by. See ZEMINDAR.

EKASAL.

———*Meaning of.*

Ekasal is a revenue expression meaning one year. (*Sir Andrew Scoble.*) *SEENA PENA REENA SEENA MAYANDI CHETTIAR v. CHOCKALINGAM PILLAI.*

(1904) 31 I.A. 83=27 M. 291 (296)=
8 C.W.N. 545=8 Sar. 587=14 M.L.J. 200.

ELECTION.

———*Heir-at-law—Bequest to, of estate belonging to him and of legacy—Claim to both—Maintainability.*

A, by an unattested will, devised lands to B, his mother. B received the rents, and by a will, also unattested, gave the lands, together with a legacy, to plaintiff, the heir-at-law of A. In a suit by plaintiff alleging that as A's will was not attested by three witnesses, it did not pass the lands to B, and praying for (1) an account of the rents and profits received by B during her lifetime, or by the defendants, her executors, since her death, and (2) for the recovery of the legacy bequeathed to him (plaintiff) by B, held that plaintiff was entitled to receive the legacy, and also to call for an account of the rents received by B.

The only other question is that of election. And it must be allowed that this lady made her will under the idea that the property was hers, and not supposing that any account of the rents would be called for retrospectively. If she had been told, the heir-at-law means to demand an account of what you have received from this estate, it is very probable that she would not have given him the 1,000/., or would have imposed a condition of releasing that claim; but the court cannot impose such a condition upon conjecture. The question is, whether as the will is framed, giving the 1,000/., together with the estate, if imports that there must be any election or condition not to take both, and I think I shall not be warranted in putting such a construction upon it. It is admitted, that a will attested by two witnesses only, is not sufficient to put the heir to his election. It might have been argued, that if you put a party to elect when the testator has given away the estate of another, the same should be done with respect to the heir, when the estate is thus devised. But it has been decided in several cases, that the will cannot be looked at, and in those cases it might have been contended, and better than here, that there was an implied condition not to take the bounty given by the will and at the same time dispute it. But if it is not so implied in general, what is there to distinguish this case? Indeed, it is stronger in favour of the heir, for the testatrix intended to give both; and why should the devise operate here, which it would not have done if it had been a devise to another person? It is not possible to confer a condition in the one place and not in the other. The words are not strong enough; if they had been, I should have been glad to lay hold of them, for the purpose of doing what I think the testatrix herself would have done. For it is probable, that if she had known of this claim, she would have qualified her gift. In the same way it may be said of any legacy to a debtor (creditor?) when the testator was not aware of the debt, that if he had been, he would have imposed a condition of releasing; but the court cannot infer such a condition upon conjecture only. There is not enough

ELECTION—(Contd.)

expressed in the will to clothe the gift with any condition, and therefore I feel myself unable to decide against the heir. (*Sir Thomas Plumer, M.R.*) **GARDINER v. FELL.**

(1819) 1 M.I.A. 299 = 1 Sar. 120 = 1 Jac. & W. 22 = 2 Wilson Chancery 32.

——Hindu Law—Religious endowment—Shebait of—Office of—Election to. See HINDU LAW—RELIGIOUS ENDOWMENT—SHEBAIT—OFFICE OF.

——Mortgage—Mortgagor—Election by, subsequent to mortgage, affecting his right in mortgaged property—Effect of, on mortgagee's rights. See MORTGAGE—MORTGAGOR UNDER—ELECTION BY, ETC.

(1916) 43 I.A. 212 (230) = 38 A. 627 (656).

——Mortgage—Sale—Decree for—Surrender of rights under—Election to treat decree as money decree—What amounts to. See MORTGAGE—SUIT TO ENFORCE—DECREE IN—SALE—DECREE FOR—SURRENDER OF RIGHTS UNDER.

(1922) 27 C. W. N. 275 (279).

——Remedies alternative open to a party—Adoption of one of—Effect of, on right to adopt other. See TORT—REMEDIES ALTERNATIVE FOR.

(1913) 40 I. A. 56 (63-4) = 40 C. 598 (609-10).

——Rights arising from different sources and independent of each other—No election in case of.

S, the deceased Nawab of Tank, had, during his lifetime, granted a village to the appellant, his second son, for maintenance. On the death of S, the Government sanctioned the appointment of the respondent, a grandson by a predeceased elder son of S, to be Nawab of Tank, and also to the entire jagir and cash assignment by S subject to a deduction of Rs. 5,000 for the maintenance of the appellant.

In a suit brought by the respondent against the appellant for the recovery of the half share of the estate of S entered in the appellant's name in the mutation proceedings, on the ground that the estate went with the chiefship, the Chief Court of the Punjab, which found in favour of the respondent's case, held nevertheless that by virtue of the grant made by S, the appellant was entitled to retain the village granted to him for his subsistence. But they held that he was bound to elect which maintenance he would take, the village granted to him by S, or the Rs. 5,000 provided by the British Government.

Held, reversing the Chief Court, that there was no ground for putting the appellant to that election (201).

The cash allowance and the assignment of the village arise from different sources, and are independent of each other (201). (*Sir Andrew Scoble.*) **SARDAR MUHAMMAD AFZAL KHAN v. NAWAB GHULAM KASIM KHAN.**

(1903) 30 I. A. 190 = 30 C. 843 (863-4) = 8 C.W.N. 81 = 5 Bom. L. R. 486 = 67 P. R. 1903 = 8 Sar. 455.

——Will bequeathing property to A—Statement in, of devolution of another person's property against A's interest—A's right to recover property bequeathed and his interest in that other property—No disposition of latter property by testator.

J, a Hindu, executed a will by which, after giving legacies and monthly stipends to some persons, he bequeathed all his remaining properties moveable and immoveable to the plaintiff, a son of an uncle of J's. S was the other son of the same uncle of J. The will of J contained the following passage: "And the share of annas 4-5-1-1 which the late R" (the said uncle of J) "had in the same way, has been obtained by his son, S." That passage occurred in a paragraph of the will, in which the testator stated the devolution of the property of his paternal grandfather.

In a suit brought by the plaintiff to recover by right of inheritance, one-half of his father's (R's) estate, and the property bequeathed to him under the will of J, it was contended for S that the bequest of J's property to the plaintiff

ELECTION—(Contd.)

was made on the understanding as expressed in the will that R's share "had been obtained by S", and that the plaintiff ought, therefore, to be put to his election.

Held, that no case of election arose (106).

The testator had no power to dispose of R's share and did not intend to do so (106). (*Sir Richard Couch.*) **BISESWAR MOOKERJI v. ARDHA CHUNDER ROY CHOWDHRY.** (1892) 19 I. A. 101 = 19 C. 452 (461) = 6 Sar. 171.

EMBEZZLEMENT.

——Civil and criminal responsibility for—Distinction—Test. See SCYCHELLES PENAL CODE, S. 216.

(1913) 26 M. L. J. 1.

——Evidence of. See EVIDENCE—EMBEZZLEMENT.

ENFRANCHISEMENT.

——See SERVICE INAM—ENFRANCHISEMENT OF.

ENGLAND.

——Ecclesiastical Courts in. See ECCLESIASTICAL COURTS IN ENGLAND.

——Ecclesiastical Law in. See ECCLESIASTICAL LAW—ENGLAND.

ENGLISH DECISIONS.

——Authority of, in Colonies. See COLONIAL COURTS—ENGLISH DECISIONS.

(1927) A. I. R. 1927 P. C. 66 (69).

——Bellamy v. Sabine—Doctrine of—Applicability—Proceedings taken in invitum—Suit to recover money paid under—Defendant in—Applicability to case of.

The case of *Bellamy v. Sabine* proceeds upon the doctrine of Courts of Equity—that a plaintiff who comes to be relieved from his own act, or the act of one whom he represents, on equitable grounds, must do equity, and submit to those equitable conditions which the Court may see fit to impose on its grant of relief. The principle of that decision has no application to the case of a party who is not seeking the aid of the Court, but is sued as a defendant, and the money sought to be recovered has not been paid under any contract of his, or in any transaction to which he was a consenting party, but under proceedings taken *in invitum* (140-1). (*Sir James W. Colville.*) **RAM TUHUL SINGH v. BISESWAR LALL SAHOO.** (1875) 2 I. A. 131 = 15 B.L.R. 208 = 23 W. R. 305 = 3 Sar. 477 = 3 Suth. 136.

——Fletcher v. Rylands—Principle of—Applicability—Locusts—Driving away of, to avoid damage to one's own land—Damage to neighbour's land caused by—Liability for. See DAMAGES—LOCUSTS. (1911) 21 M. L. J. 674.

——Fletcher v. Rylands—Rule in—Applicability to India—Authority of that decision in India—Maxim *Sic utere tuo ut alienum non loedas*—Applicability.

It has been argued that the case of *Fletcher v. Rylands* decided on the relations subsisting between adjoining landowners in this country (England) has no application whatever to India. Though that case would not be binding as an authority upon a Court in India not administering English law, their Lordships are far from holding that, decided as it was, on the application of the maxim *Sic utere tuo ut alienum non loedas*, expressing a principle recognised by the laws of all civilised countries, it does not afford a rule applicable to circumstances of the same character in India (385). (*Sir Robert P. Collier.*) **MADRAS RAILWAY COMPANY v. ZEMINDAR OF CARVATENAGARAM.**

(1874) 1 I. A. 364 = 14 B. L. R. 209 = 22 W. R. 279 = 3 Sar. 391.

——Shelly's case—Rule in—Applicability to deed by Hindu. See DEED—CONSTRUCTION OF—ENGLISH LAW RULES. (1927) 55 I. A. 74 = 52 B. 176.

——Tweedle v. Atkinson—Common law doctrine laid down in—Applicability—Marriage contracts among Hindus and Mahomedans—Applicability to.

ENGLISH DECISIONS—(Contd.)

In India and among communities circumstanced as the Mahomedans, among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the common law doctrine in *Tweedle v. Atkinson* was applied to arguments or arrangements entered into in connection with such contracts. (*Mr. Amcer Ali.*)
KHWAJA MUHAMMAD KHAN v. HUSAINI BEGUM.

(1910) 37 I. A. 152 (158-9) = 32 A. 410 (413) =
 8 M. L. T. 147 = 12 C. L. J. 205 = 14 C. W. N. 865 =
 12 Bom. L. R. 638 = 7 A. L. J. 871 = 7 I. C. 237 =
 20 M. L. J. 614.

——Wills—Construction of—Decisions and rules applicable to—Applicability of, to Hindu will. See HINDU LAW
 —WILL—CONSTRUCTION OF—ENGLISH DECISIONS—ENGLISH RULES.

ENGLISH LAW.

——Advancement — Presumption of — Applicability in India of. See BENAMI—ADVANCEMENT—ENGLISH LAW PRESUMPTION OF.

——Alien—Incapacity of, to hold real property to his own use and to transmit it by descent or devise—Rule as to—Inapplicability of, in India. See ALIEN—REAL PROPERTY.
 (1836) 1 M. I. A. 175 (286).

——Applicability of—Mofussil Courts in India. See MOFUSSIL COURTS IN INDIA.

(1863) 9 M. I. A. 195 (240).
 ——Applicability of—Settlement obtained in inhabited country by conquest or by cession—Settlement made by colonising—Distinction.

In the case of a Settlement made by colonising, that is, peopling an uninhabited country, the subjects of the Crown carry with them the laws of England, there being, of course, no *lex loci*. In the case of a foreign settlement obtained in an inhabited country by conquest, or by cession from another power, on the other hand, the law of the country continues until the Crown or the Legislature change it. This distinction, to this extent, is taken in all the books. Two limitations of this proposition (that the subjects of the Crown carry with them the laws of England) are added; one of those refers to conquests or cessions; the other limitation refers to new plantations. Mr. Justice Blackstone says, that only so much of the English law is carried into them, by the settler, as is applicable to their situation, and to the condition of an infant colony. And Sir William Grant, in *Attorney-General v. Stuart* (2 Mer. 161), applies the same exception, even to the case of conquered or ceded territories, into which the English law of property has been generally introduced. Upon this ground, he held, that the Statute of Mortmain does not extend to the colonies governed by the English law, unless it has been expressly introduced there; because it had its origin in policy peculiarly adapted to the circumstances of the mother country. (*Lord Brougham.*)
MAYOR OF THE CITY OF LYONS v. HON. EAST INDIA CO.

(1836) 1 M. I. A. 175 = 1 Moo. P. C. 175 =
 3 State Tr. (N. S.) 647 = 1 Sar. 107.

——Applicability in India of — Fee simple estate—Devise of—Validity—Unattested will—Effect.

Lands in the East Indies, held by a tenure of the nature of fee-simple, do not pass by an unattested will, but descend to the person who would be heir-at-law in England.

The first point is whether plaintiff is entitled to the estate? It was the property of a gentleman, who by will gave it to his mother (B), and she afterwards disposed of it to the plaintiff. The claim was made upon the ground that both these dispositions were void, from not having been executed with the solemnities required by the statute, in devises of (real) property in England. Now it is admitted that the plaintiff is heir-at-law. The estate is said to be of the nature of fee-simple; that is, it possesses the qualities of a

ENGLISH LAW—(Contd.)

fee-simple estate; it must therefore have the quality of being descendible to the heir. How can it be of the nature of fee-simple if it does not descend to the heir-at-law? It is an estate of inheritance, and if such, the rules and doctrines of estates of inheritance must be applied to it. (*Sir Thomas Plumer, M. R.*)
GARDINER v. FELL.

(1819) 1 M. I. A. 299 = 1 Sar. 120 = 1 Jac. & W. 22 =
 2 Wilson Chancery 32.

——Application in India of—Propriety—Legislation in India inconsistent with such law.

In proposing to apply the juristic rules of a distant time or country to the conditions of a particular place at the present day regard must be had to the physical, social and historical conditions to which that rule is to be adopted. The analogy of the English rule can hardly be prayed in aid when Indian legislation has an established and different rule on the subject (243, 245). (*Lord Sumner.*)
SRINATH ROY v. DINABANDHU SEN.

(1914) 41 I. A. 221 =
 42 C. 489 (531) = 16 M. L. T. 319 = 1 L. W. 733 =
 18 C. W. N. 1217 = (1914) M. W. N. 654 = 25 I. C. 467 =
 16 Bom. L. R. 901 = 20 C. L. J. 385 = 27 M. L. J. 419.

——Base-fee in—Nature of.

A base-fee is a grant in terms general, its limitation in point of duration being due only to the fact that the grantor was possessed of no estate enabling him to extend the grant, however general its terms, for any period subsequent to the extinction of his own issue (301). (*Lord Blanesburgh.*)
SUBHAN ALI v. IMAMI BEGUM.

(1925) 52 I. A. 294 =
 52 C. 971 = 23 A. L. J. 667 = 88 I. C. 347 =
 (1925) M. W. N. 535 = 21 N. L. R. 117 = 30 C. W. N. 122 =
 A. I. R. 1925 P. C. 184 = 50 M. L. J. 136 (141).

——Champerty and maintenance—Law of—Applicability in India of. See CHAMPERTY AND MAINTENANCE.

——Civil and criminal law—Applicability of, to natives within Calcutta—Commencement of.

The English Law, Civil and Criminal has been usually considered to have been made applicable to natives, within the limits of Calcutta, in the year 1726, by the Charter, 13 Geo. 1. Neither that nor the subsequent charters expressly declare that the English law shall be so applied, but it seems to have been held to be the necessary consequence of the provisions contained in them (426-7). (*Lord Kingsdown.*)
ADVOCATE-GENERAL OF BENGAL v. RANEE SURNO-MOYE DOSSEE.

(1863) 9 M. I. A. 387 = 1 W. R. 14 =
 2 Moo. P. C. (N. S.) 22 = 9 Jur. N. S. 877 =
 8 L. T. 843 = 2 N. R. 530 = 12 W. R. (Eng.) 21 =
 1 Suth. 515 = 2 Sar. 39.

——Criminal Law—Introduction into India of—Forfeiture for suicide—Law as to—Law with respect to other offences. See SUICIDE—FORFEITURE FOR.

(1863) 9 M. I. A. 387 (427, 429-30).
 ——Ecclesiastical law in. See ECCLESIASTICAL LAW IN ENGLAND.

——Feudal law—Principles of—Inapplicable to Hindu Zemindar. See ESCHEAT—CROWN—ZEMINDAR.

(1876) 3 I. A. 92 (101) = 1 C. 391 (402).
 ——Heir-at-law—Alienation by—Validity—Purchase without notice of debts of deceased—Not subject to such debts—Specialty debts—Heir-at-law if bound by.

Under the English law although an heir-at-law is bound by specialty debts in respect of lands descended, yet a purchaser of those lands, without notice of any debts, was never holden to be subject to them (221). (*Sir Barnes Peacock.*)
SYUD BAZAYET HOSSEIN v. DOOLICHAND.

(1878) 5 I. A. 211 = 4 C. 402 (407) = 3 Sar. 853.
 ——Introduction into India of—Land of British subject in Calcutta—Tenure of—Devise by unattested will—Validity.

The estate in land and tenements of a British subject in Calcutta is of such a nature as to descend to him according

ENGLISH LAW—(Contd.)

to the English Law of Succession; it is freehold of inheritance, real property according to the Law of England and not real chattel, or personal chattel, and will not therefore pass by an unattested will.

This conclusion was reached by the adoption of the latter position, that the English law had been introduced into the Settlement, the grounds of this more general proposition being chiefly the practice of the settlement in regard to the mode of conveyances, viz., by lease and release, with the course of succession, and also the charters of the Company. (Lord Chancellor.) FREEMAN v. FAIRLIE.

(1828) 1 M. I. A. 305 = 1 Sar. 123.

—Land—Buildings erected on another's—Ownership of—*Quidquid plantatur solo solo cedit*—English Law as comprised in—Applicability in India of. See LAND—BUILDINGS ERECTED ON ANOTHER'S.

—Land—Incidents of—Law governing—Lex loci rei sitae.

The Law of England recognises the principle that the incidents of land are governed by the law of its site (131). (Lord Hobhouse.) SECRETARY OF STATE FOR FOREIGN AFFAIRS v. CHARLESWORTH, PILLING AND CO.

(1901) 28 I. A. 121 = 26 B. 1 (13) = 8 Sar. 1.

—Legal and equitable estates—Distinction between—Nature of—Inapplicability in India.

The anomalous law which has grown up in England of a legal estate which is paramount in one set of Courts, and an equitable ownership which is paramount in Courts of Equity, does not exist in and ought not to be introduced into Hindu Law (71). The distinction between "legal" and "equitable" represents only the accident of falling under diverse jurisdictions, and not the essential characteristic of a possession in one for the convenience and benefit of another (72). (Mr. Justice Willes.) JOTENDROMOHUN TAGORE v. GANENDROMOHUN TAGORE. (1872) Sup. I. A. 47 = 9 B. L. R. 377 = 18 W. R. 359 = 3 Sar. 82 = 2 Suth. 692.

—Personal and real estate—Distinction between—Inapplicability in India

There is not in India the difference between real and personal estate which obtains in England (126). (Sir James Colvile.) DORAB ALLY KHAN v. ABDOL AZEEZ.

(1878) 5 I. A. 116 = 3 C. 806 (814) = 2 C. L. R. 529 = 3 Suth. 520 = 3 Sar. 818.

—Pin-money—Nature and incidents of. See MAHOMEDAN LAW—MARRIAGE—KHARAH-I-PANDAN.

(1910) 37 I. A. 152 (159) = 32 A. 410 (414).

—Question to be decided according to—Dearth of English authority on—Procedure in case of—Principle on which law in England on the subject is founded—Recourse to—American authorities—Resort to.

American authorities are, no doubt, entitled to the highest respect. But, when the question is to be decided by English law, and there is a dearth of English authority on it, recourse must be had to the principle on which the law in England on the subject is founded. (Lord Macnaghten.) MACINTOSH v. DUN. (1908) 12 C. W. N. 1053 = 4 M. L. T. 1 = 14 Bur. L. R. 225 = 11 I. C. 348 = 19 M. L. J. 20 (28).

—Rules of—Applicability in India of, under head of "Equity and Good Conscience". See JUSTICE, EQUITY AND GOOD CONSCIENCE—MEANING OF.

(1887) 14 I. A. 89 (96) = 11 B. 551 (561).

—Special laws of—Exclusion from India of—Principles of.

Unless, therefore, the English laws of maintenance and champerty were plainly appropriate to the condition of things in the Presidency-towns of India, it ought not to be held that they had been introduced there as specific laws

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upon the general introduction of British law. The principles on which the exclusion from India of special English laws rest are explained in the well-known judgment of the Mayor of Lyons v. The East India Company (1 Moore's I. A. C. 176). (Sir Montague E. Smith.) RAM COOMAR COONDOO v. CHUNDER CANTO MOOKERJEE.

(1876) 4 I. A. 23 = 2 C. 233 (256) = 3 Sar. 654 = 3 Suth. 361.

—Succession—Murderer—Murdered person—Right to succeed to property of.

Under the English law a murderer is disqualified from succeeding to the property of the murdered person in the case of an intestacy. He is so disqualified on principles of public policy. (Lord Phillimore.) KENCHAVA v. GIRIMALLAPPA CHANNAPPA. (1924) 51 I. A. 368 (373) = 48 B. 569 = 26 Bom. L. R. 779 = 20 L. W. 417 =

A. I. R. 1924 P. C. 209 = 3 Pat. L. R. 9 = 22 A. L. J. 962 = 40 C. L. J. 447 = 29 C. W. N. 271 = 35 M. L. T. 241 = (1924) M. W. N. 719 = 82 I. C. 966 = 47 M. L. J. 401.

—Suicide—Forfeiture for—Rule as to—Applicability to natives and Europeans in India. See SUICIDE—FORFEITURE FOR.

ENGLISH SETTLEMENT IN FOREIGN COUNTRIES.

—See SETTLEMENT IN FOREIGN COUNTRIES.

ENGLISH SETTLEMENT IN INDIA.

—Factories—Law applicable to people within—Foreign countries—Settlement in—Distinction. See SETTLEMENT IN FOREIGN COUNTRIES.

(1863) 9 M. I. A. 387 (425).

EQUITY.

—One who seeks equity must do equity—Maxim of—Applicability of—Void transaction—Moneys received under—Restoration of—Inapplicability to case of.

In a suit by a minor for a declaration that a mortgage deed executed by him was void and inoperative, and should be delivered up to be cancelled, the defendant-mortgagee contended that in any case the Court should not grant the plaintiff any relief without making him repay the moneys advanced under the mortgage. In support of his contention the mortgagee relied upon the maxim that one who seeks equity must do equity.

In overruling the contention their Lordships adopted the observation of Romer, L. J., to the following effect: "The short answer is that a Court of Equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the Legislature has declared to be void." (125-6). (Sir Ford North.) MOHORI BIBEE v. DHARMODAS GHOSE.

(1903) 30 I. A. 114 = 30 C. 539 (549) = 7 C. W. N. 441 = 5 Bom. L. R. 421 = 8 Sar. 374.

—See also ENGLISH DECISIONS—BELLAMY v. SABINE. (1875) 2 I. A. 131 (140-1).

EQUITY AND GOOD CONSCIENCE.

—See JUSTICE, EQUITY AND GOOD CONSCIENCE.

ESCHEAT.

—Brahmin's estate—Claim by escheat to.

According to Hindu Law, the title of the King by escheat to the property of a Brahmin dying without heirs ought, as in any other case, to prevail against any claimant who cannot show a better title (523-4). (Lord Justice Knight Bruce.) COLLECTOR OF MASULIPATAM v. CAVALY VENCATA NARRAINAPAH. (1860) 8 M. I. A. 500 = 2 W. R. 59 = 1 Suth. 417 = 1 Sar. 752.

—Brahmin's estate—Claim by escheat to—Basis of—Hindu Law—General or universal law.

ESCHEAT—(Contd.)

In a case in which the Government claimed to take by escheat the property of a Brahmin dying without heirs, *held*, that the title of the Crown might be rested on grounds of general or universal law (524).

When it is made out clearly that by the law applicable to the last owner, there is a total failure of heirs, then the claim to the land, which was his absolute property, ceases to be subject to the personal law of the last owner; and as all property not dedicated to certain religious trusts must have some legal owner, and there can be, legally speaking, no unowned property, the law of escheat intervenes and prevails, and is adopted generally in all the courts of the country alike. Private ownership not existing, the State must be owner as ultimate Lord (525). (*Lord Justice Knight Bruce.*) **COLLECTOR OF MASULIPATAM v. CAVALY VENCATA NARRAINAPAH.** (1860) 8 M. I. A. 500 = 2 W. R. 59 = 1 Suth. 417 = 1 Sar. 752.

—*Brahmin's estate taken by escheat by—Distribution of estate among Brahmins—Duty of Crown as to—Nature and enforceability of.*

Quære whether Brahminical property taken by escheat by the Crown is, in the hands of the King, subject to a trust in favour of Brahmins, whether the duty imposed upon the King of disposing of the property so taken among the Brahmins is one of imperfect obligation, or a positive trust affecting the property in his hands, or, whether, if a trust, it is or is not one incapable of enforcement by reason of the uncertainty of its objects, and whether there is or is not, in this respect, any distinction between sacerdotal Brahmins and the ordinary members of the caste (524). (*Lord Justice Knight Bruce.*) **COLLECTOR OF MASULIPATAM v. CAVALY VENCATA NARRAINAPAH.**

(1860) 8 M. I. A. 500 = 2 W. R. 59 = 1 Suth. 417 = 1 Sar. 752.

—Ceremonies to deceased—Performance of—Duty of Crown taking by escheat as to. *See* HINDU LAW—INHERITANCE—PERSON TAKING BY—CEREMONIES TO DECEASED. (1870) 13 M. I. A. 373 (390-1).

—Charge or trust affecting property taken by escheat—Binding nature on Crown of. *See* ESCHEAT—CROWN—HEIRS—TOTAL FAILURE OF. (1876) 3 I. A. 92 (100) = 1 C. 391 (401).

—*Claim of, by escheat—Jealousy of Mitakshara as regards.*

It is impossible to read the second chapter of the Mitakshara without remarking the extreme jealousy with which the Hindu Law regarded the right of the King to take on a failure of heirs. The seventh section refuses altogether to recognise that right where the property was that of a Brahmin. Admitting it as to the property of the other castes, or classes, it expressly says, "if there be no relations of the deceased, the Preceptor, or, on failure of him, the Pupil;" and again, "if there be no Pupil, the fellow-student is the successor". It thus exhausts the relatives and then interposes between them and the King three classes of heirs not connected with the deceased by blood, or participation in funeral oblations. The title of the King is afterwards stated in column 6 affirmatively, thus, "The King, and not a Priest, may take the estate of a Kshatriya, or other person of an inferior tribe, on failure of heirs down to the fellow-student." So *Manu* ordains: "But the wealth of the other classes, on failure of all (heirs), the King may take" (463). (*Sir James Colville.*) **GRIDHARI LALL ROY v. THE BENGAL GOVERNMENT.**

(1868) 12 M. I. A. 448 = 10 W. R. P. C. 31 = 1 B. L. R. P. C. 44 = 2 Suth. 159 = 2 Sar. 382.

—*Claim of, by escheat—Maintainability—Bandhoos—Exhaustion of three classes of—Necessity—Mitakshara Law.*

ESCHEAT—(Contd.)

—It is admitted that, on the strictest interpretations of the Mitakshara, the three classes of Bandhoos must be exhausted before the King can take for want of heirs (462). (*Sir James W. Colville.*) **GRIDHARI LALL ROY v. THE GOVERNMENT OF BENGAL.** (1868) 12 M. I. A. 448 = 10 W. R. P. C. 31 = 1 B. L. R. P. C. 44 = 2 Suth. 159 = 2 Sar. 382.

—*Claim of, by escheat—Maintainability—Estoppel—Mutation proceedings—Recognition of title of alleged heir in—Effect.*

On the death of a Hindu, G, claiming to be his heir, applied for mutation of names. A question was thereupon raised whether he was the heir of the deceased, and whether the property of the deceased did not pass for want of heirs to the Crown. The Board of Revenue, on the strength of the opinion of their legal adviser, the Legal Remembrancer, recognised G's title, and he was accordingly put into possession, or left in possession of the property, recorded as proprietor of the estate in the Collector's Books, and continued to pay the Government revenue assessed upon it. Subsequently the Government changed its view of G's title, and instituted a suit claiming the property by escheat. *Held*, that the mutation proceedings did not estop the Government from bringing the suit, though the effect of those proceedings was to determine, if it were previously doubtful, the fact of possession (469). (*Sir James W. Colville.*) **GRIDHARI LALL ROY v. GOVERNMENT OF BENGAL.** (1868) 12 M. I. A. 448 = 10 W. R. P. C. 31 = 1 B. L. R. P. C. 44 = 2 Suth. 159 = 2 Sar. 382.

—*Claim of, by escheat—Maintainability—Relation remote, not falling within category of Bandhoos, or other class of heirs specified in Mitakshara—Existence of—Effect.*

It is, therefore, unnecessary to consider whether the title of any remote relation who could not be brought within the category of Bandhoos, or other class of heirs specified by the Mitakshara would prevail against that of the Crown (467). (*Sir James W. Colville.*) **GRIDHARI LALL ROY v. THE GOVERNMENT OF BENGAL.** (1868) 12 M. I. A. 448 = 10 W. R. P. C. 31 = 1 B. L. R. P. C. 44 = 2 Suth. 159 = 2 Sar. 382.

—*Claim of, by escheat—Waiver by Collector of—Validity.*

Held, that the Collector had no authority to waive the rights to which Government might become entitled by escheat (554). (*Lord Justice Turner.*) **COLLECTOR OF MASULIPATAM v. CAVALY VENCATA NARRAINAPAH.** (1861) 8 M. I. A. 529 = 2 W. R. 61 = 1 Suth. 476 = 1 Sar. 820.

—*Ejectment suit by, in right of claim by escheat—Jus tertii—Plea of—Defendant's right to set up.*

In a case in which the possession by a person of the estate of a deceased Hindu has been recognised by the Government itself, the Government suing to recover from that person the estate of the deceased under a claim by escheat is in the position of a plaintiff in an ordinary suit in the nature of an ejectment. The Government could only recover by the strength of their own title. Accordingly it lies upon the Government to prove at least *prima facie* that the deceased died without heirs; and, on the other hand, the defendant would be entitled to defend his possession not only by proof of his own title, but by setting up any *jus tertii* that might exist (469). (*Sir James W. Colville.*) **GRIDHARI LALL ROY v. GOVERNMENT OF BENGAL.** (1868) 12 M. I. A. 448 = 10 W. R. P. C. 31 = 1 B. L. R. P. C. 44 = 2 Suth. 159 = 2 Sar. 382.

—*East India Company—Rights of—Onus of proof of.*
The Crown has not under the statute, 21 and 22 Vict. c. 106, transferring the Government of India to the Crown

ESCHEAT—(Contd.)

a higher title than the late East India Company had. If the East India Company had claimed lands upon the ground of the extinction of the immediate tenancy, they must have proved their title in the same manner as a party claiming under a remote remainder would have to prove extinction of the previous heirs (454). (*Sir Lawrence Peel.*) GRIDHARI LALL ROY v. THE BENGAL GOVERNMENT.

(1868) 12 M. I. A. 448 = 10 W. R. P. C. 31 =
1 B. L. R. P. C. 44 = 2 Suth. 159 = 2 Sar. 382.

—Ejectment suit by, in right of claim by escheat—
Onus on Crown in—Entire failure of heirs—Proof of—
Necessity.

In this country (England) in a writ of intrusion, or ejectment, the Crown must, to take lands by escheat, prove that there was an entire failure of heirs, and so also a Lord of a Manor with respect to copyholds on the death of a tenant without heirs, and cannot rely upon the want of title of the party in possession. The Government must show a good title (453-4). (*Lord Chief Baron.*) GRIDHARI LALL ROY v. THE BENGAL GOVERNMENT.

(1868) 12 M. I. A. 448 = 10 W. R. P. C. 31 =
1 B. L. R. P. C. 44 = 2 Suth. 159 = 2 Sar. 382.

—Heirs—Total failure of—Right in case of—Charges
or trusts affecting property taken—Binding nature on Crown
of.

Where there is a failure of heirs, the Crown, by the general prerogative, will take the property by escheat, but will take it subject to any trusts or charges affecting it (100). (*Sir James W. Colville.*) RANEE SONET KOWAR v. MIRZA HIMMUT BAHADOOR.

(1876) 3 I. A. 92 =
1 C. 391 (401) = 25 W. R. 239 = 3 Sar. 608 =
3 Suth. 258 = 11 M. J. 149.

—Widow of last male owner—Alienation unauthorised
by—Impeachment of—Crown taking by escheat—Right
of.

If, for want of heirs, the right to the property of a Hindu, so far as it has not been lawfully disposed of by his widow, passes to the Crown, the Crown has the same power which an heir would have of protecting its interests by impeaching any unauthorised alienation by the widow (553). (*Lord Justice Turner.*) COLLECTOR OF MASULIPATAM v. CAVALY VENCATA NARRAINAPAH.

(1861) 8 M. I. A. 529 =
2 W. R. 61 = 1 Suth. 476 = 1 Sar. 820.

—Widow of last male owner—Alienation unauthorised
by—Impeachment of—Crown taking by escheat—Right
of—Estoppel—Collector's acts amounting to—Advice by
him to widow to enter into arrangement with creditor and
sanction of arrangement by him—Effect.

In a suit brought by the Collector of Masulipatam for the recovery of a zemindary, claiming the same on behalf of the Government of Madras, as an escheat to which the Crown became entitled on the death of the widow of the last male Zemindar, the defendant contended that he had a title to the zemindary, paramount to that of the Crown by virtue of a Razinamah executed in his favour by the widow of the last male Zemindar in her lifetime. The question was whether the Crown was estopped from asserting its right of escheat by the acts of a former Collector, and the sanction given by him to the Razinamah.

The defendant's father had, during his lifetime, made advances to the widow, and had obtained a decree for the amount of the debt. After his father's death, the defendant had taken out execution on that decree, and was about to have his claim satisfied by sale of the zemindary, as provided for in the decree. The execution was intrusted to the Collector to enforce. The then Collector advised the widow to the effect that unless she made an arrangement with the defendant, the estate would be sold. To stay the execution of the decree the said Razinamah was entered into by the

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widow. The Razinamah was in the nature of an agreement for the payment of the judgment debt by instalments, with stipulations that if default were made in the payment of any instalment, the whole sum should become due, and that the judgment creditor should be put into possession of twelve out of the fourteen villages comprising the zemindary (which were to be impleaded to him), and should, on her death, take possession of the two other villages, and hold the whole zemindary as his absolute estate. The terms of the Razinamah were immediately communicated to the then Collector. He sanctioned the same, and the execution was in consequence dropped. No instalment was paid by the widow, nor yet was possession taken under the Razinamah in her lifetime. The defendant alleged that it was by reason of an order of the Sudder Court, suspending the execution of the Razinamah, in consequence of proceedings in another suit, that he failed to get possession.

Held, that the Crown was not estopped by the act of the former Collector from disputing the title asserted by the defendant under the Razinamah (553).

The principles of estoppel do not support the contention of the defendant. On every reasonable presumption the facts relating to the creation of the original debt were known to the defendant, or to the original plaintiff in the suit whose judgment he was enforcing. The Collector would have no necessary knowledge on the subject; nor is he proved to have had actual knowledge. The threatened sale in execution could only be of the widow's right, title and interest in the estate, and the then Collector's advice to the widow to avert it by entering into an arrangement with the defendant was not a statement at variance with the true state of things. The Razinamah into which she entered, might, for aught that appeared, be satisfied by payment of the instalments in her lifetime (553-4). (*Lord Justice Turner.*) COLLECTOR OF MASULIPATAM v. CAVALY VENCATA NARRAINAPAH.

(1861) 8 M. I. A. 529 = 2 W. R. 61 =
1 Suth. 476 = 1 Sar. 820.

—Widow of last male owner—Debts properly charged
on estate by—Binding nature of, on Crown taking by
escheat.

The Crown's claim to take by escheat the estate of a Brahmin on the death of his widow on the ground of failure of heirs ought to prevail, unless it has been absolutely, or to the extent of a valid and subsisting charge, defeated by the acts of the widow in her lifetime. In the latter case, the Government will be entitled to the property subject to the charge (527). (*Lord Justice Knight Bruce.*) COLLECTOR OF MASULIPATAM v. CAVALY VENCATA NARRAINAPAH.

(1860) 8 M. I. A. 500 = 2 W. R. 59 =
1 Suth. 417 = 1 Sar. 752.

—Widow of last male owner—Debts properly charged
on estate by—Payment of—Onus of proof of. See HINDU
LAW—WIDOW—DEBT PROPERLY CHARGED ON ESTATE
BY.

(1867) 11 M. I. A. 619 (633).

—Zemindar—Rights of—Zemindari tenure carved
out of—Death of tenure-holder without heirs—Escheat in
case of.

The principles of English feudal law are clearly inapplicable to a Hindu Zemindar (101).

Held, therefore, that on the death without heirs of a tenant under a mokurrari istimrree pottah, the Zemindar was not entitled by escheat to the possession of the land comprised in the pottah, though the mokurrari was carved out of his zemindary, and a rent was reserved under the pottah (101). (*Sir James W. Colville.*) RANEE SONET KOWAR v. MIRZA HIMMUT BAHADOOR.

(1876) 3 I. A. 92 = 1 C. 391 (402) = 25 W. R. 239 =
3 Sar. 608 = 3 Suth. 258 = 11 M. J. 149.

—On the death without heirs of the grantee under an
absolute and hereditary mokurrari tenure carved out of a

ESCHEAT—(Contd.)

zemindary, the question arose whether the right to the possession of the land reverted to the original grantor, or whether the tenure escheated to the Crown.

Held, that the Crown, by the general prerogative, took the property by escheat, subject to the payment of the rent reserved upon it (100).

The fact that the mokurrari was not an independent zemindary, but was carved out of a zemindary does not vest a right of reversion in the Zemindar. The mokurrari was clearly an absolute interest. It was also an alienable interest. It might have been seized and sold, under Act X of 1859, even in a suit for rent. It could not have been forfeited for non-payment of rent, for in such a case the Zemindar could only have caused it to be seized, put up for sale, and sold to the highest bidder. It is, therefore, property which might have passed to any purchaser, whatever his nationality, or by whatever law he was to be governed. It cannot be successfully argued that, having so passed, the estate would have determined upon the death of the grantee (supposing it had been sold in her lifetime) without heirs; for the grant contains no provision for the lessee of the estate created in such event. The lands did not, therefore, revert to the Zemindar in the proper sense of the term (100-1).

The Zemindar is not also entitled to take the tenure by escheat. There is no authority upon which the power of taking by escheat can be attributed to the Zemindar. The principles of English feudal law are clearly inapplicable to a Hindu Zemindar (101). (*Sir James W. Colville.*) **RANEE SONET KOWAR v. MIRZA HIMMUT BAHADOOR.**

(1876) 3 I.A. 92 = 1 C. 391 (401-2) = 25 W.R. 239 = 3 Suth. 258 = 3 Sar. 608 = 11 M.J. 149.

ESTATE.

—Devolution of—Legal course of—Alteration of—Legality of. *See* HINDU LAW—INHERITANCE—LEGAL COURSE OF—ALTERATION OF.

—Law—Estate not recognised by—Creation of—Validity. *See* LAW—ESTATE NOT RECOGNISED BY.

—Legal and equitable estates—English law distinction between—Inapplicability in India of. *See* ENGLISH LAW—LEGAL AND EQUITABLE ESTATES.

(1872) Sup. I.A. 47 (72).

—Hindu Law—Estates recognised by. *See* HINDU LAW—ESTATES.

—Mahomedan Law—Estates recognised by. *See* MAHOMEDAN LAW—ESTATES.

—Personal and real estates—English law distinction between—Applicability in India of. *See* ENGLISH LAW—PERSONAL AND REAL ESTATES.

(1878) 5 I.A. 116 (126) = 3 C. 806 (814).

—Quality of—Alteration by law of.

The quality of an estate might doubtless be altered by a law (115). (*Sir Arthur Hobhouse.*) **MUTTU VADUGANADHA TEVAR v. DORASINGA TEVAR.**

(1881) 8 I.A. 99 = 3 M. 290 (307) = 4 Sar. 239.

ESTATE OF THE NAWAB OF CARNATIC, ACT XXX OF 1858.

—Remedy given by—Debts to which, limited—Proof of—Onus on claimant—Quantum.

Act XXX of 1858 not only limits the extraordinary remedy which it gives, to certain defined classes of debt, but throws upon the claimant more than the ordinary burden of proof, compelling the holder of any acknowledgment or security to prove the actual consideration for it; and those claiming the price of goods delivered, to prove the fair and actual value of them. In the exercise of this statutory and peculiar jurisdiction, the court is almost bound to insist on the utmost strictness of proof. **GHOOLAM MOORTOOZAH KHAN BAHADOOR v. GOVERNMENT.**

(1863) 9 M.I.A. 456 (475, 478) = 1 W.R. P.C. 47 = 1 Suth. 513 = 2 Sar. 23.

ESTOPPEL.

See EVIDENCE ACT, S. 115.

EVIDENCE.

ACCOMPLICE.

ACCOUNTS.

ACCOUNT BOOKS.

ACTS OF PARTIES—WORDS ALLEGED TO BE USED BY THEM AT TIME OF.

ADMISSIBILITY OF.

ADMISSION.

ADMISSION OF.

ADOPTION.

AFFIRMATIVE PROPOSITION—PROOF OF.

AGE.

ALIENABILITY OF PROPERTY—CUSTOM AGAINST.

ANTE-NUPTIAL AGREEMENT.

APPEAL.

AWARD—VALIDITY OF—QUESTION AS TO, BETWEEN PLAINTIFF AND DEFENDANT—EVIDENCE.

BENAMI TRANSACTION.

BEST EVIDENCE RULE.

BIRTH—DATE OF.

BORROWING—TERMS OF—REASONABLENESS AND PROPRIETY OF.

BOUNDARY.

BOUNDARY DISPUTE.

CHITTAS.

CIRCUIT COMMITTEE—RECORDS OF.

CIRCUMSTANTIAL EVIDENCE.

CIVIL SUIT—CRIMINAL PROCEEDINGS PRIOR.

CO-DEFENDANTS.

COLLECTOR—PROCEEDINGS BEFORE—EVIDENCE IN, OR INFORMATION OBTAINED AT—ADMISSIBILITY IN CIVIL SUIT OF.

COMMISSION.

COMMISSIONER FOR TAKING.

COMPROMISE.

CONFLICT OF—JUDGMENT IN CASE OF.

CONJECTURE.

CONNECTED SUITS—EVIDENCE IN ONE OF.

CONSIDERATION OF CASE ON.

CONTEMPORANEOUS WRITTEN STATEMENTS OF PARTIES.

CONTRACT.

CONTRADICTION IN—INDIAN CASES.

CRIMINAL CASE.

CRIMINAL PROCEDURE CODE—S. 145.

CROSS-SUITS—EVIDENCE IN ONE OF.

CUSTOM.

DATE—NATIVE AND ENGLISH DATES.

DEATH—DATE OF.

DEBT.

DECEASED.

DEED.

DEFENDANT.

DEPOSITION—HEADING OF.

DIRECT AND POSITIVE EVIDENCE—CIRCUMSTANTIAL EVIDENCE.

DISCREPANCIES IN HONEST CASES.

DIVORCE.

DOCUMENT.

EMBEZZLEMENT.

FALSE EVIDENCE.

FRAUDS—PARTICIPATION IN A SERIES OF.

GIRL.

HEARSAY EVIDENCE—ADMISSIBILITY OF.

HINDU—CONCUBINE KEPT BY.

HINDU TESTIMONY.

HONEST CASES—DISCREPANCIES IN EVIDENCE IN, IMPARTIBLE ESTATE.

INAM COMMISSION.

EVIDENCE—(Contd.)

INAM REGISTER.
 INADMISSIBLE EVIDENCE.
 INHERITANCE—CUSTOM OF.
 INSANITY.
 ISSUMNOVISEE RETURNS.
 JUDGMENT NOT *inter partes*.
 JUDICIAL OFFICER—INFORMATION OF.
 LANDLORD—TENANTS DIFFERENT OF DIFFERENT PARCELS OF LAND—EJECTMENT SUIT SINGLE AGAINST.
 LANDLORDS—DISPUTE BETWEEN.
 LEGITIMACY.
 LITIGATION.
 LOAN.
 LUNACY.
 MAHALWAR REGISTER.
 MAJORITY OF GIRL.
 MALICIOUS PROSECUTION.
 MAP.
 MARRIAGE.
 MUTATION PROCEEDINGS.
 NATIVES OF HIGH RANK—APPEARANCE IN COURT.
 NATIVE PALACE—FACTIONS IN.
 NATIVE TESTIMONY.
 NEGOTIABLE INSTRUMENT.
 NON-PRODUCTION OF AVAILABLE.
 OFFICIAL—EMBEZZLEMENT BY—SUIT AGAINST SURETY FOR OFFICIAL IN RESPECT OF.
 OFFICIALS.
 OPPONENT.
 OPPORTUNITY TO ADDUCE—REFUSAL OF—PLEA IN APPEAL OF.
 ORAL AGREEMENT.
 ORAL EVIDENCE.
 PARTS OF—CONSIDERATION OF EACH OF, BY ITSELF.
 PARTY.
 PAYMENT.
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 PERJURY AND FORGERY.
 PERMANENT SETTLEMENT OF 1793—LAND WHETHER INCLUDED IN, OR NOT.
 PERSON PRESENT IN COURT BUT NOT EXAMINED AS A WITNESS.
 PLEADINGS—ALLEGATIONS IN.
 POSSESSION.
 POTTAH.
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 PROBABILITIES.
 PROCEEDINGS NOT *inter partes*—ADMISSIBILITY OF.
 PRODUCTION OF AVAILABLE.
 PROFIT FOR PURPOSES OF INCOME-TAX.
 PROPERTY.
 PUBERTY OF GIRL.
 PYMASH ACCOUNTS.
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 QUANTUM OF—SUFFICIENCY OF—OBJECTION TO.
 RAILWAY COMPANY.
 RECEIPT.
 RECENT HAPPENINGS.
 REJECTION OF ENTIRE.
 RELATIONSHIP.
 RENT.
 REVENUE OFFICIALS.
 RULES OF, ADOPTED IN ONE COUNTRY.
 SEALS.
 SECONDARY EVIDENCE.
 SERVICE TENURE.
 SETTLEMENT RECORDS.
 SETTLEMENT REGISTER.
 SHAM DOCUMENT.

EVIDENCE—(Contd.)

SON AND HEIR OF DECEASED.
 SPECULATION.
 SRADDH—PERFORMANCE OF.
 SUITS NOT *inter partes*—FINDING OF FACT IN ONE OF.
 SURVEY.
 SURVEY AWARD.
 SURVEY MAP.
 SURVEY OFFICERS—REPORTS OF.
 SURVEY PROCEEDINGS.
 SURVEY AND SETTLEMENT REGISTER.
 SUSPICION.
 TAMPERING WITH—FRAUD IN.
 TENURE—INCIDENTS OF.
 THAKBUST MAP.
 THAKBUST PROCEEDING.
 THAK KHASRA.
 THAK MAP.
 TITLE.
 TRANSACTION.
 WITNESSES.

Accomplice.

—Evidence of. *See* ACCOMPLICE AND EVIDENCE ACT, S. 114, ILL. (b).

Accounts.

—Adjustment of—Document by party amounting to—Signature in—Proof of. *See* EVIDENCE—DOCUMENT—SIGNATURE IN—PROOF OF. (1875) 23 W. R. 390

—Forgery of—Perjury supporting—Imputation of—Evidence to support necessary. *See* ACCOUNTS—FORGERY OF—PERJURY SUPPORTING.

(1898) 25 I. A. 225 (234-5) = 26 C. 11 (23).

—Forgery detailed of—Difficult to accomplish and easy to expose. *See* ACCOUNTS—FORGERY OF—DETAILED FORGERY. (1898) 25 I. A. 225 (235) = 26 C. 11 (23-4).

—Fraud by manipulation of—Proof of—Mode of. *See* EVIDENCE—EMBEZZLEMENT—TREASURER.

(1874) 14 M. I. A. 86 (92-3).

—Inspection of, referred to officer of Court—Report of Inspector—Admissibility in evidence of—Weight due to. *See* ACCOUNTS—INSPECTION OF, ETC.

(1855) 6 M. I. A. 88 (95).

—Keeping of—Habit of Indians as to. *See* ACCOUNTS—KEEPING OF.

—Production of—Time for—Extension of—Discretion as to—Interference in appeal with. *See* ACCOUNTS—PRODUCTION OF. (1866) 10 M. I. A. 490 (507).

—Rejection in appeal of—Propriety—Conditions. *See* ACCOUNTS—APPEAL—REJECTION IN.

(1898) 25 I. A. 225 (234) = 26 C. 11 (22).

Account Books.

—*See* ACCOUNT BOOKS AND EVIDENCE ACT—S. 34.

Acts of Parties—Words alleged to be used by them at time of.

—Weight to be attached to—Preference.

In a case in which the question was whether the defendants or those under whom they claimed held the suit property in their own right or as the agents of the plaintiff, it appeared that two persons under whom the defendants claimed actually conveyed the property as their own, a circumstance which was utterly inconsistent with the plaintiff's case. The plaintiff, however, adduced evidence to shew that about the very times that those persons conveyed the property as their own, they made declarations admitting the title of the plaintiff.

Held, that it was impossible to suppose that, when they were acting as owners, and in their own right, they should be admitting to witnesses that they had no right at all.

EVIDENCE—(Contd.)**Acts of Parties—Words alleged to be used by them at time of—(Contd.)**

Much greater credence is to be given to their acts than to their alleged words, which are easily mistaken or misrepresented. (*Mr. Baron Parke.*) *MEER USUD-OOLLAH v. MUSSUMAT BEEBY IMAMAN.*

(1836) 1 M. I. A. 19 (42-3) = 5 W. R. 26 = 1 Sar. 89 = 1 Suth. 46.

Admissibility of.

—English technical rules—Application of—Improperly of.

With regard to the admissibility of evidence in the Native Courts in India, we think that no strict rule can be prescribed. However highly we may value the rules of evidence as acknowledged and carried out in our own Courts, we cannot think that those rules could be applied with the same strictness to the reception of evidence before the Native Courts in the East Indies, where it is perfectly manifest the practitioners and Judges have not the same intimate acquaintance with the principles which govern the reception of evidence in our own tribunals; we must look to their practice, we must look to the essential justice of the case, and not hastily reject any evidence, because it may not be accordant with our own practice. We must endeavour, as far as the materials will allow us, having received the evidence, to ascertain what weight ought properly to be ascribed to it, and more especially, where we find that it has been the practice of the Court to receive documentary evidence, without the strict proof which might here be considered necessary, we must not reject that evidence; indeed, the consequence of so doing must inevitably be, if the strict rule were adhered to, to reject the most important evidence, not only in this case, but almost in every other (137-8). (*Dr. Lushington.*) *UNIDE RAJAH RAJE BOMMARAUZE BAHADUK v. PEMMASAMY VENKATADRY NAIDOO.*

(1858) 7 M. I. A. 128 = 4 W. R. 121 = 1 Suth. 300 = 1 Sar. 637.

—(*Lord Kingsdown.*) *NARAGUNTY LUTCHMEE-DAVAMAH v. VENGAMA NAIDOO.*

(1861) 9 M. I. A. 66 (90) = 1 W. R. P. C. 30 = 1 Suth. 460 = 1 Sar. 826.

—(*Lord Hatherley, L. C.*) *FORESTER v. SECRETARY OF STATE FOR INDIA.* (1872) Sup. I. A. 10 (22) =

12 B. L. R. 120 = 18 W. R. 349 = 3 Sar. 1 = 1 P. R. 1872 = 2 Suth. 628.

Admission.

—See ADMISSION AND APPEAL—ADMISSION.

Admission of.

—Application for, at late stage of the case—Onus on applicant in case of—Diligence due—Proof of—Failure—Effect.

When application is made at a late stage in the case to put in evidence *res noviter ad notitiam perventa*, one of the primary duties of the applicant is to show that it was owing to no want of diligence on his part that the matter was not discovered before.

Their Lordships declined to admit the document the admission of which was applied for on the ground that that burden on the applicant had only been imperfectly discharged. (*Lord Phillimore.*) *KACHIREDDI NAGIREDDI v. NARAYANAREDDI.*

(1926) 25 L. W. 400 = 38 M. L. T. (P. C.) 57 = (1927) M. W. N. 190 = 100 I. C. 77 = 45 C. L. J. 308 = 29 Bom. L. R. 786 = 31 C. W. N. 245 = A. I. R. 1927 P. C. 27 = 52 M. L. J. 492.

EVIDENCE—(Contd.)**Admission of—(Contd.)**

—Effect of—Admission for one purpose is admission for all purposes. (*Lord Macnaghten.*) *BANK OF BOMBAY v. NANDLAL THACKERSEYDAS.* (1912) 40 I. A. 1 (9) = 37 B. 132 (137) = 17 C. L. J. 146 = 17 C. W. N. 358 = 12 M. L. T. 646 = (1913) M. W. N. 29 = 15 Bom. L. R. 1 = 24 M. L. J. 176.

—Improper admission—Improperly of. *MOHUR SINGH v. GHURIBA.* (1870) 6 B. L. R. 495 (499) = 15 W. R. 8 = 2 Sar. 616 = 2 Suth. 379.

—Improper admission or improper rejection—New trial on ground of—Grant of—Conditions. See PRACTICE—NEW TRIAL—EVIDENCE. (1849) 5 M. I. A. 43 (67-8).

—Inadmissible evidence—Admission of—Evil consequences of.

The evil consequences of the admission of legally inadmissible evidence is not merely that it prolongs litigation, and increases its cost, but that it may unconsciously be regarded by judicial minds as corroboration of some piece of evidence legally admissible and thereby obtain for the latter quite undue weight and significance. (*Lord Atkinson.*) *MUSAMMAT ATKIA BEGUM v. MAHOMED IBRAHIM RASHID NAWAB.* (1916) 6 L. W. 26 (29) = (1917) M. W. N. 261 = 21 C. W. N. 345 = 36 I. C. 20 = 10 Bur. L. T. 79.

—Inadmissible evidence—Admission of—Objection to—Failure to raise—Effect.

The erroneous omission before the Commissioner and the District Court to object to the admission of evidence which according to law is not relevant does not make it relevant and their Lordships must in this appeal, as the High Court should have done, entirely disregard it (116). (*Sir Richard Couch.*) *MILLER v. BABU MADHO DAS.*

(1896) 23 I. A. 106 = 19 A. 76 (92) = 7 Sar. 73.

—Hearsay—The fault of an advocate in not objecting to the admission of merely hearsay evidence cannot so alter its character as to convert it into corroborative evidence. (*Lord Darling.*) *LIM YAM HONG v. LAM CHOON & CO.* (1928) 29 L. W. 520 = 47 C. L. J. 288 = 107 I. C. 457 = 30 Bom. L. R. 757 = A. I. R. 1928 P. C. 127 = 56 M. L. J. 88.

—Inadmissible evidence—Admission of—Propriety—Opposite party adducing evidence equally inadmissible. See EVIDENCE—DOCUMENT—INADMISSIBLE DOCUMENTS.

(1902) 30 I. A. 27 (33-4) = 25 A. 143 (153).

—Irregularity in—Waiver of—Objection to, in appeal—Maintainability. See C. P. C. OF 1908—O. 2, R. 3—LANDLORD. (1919) 47 I. A. 76 (86-7) = 43 M. 567 (578).

—Material evidence—Admission of all—Court's duty.

Justice requires that all the evidence material to the issue which the parties may desire to adduce should be received before the rights of the parties are disposed of, and their Lordships fully adhere in that respect to the principle on which the case in 2 M. I. A. 424 proceeded. (*Lord Justice Turner.*) *MODEE KAIKHOOSCROW HORMUSJEE v. COOVERBHAE.* (1856) 6 M. I. A. 448 (459) = 4 W. R. 94 = 1 Suth. 268 = 1 Sar. 562.

Adoption.

—Hindu Law—Adoption—Proof of. See HINDU LAW—ADOPTION.

—Punchayet report ancient, made at instance of ancestors of parties and signed by them—Admissibility of—Value of.

Where the question for decision was whether or not S, an ancestor of plaintiff, was adopted by one F, held that a punchayet's report made in 1819 and preserved in the Collector's Office which after a minute local inquiry into the history of the family stated its pedigree including the adoption of S, and was signed by the ancestors of the parties

EVIDENCE—(Contd.)**Adoption—(Contd.)**

was conclusive evidence in favour of the adoption notwithstanding that the question of adoption was not the point in dispute before the punchayet and that the report had otherwise been tampered with. (*Lord Hobhouse.*) *AJABSING v. NARABHAU VALAD DHANSING RAUL.*

(1898) 26 I. A. 48 (53) = 25 B. 1 (7-8) = 3 C. W. N. 130 = 7 Sar. 443.

Affirmative proposition—Proof of

—Contradictory negative proposition—Witnesses deposing to a—Evidence of, not reliable—Proof of, not enough to establish affirmative proposition. (*Lord Atkinson.*) *SRI-MATI SARAT KUMARI DAS v. AMULLYADHAN KUNDU.*

(1922) 17 L. W. 481 (483) =

A. I. R. 1923 P. C. 13 = 32 M. L. T. (P. C.) 137 =

37 C. L. J. 501 = 25 Bom. L. R. 548 =

(1923) M. W. N. 392 = 72 I. C. 632.

Age.

—Application to court, for return of documents, as a major—Court treating applicant as a major, on evidence of his *Vakil* that he had attained majority—Value of.

In a suit instituted on the 18th of August, 1882, the question was whether the plaintiff had attained his majority more than one year before that time.

It appeared that an application was made for the return of documents, which was presented by a pleader; and in that application the plaintiff was made to state, or stated "I have attained my majority since 1880, and have been personally transacting my own affairs." Upon that application, after a report was made to the Judge by the record-keeper, an order was made that the documents should be returned on the petitioner having attained his majority. The pleader who was employed to present the petition was examined as a witness, and he appeared to have asked to see the petitioner, and saw him. He said that the plaintiff on that occasion told him that he had attained majority.

Held that that supported the conclusion of the Sub-Judge that the plaintiff had attained his majority more than one year before suit (204).

It is suggested that the plaintiff had then in his mind the age of 18, but it is not to be supposed that the pleader, who no doubt was acquainted with the law did not consider that the proper age to be attained was twenty-one, and certainly a judge whose duty it was to see that the plaintiff was entitled to have back the documents would have to consider whether it was true or not that he had attained his majority (204). (*Sir Richard Couch.*) *MUNGNIRAM MARWARI v. MOHUNT GURSAHAI NUND.* (1889) 16 I. A. 195 = 17 C. 347 (360-1) = 5 Sar. 463.

—Birth—Date of—Plaint allegation as to—Statement on oath made at settlement of issues—Discrepancy between.

In a case in which the question was as to the date of birth of the plaintiff, his plaint and his witnesses stated that he was born on January 4; while he himself, in his statement on oath, made at the time of the settlement of the issues, stated that he was born on January 6. Either date was equally good for his case. The Court of appeal commented upon this matter unfavourably.

Their Lordships, on appeal, observed that plaintiff could not himself know on which day he was born, and if he made some error or misstatement to that very trifling extent it would not destroy his case (288). (*Lord Phillimore.*) *BANWARI LAL v. MAHESH.* (1918) 45 I. A. 284 =

41 A. 63 (67) = 21 O. C. 228 = 23 C. W. N. 577 =

(1919) M. W. N. 490 = 49 I. C. 540.

—Birth-day books—Entries in.

On an issue relating to the age of the appellant, her grandmother, who was examined for her, spoke to the date of her

EVIDENCE—(Contd.)**Age—(Contd.)**

birth, and produced birth-day books which contained an entry of the appellant's birth at the date spoken to by her. The evidence showed a practice to make entries of dates of births in books in order to obtain the opinion of astrologers as to good or ill fortune.

Held that under the Straits Settlements Ordinance No. 3 of 1893, which was identical with the sections of the Indian Evidence Act bearing on the point, the birth-day books, if the parol evidence concerning them was accepted, were clearly admissible. (*Sir Arthur Channell.*) *CHUAH HOOI GNOH NEOH v. KHAW SIM BEE.*

(1915) 19 C. W. N. 787 (790) = 31 I. C. 637.

—Deposition in prior suit—Heading of—Age given in—Evidentiary value of—Duty to explain.

The plaintiff stated in his plaint that he attained majority in January, 1880, that is, when he completed his age of 18 years. The question was as to the truth of that statement.

Examined as a witness in another case at a time when he had no idea of bringing such a suit, the plaintiff had, however, stated his then age to be 25 years, and distinctly said that he was a minor up to 1879, that is, until he completed the age of 21. The statement was a deposition which he made in that suit, and in that deposition there was this statement:—"My name is G, father's name M, age 24 years." The plaintiff did not go into the box and explain away his previous statement, though the trial Judge remarked that it would be satisfactory if the plaintiff himself was examined.

Held that the trial Judge had properly attached considerable importance to that previous statement (202).

It was urged that the heading of a deposition of this kind is not of much importance; that the statement of the age by a witness is taken down in such a way that little weight ought to be attached to it. The answer to that seems to be that if the plaintiff made this statement without considering what his age was, or made it in a loose and informal manner, he might have come forward as a witness, or been produced as a witness by his legal advisers and explained it. He might have shown how it was that he came to allow his age to be put down at twenty-four years, when, according to his present case, he was some three or four years younger at that time and would be nineteen or twenty (202). (*Sir Richard Couch.*) *MUNGNIRAM MARWARI v. MOHUNT GURSAHAI NAND.* (1889) 16 I. A. 195 =

17 C. 347 (358-9) = 5 Sar. 463.

—See also EVIDENCE—DEPOSITION.

—Doctor's certificate—Declaration of party concerned before Magistrate based on.

A doctor gave a certificate stating that in his opinion A was of the age of 21 years. On examination, he said that he formed the opinion that A was 21, judging by his teeth, his appearance, and his voice. *Held* that such a certificate was worthless (260).

It is in truth not a certificate, but only an assertion of opinion (260).

Held further that a declaration made by A before a Magistrate to the effect. "By the certificate of Dr. Bright, hereto annexed and marked 'A', I believe I am over 21 years of age," was of no greater value than the certificate itself (260-1).

Held that proof of the age of A was not advanced by such documents (261). (*Lord Shaw.*) *MAHOMED SYEDOL ARIFFIN v. YEOH OOI GARK.*

(1916) 43 I. A. 256 = 21 C. W. N. 257 =

(1917) M. W. N. 162 = 19 Bom. L. R. 157 = 39 I. C. 401.

—Family record of date of birth—Entry by father in. See STRAITS SETTLEMENTS EVIDENCE ORDINANCE—S. 32 (5).

(1916) 43 I. A. 256 (261, 263).

EVIDENCE—(Contd.)**Age—(Contd.)**

—*Mohunt—Age of, at date of deed by predecessor of, appointing him successor—13 only or nearly 18—Description in deed of successor as more competent to manage affairs than other disciples—Guardian not appointed by deed—Evidentiary value of.*

A hibbanamah by which *H*, the then mohunt of a muth appointed the plaintiff to be his successor, stated, as a reason for the selection of the plaintiff, that "no one out of *H*'s old disciples is intelligent and clever enough to discharge and manage the zemindari, village, and Court affairs, and the affairs relating to the gaddi of mohuntship," and that the plaintiff "is competent to manage the zemindari, village, and Courts affairs, as the holder of the estate to be left, and the guddi of mohuntship."

In a suit subsequently instituted by the plaintiff he gave an age at the date thereof which would make him only a youth of 13 at the date of the hibbanama. The defendant's contention was that at the date of the hibbanama the plaintiff was very nearly attaining the age of 18.

Held, that the language of the hibbanama quoted above together with the fact that no provision was made therein for the appointment of a guardian for plaintiff was not consistent with the plaintiff's case, although it might be consistent with that of the defendant, and that the hibbanama therefore threw some light upon the question of the age of the plaintiff (203). (*Sir Richard Couch.*) *MUNG-NIRAM MARWARI v. MOHUNT GURSAHAI NUND.*

(1889) 16 I. A. 195 = 17 C. 347 (359-60) = 5 Sar. 463.

—*Oral evidence as to, given after long lapse of time—Contemporaneous statements made without any possible motive for misrepresenting facts—Conflict between—Preference.*

Oral evidence as to the age of a person given after a long lapse of time cannot be held to be conclusive. Such evidence is always far less reliable than contemporaneous statements made without any possible motive for misrepresenting the facts. (*Lord Salvesen.*) *SADIQ ALIKHAN v. KISHORI.* (1928) 26 A. L. J. 685 = 47 C. L. J. 628 =

32 C. W. N. 874 = 5 O. W. N. 547 = 28 L. W. 17 = 109 I. C. 387 (2) = 30 Bom. L. R. 1346 =

A. I. R. 1928 P. C. 152 = 55 M. L. J. 88 (94).

—*Woman—Age of—Husband's affidavit as to, sworn to before dispute—Admissibility of.*

On an issue as to the age of a woman, *held* that an affidavit sworn to by her husband previously could not have been admissible as a material document if the deponent had not been called or if his parol evidence had not been admissible, but that, as he was called and his statement as to his wife's age was admissible, he could not have been prevented from saying that he had sworn to the same date before the question in dispute arose, and that that was the materiality of the affidavit (790). (*Sir Arthur Channel.*) *CHUAH HOOI GNOH NEOH v. KHAW SIM BEE.*

(1915) 19 C. W. N. 787 = 31 I. C. 637.

—*Woman—Age of—Husband's parol evidence as to—Admissibility and value of.*

On an issue as to the age of the appellant, *held* that the parol evidence of the husband was admissible under the Straits Settlements Ordinance No. 3 of 1893 for what it was worth (which, of course, was very little). (*Sir Arthur Channel.*) *CHUAH HOOI GNOH NEOH v. KHAW SIM BEE.* (1915) 19 C. W. N. 787 (790) = 31 I. C. 637.

Alienability of property—Custom against.

—*Evidence of—Instances of alienation—Absence of—Value of.* See HINDU LAW—CUSTOM—ALIENABILITY OF PROPERTY—CUSTOM AGAINST.

Ante-Nuptial agreement.

—*See ANTE-NUPTIAL AGREEMENT.*

EVIDENCE—(Contd.)**Appeal.**

—*See UNDER APPEAL.*

Award—Validity of—Question as to, between plaintiff and defendant—Evidence.

—*Decree obtained on foot of award by third party against plaintiff and defendant—Admissibility.* See ARBITRATION—AWARD—VALIDITY OF—QUESTION AS TO, BETWEEN PLAINTIFF AND DEFENDANT.

(1894) 21 I. A. 148 (158) = 17 A. 1 (14).

—*Benami transaction—Evidence of.* See BENAMI—EVIDENCE.

Best evidence rule.

—*Applicability in India of.*

There seems to be no reason for assuming that a rule requiring the best evidence producible to be produced has no application to courts of which the Judges may be presumed to be, for want of professional training, less capable than they are elsewhere of weighing the effect of evidence (21). (*Lord Hatherley, L. C.*) *FORESTER v. SECRETARY OF STATE FOR INDIA.* (1872) Sup. I. A. 10 =

12 B. L. R. 120 = 18 W. R. 349 = 3 Sar. 1 =

1 P. R. 1872 = 2 Suth. 628.

—*Compliance with—Necessity.*

Considerable, and perhaps undue laxity in admitting documents has been sometimes allowed by the Indian Courts: but their Lordships consider that, whilst it may not be desirable, in all cases to apply strict and technical rules to the admissibility of evidence in the courts in India, the substantial principles on which the authenticity and value of all evidence rest should be observed. One of these principles is that the best evidence of which the subject is capable ought to be produced, or its absence reasonably accounted for or explained before secondary and inferior evidence is received. (*Sir Mantague E. Smith.*) *RAMALAKSHMI AMMAL v. SIVANANTHA PERUMAL SETHURAYER.* (1872) Sup. I. A. 1 (4-5) = 17 W. R. 553 = 2 Suth. 603 =

12 B. L. R. 396 = 3 Sar. 108 = 14 M. I. A. 570.

Birth—Date of.

—(*See also EVIDENCE—AGE.*)

—*Evidence of—Lapse of time—Effect—England and India—Distinction.*

In India it is no doubt difficult to prove such facts as the date of birth, after a lapse of many years, and it would be unreasonable to require such a class of evidence as would justly be demanded in England. But the evidence must be such as to carry reasonable conviction to the mind. (*Sir Arthur Wilson.*) *ARA BEGAM v. NANHI BEGAM.*

(1906) 34 I. A. 1 (4) = 29 A. 29 (33) = 1 M. L. T. 429 = 5 C. L. J. 4 = 11 C. W. N. 130 = 9 Bom. L. R. 80 = 17 M. L. J. 32.

—*Family record of date of birth—Entry by father in.* See STRAITS SETTLEMENTS EVIDENCE ORDINANCE—S. 32 (5). (1916) 43 I. A. 256 (261, 263).

—*Proof of Quantum.*

In this case the question was whether the plaintiff had shown by sufficiently trustworthy evidence that she came of age within three years before commencing her suit. On the proof of the date of her birth depended the question of whether or not the suit was barred by limitation. *Held*, reversing the judgment of the appellate court and restoring that of the trial Judge, that the plaintiff had failed to prove her story as to the date of her birth. (*Sir Arthur Wilson.*) *ARA BEGAM v. NANHI BEGUM.*

(1906) 34 I. A. 1 = 29 A. 29 = 1 M. L. T. 429 = 5 C. L. J. 4 = 11 C. W. N. 130 = 9 Bom. L. R. 80 = 17 M. L. J. 32

EVIDENCE—(Contd.)**Birth—Date of—(Contd.)**

———Servants—Evidence of — Rejection of — Grounds.
See EVIDENCE—WITNESSES—SERVANTS.

(1895) 22 I. A. 119 (126) = 18 M. 347 (356).

Borrowing—Terms of—Reasonableness and propriety of.

———Other borrowings by same borrower on similar onerous terms—Evidence of—Admissibility. See EVIDENCE—LOAN—TERMS OF.

Boundary.

———Evidence of. See BOUNDARY—EVIDENCE.

Boundary dispute.

———Evidence of. See BOUNDARY DISPUTE—EVIDENCE.

Chittas.

———Admissibility—Zemindar and tenant—Dispute between—Zemindar and rival proprietor—Dispute as to boundary between—Cases of—Distinction.

The document put in evidence and relied upon by the appellant appears to be only a copy of a chittah of resumed land, and it is introduced by no evidence preparing the way for its reception. Whatever might be the value of the chittahs in general in questions between the Zemindar and his tenants or ryots, to receive them as evidence of boundary, against a rival proprietor, without further account, introduction, or verification, would, if it obtained as a practice, and each relaxation is apt to become a precedent for another, tend further to encourage the manufacture of evidence in a place already too prone to the fabrication of it. (*Lord Chelmsford.*) SREE ECKOWRIE SINGH v. HEERALOLL SEAL. (1868) 12 M. I. A. 136 (142 3) = 11 W. R. P. C. 2 = 2 B. L. R. P. C. 4 = 2 Suth. 171 = 2 Sar. 399.

Circuit Committee—Records of.

———Value of—Service tenure—Resumption of—Zemindar's right of—Statement as to. See CIRCUIT COMMITTEE—PURPOSE OF. (1905) 33 I. A. 46 = 29 M. 52 (57).

Circumstantial evidence.

———Use of, to discredit direct and positive evidence—Propriety—No evidence contra—Effect.

The question was whether or not a compromise of a suit purporting to have been made and entered into by a purdanishin lady had in fact been so made and entered with her full knowledge and consent or the contrary.

The lady and one of her brothers practically denied that she ever consented to the compromise. No witness gave direct and positive evidence that she did consent to it. There was also no documentary evidence to prove that she did so. Yet the appellate Judges considered that the circumstantial evidence given in the case went to show that the evidence of the lady and her brother was false, and found that the compromise was made with the knowledge and consent of the lady.

Held, that the learned Judges erred in so finding.

If there was a conflict of evidence on the point some witnesses asserting that the lady did consent to the compromise, some the contrary, it would be perfectly legitimate to take into consideration the circumstantial evidence with a view to show that evidence of the first class of witnesses was true and that of the second false. But in this case, there is no conflict of evidence of this kind. (*Lord Atkinson.*) SRIMATI SARAT KUMARI DAS v. AMULLYADHAN KUNDU. 1922 17 L. W. 481 (483) =

A. I. R. 1923 P. C. 13 = 37 C. L. J. 501 = 25 Bom. L. R. 548 = 72 I. C. 632 = (1923) M. W. N. 392 = 32 M. L. T. (P. C.) 137.

EVIDENCE—(Contd.)**Civil suit—Criminal proceedings prior.**

———Evidence in latter—Admissibility of, in former. See EVIDENCE—CRIMINAL CASE.

Co defendants.

———(See also EJECTMENT SUIT—CO-DEFENDANTS.)

———Admission by one of—Admissibility of, against the other or others. See ADMISSION.

———Conveyance of suit estate by one of, to plaintiff—Admissibility of, against other defendants in proof of plaintiff's title—Conveyance prior to suit—Plaintiff without title otherwise.

In a suit brought by the only son of a daughter of *R* to recover the property of *R* from the defendants, who represented *R*'s brothers, it was found that the plaintiff was not the heir of *R* but that *N*, an aunt of the plaintiff, was the real heir of *R*. *N* was also a defendant in the suit.

Held, that if a Vakil professing to act for *N* had filed a deed purporting to have been executed by her before the commencement of the suit conveying the estate to the plaintiff, it would not have been evidence against other defendants without further proof (129). (*Sir Barnes Peacock.*) AUMIRTOLALL BOSE v. RAJONUKANT MITTER. (1875) 2 I. A. 113 = 15 B. L. R. 10 = 23 W. R. 214 = 3 Sar. 430 = 3 Suth. 94.

Collector—Proceedings before— Evidence in, or information obtained at—Admissibility in Civil suit of.

———Departmental inquiries by—Ex parte depositions of witnesses in.

The suit was brought on the part of the Government of Bengal against the appellant, who was a surety for *S* the Treasurer of the Mirzapore Collectorate, to recover a sum of money with interest. The case on the part of the Government was, that between the years 1843 and 1848 the Treasurer had been a party to the embezzlement of the sums of money in question.

It appeared that when the alleged frauds were in the first instance discovered, the first thing which was done was that the Collector went down to examine into the matter, and to examine everybody who could give any information upon the subject, to find out what the truth of the matter really was, and he took a great number of depositions, and no doubt examined those persons from whom he thought he could get information privately, when neither *S* nor the appellant were present.

Held that the depositions so taken by the Collector were inadmissible in evidence (91).

If the witnesses whose depositions were so taken were alive (and there is nothing to show that any of them except *S* were dead), they ought to have been called at the trial; and to rely upon an *ex parte* deposition of a witness who might have been called and cross-examined at the trial, would not be a practice that their Lordships would at all agree with, or think that any weight should be given to their depositions (91). (*Lord Justice Mellish.*) LALLA BUNSIDHUR v. GOVERNMENT OF BENGAL. (1871) 14 M. I. A. 86 = 16 W. R. P. C. 11 = 9 B. L. R. 364 = 2 Suth. 448 = 2 Sar. 689.

———Ex parte inquiries—Statement obtained at.

In a suit brought by the presumptive collateral heir to a deceased Hindu, the question was whether the defendant was the real son and heir of the deceased, or, as alleged by the plaintiff, the real son and heir of the deceased of the same name as the appellant had died and the appellant was fraudulently substituted in his place. The trial Judge disbelieved the plaintiff's evidence and dismissed the suit. The High Court reversed his decree, relying chiefly upon the result of certain enquiries made previously by two officials. These inquiries were instituted as the result of an applica-

EVIDENCE—(Contd.)

Collector—Proceedings before—Evidence in, or information obtained at—Admissibility in Civil suit of—(Contd.)

tion by the presumptive heir to the Collector asserting the death of the real heir of the deceased, alleging the intention to substitute another boy in his place, and seeking assistance. The officials deputed by the Collector went to the place concerned and took statements from the boy alleged to be the substitute and from ?

Seemle the materials relating to the said inquiries, at any rate, some of them, were inadmissible in evidence.

Held that, assuming the evidence to be admissible, it was of little, if any, value.

The inquiries, if they can be called official in any sense, were certainly not judicial. The inquiries were secret; no notice was given to anybody on behalf of the boy. Nobody was present throughout the inquiries to represent the boy or protect his interests. There was nobody to check the mode in which the alleged statements were elicited, whether by leading questions or otherwise, nobody to test the statements by cross-examination, nobody to watch the accuracy with which they were recorded. (*Sir Arthur Wilson*). **CHANDRASANGJI HIMATSANGJI v. MOHANSANGJI HAMIR-SANGJI.** (1906) 33 I. A. 198 (206-7) =

30 B. 523 (535 6) = 4 C. L. J. 181 = 8 Bom. L. R. 705 = 1 M. L. T. 301.

———*Mutation—Proceedings—Statements made in—Civil suit subsequent—Admissibility of statements in.*

In a Civil suit in which the question was whether an alleged posthumous son of a deceased Hindu was his real legitimate son or was only a spurious son, *held* that there might be very considerable doubt as to whether statements made before the Collector in mutation proceedings, which truly did not form a part of the suit, should have been admitted in the Civil Suit. (*Lord Shaw*). **SARDAR GURBAKSH v. GURDIAL SINGH.**

(1927) 46 C. L. J. 272 = A. I. R. 1927 P. C. 230 =

4 O. W. N. 935 = (1927) M. W. N. 778 =

29 Bom. L. R. 1392 = 28 Punj. L. R. 567 =

105 I. C. 220 = 32 C. W. N. 119 = 53 M. L. J. 392.

———*Statements obtained by one of parties to, and forwarded in—Admissibility of, in Civil suit—Statements not obtained by competent or independent authority.*

The question in the appeal related to the right of the Zemindars of Ramnad either to appoint, or to confirm the election of the *pandaram* or head of the pagoda of Rameswaram.

The Counsel for the Zemindar strongly relied on statements found in certain depositions as affording proof of the direct appointment and removal of *pandarams* by the Rajahs of Ramnad prior to the Christian year 1793; and if those statements were admissible and trustworthy, they would afford strong support to the Zemindar's case.

The depositions were taken in 1815, on the death of *Pandaram R*, who had held the office from 1793. On his death *V* claimed to be his successor, alleging that he had been appointed by his predecessor according to custom. Objections were made to the Collector of the District against his appointment, upon the ground that he had not been nominated by the dying *pandaram*, but had been put forward after his death by certain persons attached to the pagoda. The Collector required the head Tahsildar to make inquiries as to the fact, and time of *V*'s appointment, and several depositions, the authenticity of which was not questioned, were taken by him, bearing on that matter. The statements in question appeared to have been made at that time, but there was no satisfactory evidence to show they were obtained by any competent or independent authority. It was suggested that they were taken by the tahsildar, but there was no proof of that, and the tahsildar's report was

VIDENCE—(Contd.)

Collector—Proceedings before—Evidence in, or information obtained at—Admissibility in Civil suit of—(Contd.)

not forthcoming. On the other hand, the form of the documents led to the inference that they had not been so taken. They were addressed "to the company's circar", signed by the deponents, and attested by two native witnesses, from which it might be inferred that they were written statements obtained on behalf of the zemindar, and sent to the Tahsildar to be forwarded to the Collector.

Held, that such statements ought not to be received as proof of an important right, and that they had properly been rejected as inadmissible by the High Court (229-30.) (*Sir Montague E. Smith*). **RAJAH MUTHU RAMALINGA SETUPATI v. PERIANAYAGAM PILLAI.**

(1874) 1 I. A. 209 = 3 Sar. 344.

Commission.

———Evidence taken on. *See* COMMISSION AND COMMISSIONER.

Commissioner for taking.

———*See* COMMISSIONER.

Compromise.

———*See* UNDER COMPROMISE.

Conflict of—Judgment in case of.

———Basis proper of. *See* JUDGMENT—BASIS PROPER OF—EVIDENCE—ORAL EVIDENCE.

———Conjecture — Not a substitute for evidence. *See* JUDGMENT—BASIS PROPER OF—EVIDENCE — CONJECTURE.

35 I. A. 206 (211) = 35 C. 1039 (1046).

Connected suits — Evidence in one of.

———Admissibility in the others. *See* EVIDENCE—LITIGATIONS.

Consideration of case on.

———*Conduct of parties as disclosed by pleadings and by evidence adduced or withheld—Presumptions from—Regard for—Necessity.*

The consideration of a case upon evidence can seldom be satisfactory, unless all the presumptions for and against a claim arising on all the evidence offered or on proofs withheld, in the course of pleading, and tardy production of important portions of a claim, or defence, be viewed in connection with the oral or documentary proof which *per se* might suffice to establish it. This caution is more particularly necessary in India, where fabrication of seals and documents is so common and so skillfully conducted (453). (*Lord Chelmsford*). **MAHARAJAH RAJUNDUR KISHWUR SING, BAHADOOR v. SHEOPURUN MISSER.**

(1866) 10 M. I. A. 438 = 5 W. R. P. C. 55 =

1 Suth. 628 = 2 Sar. 174.

Contemporaneous written statements.

———Best evidence of nature of transaction between parties is their. *See* EVIDENCE—TRANSACTION—NATURE OF.

(1880) 7 I. A. 83 (91-2) = 2 M. 239 (249).

———Oral evidence given after long lapse of time—Conflict between—Preference, *See* EVIDENCE—AGE—ORAL EVIDENCE OF, ETC. (1928) 55 M. L. J. 88 (94).

Contract.

———*See* UNDER CONTRACT.

Contradiction in—Indian Cases.

———*Characteristic of.*

In almost all cases from India, the evidence is contradictory (104). (*Mr. Pemberton Leigh*). **RUNGAMMA v. ATCHAMMA.** (1846) 4 M. I. A. 1 = 7 W. R. P. C. 57 =

1 Suth. 197 = 1 Sar. 313.

EVIDENCE—(Contd.)**Criminal Case.**

—Admission to Magistrate in—Note in his judgment as to—Admissibility in Civil suit. *See* MARRIAGE—EVIDENCE—CIVIL SUIT. (1916) 43 I.A. 73 (81) = 43 C. 707 (720-1.)

—Deposition in—Admissibility in subsequent Civil suit.

Their Lordships regret to observe that not only are the circumstances with regard to the criminal proceedings referred to in the present litigation by the parties, but that the depositions therein become matter apparently of materiality in the judgment of the learned Judges of the High Court (146.)

In the opinion of the Board this was an irregularity of a somewhat serious character. They refer particularly to the depositions in the criminal case, which seem to have been imported in bulk into the present. There is a risk by such procedure of justice being perverted. A civil cause must be conducted in the ordinary and regular way, and judged of by the evidence led therein. Not one of the circumstances mentioned in S. 33 of the Evidence Act was proved in the present case, and the depositions could not have been used with propriety even to support the evidence of the plaintiffs, which they appear to have done. But there appears to have been no warrant whatsoever for using them for the purpose of either contradicting or discounting the evidence of the witnesses given in this suit, unless the particular matter or point had been placed before the witness as one for explanation in view of its discrepancy with the evidence then being tendered. It was stated to their Lordships that the prosecution for perjury had in the end completely failed. With that their Lordships have nothing to do. The judgment now given is pronounced irrespective of the result of the criminal suit. Successful or unsuccessful, the introduction and use in this civil action of these criminal proceedings were illegitimate (146). (*Lord Shaw.*) *BAL GANGA-DHAR TILAK v. SRINIVAS PANDIT.*

(1915) 42 I.A. 135 = 39 B. 441 (460) = 17 Bom. L.R. 527 = 19 C.W.N. 729 = 22 C.L.J. 1 = 18 M.L.T. 1 = (1915) M.W.N. 454 = 2 L.W. 611 = 13 A.L.J. 570 = 29 I.C. 639 = 29 M.L.J. 34.

—In a civil suit in which an issue was raised as to whether the defendant was a married man and the father of children, *held* that a copy of the deposition of a witness who was examined in a criminal case against the defendant but who was not, though he could have been, examined in the suit was inadmissible (81). (*Lord Shaw.*) *RAM PARKASH DAS v. ANAND DAS.* (1916) 43 I.A. 73 =

43 C. 707 (720-1) = 33 I.C. 583 = 20 C.W.N. 802 = 14 A.L.J. 621 = (1916) 1 M.W.N. 406 = 18 Bom. L.R. 49 = 24 C.L.J. 116 = 20 M.L.T. 267 = 3 L.W. 556 = 31 M.L.J. 1.

Criminal Procedure Code, S. 145.

—Order under—Admissibility of—Purpose and extent of. *See* CR. P. CODE—S. 145—ORDER UNDER—ADMISSIBILITY IN EVIDENCE OF.

(1901) 29 I.A. 24 (33-4) = 29 C. 187 (198).

—Order under—Land referred to in—Description of—Identity—Extrinsic evidence as to—Admissibility. *See* CR. P. CODE, S. 145—ORDER UNDER—LAND REFERRED TO IN. (1901) 29 I.A. 24 (33-4) = 29 C. 187 (198).

—Order under—Map referred to in—Admissibility of—Purpose of. *See* CR. P. CODE, S. 145—ORDER UNDER—MAP REFERRED TO IN.

(1901) 29 I.A. 24 (33-4) = 29 C. 187 (198)

—Order under—Reports accompanying, but not referred to in—Admissibility in evidence of—Evidence Act,

EVIDENCE—(Contd.)**Criminal Procedure Code—(Contd.)**

S. 13. *See* CR. P. CODE, S. 145—ORDER UNDER—REPORTS ACCOMPANYING, ETC.

(1901) 29 I.A. 24 (33-4) = 29 C. 187 (198).

—Proceeding under—Summons in—Schedule to—Description of property in—Parties to proceeding not responsible for—Description not evidence against either of them.

The boundaries of property given in the Schedule to the summons in a proceeding under S. 145 of Criminal Procedure Code are presumably those given to the Magistrate by a Police Officer apprehending a breach of the peace and neither party is responsible for the statement of the boundaries therein. (*Lord Blanesburgh.*) *MAHARAJADHIRAJ SIR REMESHWAR SINGH v. BAJIT LAL PATHAK.*

(1929) 33 C.W.N. 430 = 27 A.L.J. 261 = 49 C.L.J. 308 = 6 O.W.N. 413 = 114 I.C. 592 = I.R. (1929) P. C. 104 = 31 Bom. L.R. 721 = 29 L.W. 501 = A.I.R. 1929 P. C. 95 = 57 M.L.J. 565.

Cross-suits—Evidence in one of,

—Use of, in the other. *See* EVIDENCE—LITIGATIONS—CROSS SUITS.

Custom.

—Evidence of. *See* (1) CUSTOM—EVIDENCE OF (2) HINDU LAW—CUSTOM.

Date—Native and English dates.

—Conflict between, in Patwari's report as to date of death. *See* EVIDENCE—DEATH—DATE OF.

(1902) 30 I.A. 27 (31) = 25 A. 143 (151).

Death—Date of.

—Arbitration among members of deceased's family—Award made on—Share to deceased and his children in—Reservation of—Value of. *See* ARBITRATION—AWARD—MAHOMEDAN LAW. (1905) 32 I.A. 177 (180) = 33 C. 173 (178-9).

—Patwari's report regarding mutation of names—Date given in—Dates, native and English, given in—Conflict between.

The question was as to the date of a lady's death. The Patwari's report regarding mutation of names stated that she died on Sawan Sudi 5th, 1886 Fasli. That day admittedly corresponded to July 25. The report, however, added the words "corresponding to 20th July". The question was as to which date was to be taken to be correct, July 25 or 20th July.

Held, that in a statement thus made by the Patwari the substantive statement was that given in the vernacular, and that the rest was a miscalculation, and that therefore, 25th July which corresponded to the vernacular date given was to be taken to be the correct date (31). (*Lord Robertson.*) *RAI JAGATPAL SINGH v. RAJAH JAGESHAR BAKSH SINGH.* (1902) 30 I.A. 27 = 25 A. 143 (151) = 7 C. W. N. 209 = 8 Sar. 367.

—Patwari's report regarding mutation of names—Date given in—Value of.

The question was as to the date of the death of a lady.

Held, that, on such a question, the deliberate and intentional statement of the date of the lady's death contained in the report of the Patwari regarding mutation of names was very important evidence (31). (*Lord Robertson.*) *RAI JAGATPAL SINGH v. RAJA JAGESHAR BAKSH SINGH.*

(1902) 30 I.A. 27 = 25 A. 143 (151) = 7 C. W. N. 209 = 8 Sar. 367.

—Purohit of family—Entry in register kept by—Admissibility—Interpolation of entry—Effect.

EVIDENCE—(Contd.)**Death—Date of—(Contd.)**

In a suit by a reversionary heir of a deceased Hindu for the recovery of possession of his properties after the death of his widow the question was as to the date of the death of the widow. The principal evidence in support of the plaintiff's case as to the date of her death was a private register purporting to be kept by the purohit of the family and his son containing a list of the names of certain deceased persons according to the dates when their annual ceremonies would occur. This was supposed to have been prepared in the ordinary course of business with a view to the purohit's being engaged to perform the ceremonies when the time came round. In the list of deceased persons given in the book was the name of the widow, the date of whose death was in question. It appeared, however, that the crucial entry, that relating to the widow in question, was interpolated.

Held, affirming the High Court, that the register was not of such a character as to enable their Lordships to pronounce affirmatively that the entry in question was made at the date alleged, and that the register could not therefore be relied upon by the plaintiff. (*Lord Shaw.*) MALRAJU VENKATA RAMA KRISHNA RAU GARU *v.* KOPPURAVURI SRIRAMULU, (1924) 20 L. W. 1 = 26 Bom. L. R. 563 = A. I. R. 1924 P. C. 136 = 46 M. L. J. 541.

Debt.

—Deceased—Debt of—Evidence of. *See* DECEASED—DEBT OF.

—Evidence of—Account books of creditor not *per se* sufficient. *See* DEBT—EVIDENCE OF.

—Payment of—Evidence of—Debtor's account books not *per se* sufficient. *See* DEBT—PAYMENT OF—EVIDENCE OF. (1875) 23 W. R. 390.

Deceased.

—*See* DECEASED AND EVIDENCE—DOCUMENT—DECEASED PERSON.

Deed.

—*See* DEED AND EVIDENCE—DOCUMENT.

Defendant.

—(See ALSO EVIDENCE—PARTY).

—Co-defendants. *See* EVIDENCE—CO-DEFENDANTS.

—Evidence of—Reliance on, for support of plaintiff's case.

The Court of original jurisdiction seems indeed principally to have relied on the defendant's evidence for the support of the plaintiff's case. It may undoubtedly sometimes happen that the evidence adduced by the defendant instead of supporting his case, may establish that of his adversary (161). (*Sir John Romilly.*) SEVVAJI VIJAYA RAGHUNADHA *v.* CHINNA NAYANA CHETTI. (1864) 10 M. I. A. 151 = 2 Sar. 88.

—Opposing case of, found to be false—Plaintiff's case if can be held proved by reason of—Mortgage—Redemption—Suit for—Sale absolute—Defendant's opposing case of.

The suit was by the appellant, the reversionary heir of V, to redeem a usufructuary mortgage of the suit property, alleged to have been made by V's widow in favour of the ancestor of the respondent, nearly 40 years before suit. The question was whether the alleged mortgage was proved.

The evidence adduced by the appellant was insufficient to establish the suit mortgage. The defendant, however, alleged that V sold the village to his ancestor, and he put in evidence a Bill of Sale purporting to be executed by V and supported it by many witnesses. That document was clearly shown to have been a forgery, and it was not only sufficient

EVIDENCE—(Contd.)**Defendant—(Contd.)**

to destroy that supposed Bill of Sale, but to throw discredit on the oral testimony which the defendant adduced; but it went no further, and the knowledge of the forgery was not brought home to the defendant. The Court of original jurisdiction nevertheless relied principally upon the defendant's evidence for the support of the plaintiff's case.

Held, that the case was not one in which the evidence adduced by the defendant, instead of supporting his case, established that of his adversary, and that it did not follow that, because the Bill of Sale adduced by the defendant was forged, the evidence adduced by the plaintiff must be correct (161). (*Sir John Romilly.*) SEVVAJI VIJAYA RAGHUNADHA *v.* CHINNA NAYANA CHETTI.

(1864) 10 M. I. A. 151 = 2 Sar. 88.

Deposition—Heading of.

—Age given in. *See* EVIDENCE—AGE—DEPOSITION IN PRIOR SUIT. (1889) 16 I. A. 195 (202) = 17 C. 347 (358-9.)

—Description of witness in.

The description of a witness in the heading of a deposition given by him is no part of the deposition proper, that is, no part of the evidence given by the witness on solemn affirmation. It may have been elicited by questions put by the presiding judge. It is just as likely that it was filled in by a subordinate official and on the paper when put into the hands of the judge for him to take down the evidence of the witness. Again it may have been read over to the witness by the judge when the evidence was completed, or the judge may have contented himself with reading over the narrative embodying the evidence, which was all he was bound to do under the Act. (*Lord Macnaghten.*) MUSSUMMAT MAQBULAN *v.* AHMAD HUSAIN. (1903) 31 I. A. 38 (45) = 26 A. 108 (118-9) = 8 C. W. N. 241 = 6 Bom. L. R. 233 = 8 Sar. 583.

Direct and positive evidence—Circumstantial evidence.

—Discrediting of former by latter. *See* EVIDENCE—CIRCUMSTANTIAL EVIDENCE.

(1922) 17 L. W. 481 (483.)

Discrepancies in honest cases.

—Common in India,

Some discrepancies,—such, however, as are not unfrequently found in honest cases in native testimony—were dwelt upon (415). (*Lord Justice Knight Bruce.*) HUNOO-MANPERSAUD PANDAY *v.* MUST. BABOOEE MUNRAJ KOONWEREE. (1856) 6 M. I. A. 393 = 18 W. R. 81 = 2 Suth. 29 = 1 Sar. 552 = Sevestre 253 N.

Divorce.

—*See* DIVORCE.

Document.

—*See also* DEED; EVIDENCE ACT, Ss. 91, 92.

—Admissibility of—Genuineness—Proof of—Admissibility depending upon—Admission because it cannot be held to be a forgery—Propriety.

Where the question is whether a document has been proved to be genuine so as to be admissible in evidence, it cannot be admitted in evidence because the court cannot confidently pronounce the document to be a forgery. That is obviously an incorrect mode of disposing of the question (530). HURMUT-OOL-NISSA BEGUM *v.* ALLABDI KHAN AND HAJI HIDAYAT. (1871) 2 Suth. B. 108. 17 W. O. 13.

—Admissibility of—Indorsement of Judge under R. 4 of C. P. C.—Absence of—Effect. *See* C. P. C. O. 13, R. 4—DOCUMENT ADMITTED IN EVIDENCE (663-4.) (1916) 43 I. A. 212 (236-7) = 38 A. 627

EVIDENCE—(Contd.)**Document—(Contd.)**

—*Admission of—Circular Order No. 9, dated February 26, 1867, of Bengal High Court as to—Strict observance of—Necessity.*

It is essential that the subordinate courts should act according to the rule in the above Circular Order, so that all unnecessary expense may be saved to the parties (873). **MAHARANEE BROJOSOONDERY DEBEA v. RANEE LUCH-MEE KOONWAREE.** (1873) 2 **Suth.** 869 = 20 **W. R.** 95 = 4 **Sar.** 810.

—*Admission of—Custody and genuineness—Proof of—Necessity.*

In the Sudder Dewanny Adawlut the sunnuds were brought forward under circumstances of great suspicion and they ought not to have been received without enquiry into the custody from which they came, or other proof to shew that they were genuine (218.) (*Lord Campbell.*) **SRI SUNKER BHARTI SWAMI v. SIDHA LINGAYAH CHARANTI.** (1843) 3 **M. I. A.** 198 = 6 **W. R.** 39 **P. C.** = 1 **Suth.** 342 = 1 **Sar.** 266.

—*Admission of—Laxity in regard to,*

It is unfortunately too much the habit of Indian Courts to receive documents, without that just discrimination which would prevail were the rules of evidence known and established (168). (*Dr. Lushington.*) **BUNWAREE LAL v. MAHARAJAH HETNARAIN SINGH.** (1858) 7 **M. I. A.** 148 = 4 **W. R.** 128 = 1 **Suth.** 307 = 1 **Sar.** 610

—*Admission of—Order of—What amounts to—Treatment of document subsequently as forged—Propriety.*

In a suit brought by the appellant, as Swami, or Chief Priest, claiming, by grant from the Supreme power of the State, the privilege of *adavi palki*, the appellant, in his appeal to the Sudder Court from the decree dismissing his suit, applied for the admission in evidence of the Shasuns, sunnuds or grants, under which he claimed the suit privilege, and which the court below wrongly refused to admit in evidence on an application for review. The Sudder Court, without any proof of the place where the Shasuns had been kept or found, received them in evidence, and made an order calling upon the appellant to prove that the privilege claimed had been enjoyed since the date of the Sunnud, and that he was the grantee's heir.

Held that, after the said order it was not open to the Sudder Court to treat the Sunnud's as forged (216).

After the said order the appellant had reason to believe that the genuineness of the Sunnuds was admitted and that all that he had to prove was the exercise of the privilege and the spiritual pedigree (216). (*Lord Campbell.*) **SRI SUNKUR BHARTI SWAMI v. SIDHA LINGAYAH CHARANTI.** (1843) 3 **M. I. A.** 198 = 6 **W. R.** 39 **P. C.** = 1 **Suth.** 342 = 1 **Sar.** 266.

—*Ancient document. See EVIDENCE ACT, S. 90.*

—*Deceased person—Informal documents of—Value of.*

In a case like the present, where there has been so much fabrication of formal deeds, such writings as these (*viz.*, letters alleged to have been sent by a deceased person, none of which are authenticated by his seal or signature) must be received with extreme caution (28). (*Lord Watson.*) **COOMARI RODESHWAR v. MANROOP KOER.** (1885) 13 **I. A.** 20 = 4 **Sar.** 689.

—*Description of property in—Mistake as to—Evidence of—Later deeds in favour of third parties by same executant with same description—Rectification of, at their instance—Evidence of—Admissibility. See SPECIFIC RELIEF ACT, S. 31—MORTGAGE DEED—RECTIFICATION OF.* (1914) 41 **I. A.** 110 (119-20) = 41 **C.** 972 (988.)

—*Destruction or effacement of—Common in India.*

In India documentary evidence is peculiarly liable to des-

EVIDENCE—(Contd.)**Document—(Contd.)**

truction or effacement (182). (*Lord Justice Turner.*) **WISE v. BHOOBUN MOYEE DEBIA CHOWDRANEE.**

(1863-5) 10 **M. I. A.** 165 = 3 **W. R.** 5 = 2 **Sar.** 91 = 1 **Suth.** 563.

—*Execution of—Evidence of. See DEED—EXECUTION.*

—*Exhibiting and filing of—Distinction. See EVIDENCE—DOCUMENT—FILING AND EXHIBITING.*

—*Fabrication of. (See also EVIDENCE—DOCUMENT—SEALS.)*

—*Common nature of, in India.*

In India documents are readily fabricated. (*Lord Wynford.*) **SUTROOGUN SUTPUTTY v. SABITRA DYE.**

(1835) 5 **W. R.** 109 **P. C.** = 1 **Suth.** 36 = 2 **Knapp.** 287.

—*See also EVIDENCE—CONSIDERATION OF CASE ON* (1866) 10 **M. I. A.** 438 (453)-

—*Filing and Exhibiting—Distinction between.*

Filing a document is not the same thing as putting it in evidence in the suit (188). (*Sir Richard Couch.*) **HURRI-NATH CHATTERJEE v. MOHUNT MOTHOR MOHUN GOSWAMI.** (1893) 20 **I. A.** 183 = 21 **C.** 8 (16) = 6 **Sar.** 334

—*Forgery—Genuineness—Presumption—Proof—Series of documents showing reasonable origin of title and regular duration thereof—Possession consistent with.*

A long experience in Indian appeals has no doubt satisfied their Lordships that the presumption in favour of the genuineness of documents offered in evidence in that country is very weak; but still it must not be held that the presumption is in favour of forgery; and when a long series of documents is produced showing a reasonable origin of title nearly a century ago, a regular deduction of that title, and a possession consistent with it, the evidence of intrinsic improbability should be very strong indeed which is to counterbalance the weight of such testimony (173). (*Lord Justice Turner.*) **WISE v. BHOOBUN MOYEE DEBIA CHOWDRANEE.** (1863) 10 **M. I. A.** 165 = 3 **W. R.** 5 = 2 **Sar.** 91 = 1 **Suth.** 563,

—*Forgery—Genuineness—Proofs required of—Distinction.*

The proof which is sufficient to establish that a document is genuine may well be far short of that which is necessary to establish that it is a forgery, and the defect of proof must of course fall on the party who propounds the document (530). **HURMUT-OOL-NISSA BEGUM v. ALLABDIA KHAN AND HAJI HIDAYAT.** (1871) 2 **Suth.** 525 = 17 **W. R.** 108.

—*Forgery—Proof of—Suspicion not equivalent to.*

There are suspicious circumstances connected with some of the letters, but suspicion is not proof (875). (*Lord Buckmaster.*) **MUSSUMAT FAKRUNISSA v. MOULVI IZAMS SADIK.** (1921) 25 **C. W. N.** 866 = 63 **I. C.** 898 = 17 **N. L. R.** 72.

—*Genuineness of—Evidence. See DEED—GENUINENESS OF.*

—*Genuineness of—Forgery of—Proofs of, required—Distinction. See EVIDENCE—DOCUMENT—FORGERY OF—GENUINENESS OF.*

—*Genuineness of—Native character—Document in, and passing between Natives—Genuineness of—Decision of Native judges as to—Weight due to.*

The judgment on the point (as to whether letters written in the native character were genuine or not) of a native Judge, dealing with letters in the native character, and pur-

EVIDENCE—(Contd.)**Document —(Contd.)**

porting to have passed between natives, is of very great weight (843-4). (*Sir James Colville.*) **BODH SING DOOD-HOOKIA v. GUNESCHUNDER SEN.** (1873) 2 Suth. 840 = 19 W. R. 356 = 12 B. L. R. 317 = 3 Sar. 253

———Inadmissible document—Admission of—Objection to—Failure to raise—Effect. See EVIDENCE—ADMISSION OF—INADMISSIBLE EVIDENCE—OBJECTION TO.

———Inadmissible document—Admission of—Propriety—Opposite side filing equally inadmissible document to meet same—Effect.

The first set of documents were filed by the plaintiff in the suit, and are now founded upon by the respondents (as proving certain statements to have been made by one B, now deceased). But this B was alive when the plaintiff closed his case. He had been summoned as a witness by both parties. After the defendant had closed his case, the plaintiffs applied for leave to examine a number of witnesses, among them being B. This application was rightly refused. In these circumstances the question is on what ground can the written statements of a person alive when the party founding on them closed his case be received as evidence. It was attempted to distinguish this case on the ground that the defendant had himself (after B was dead), filed certain other statements of this same man. But those documents, which were doubtless filed in case the plaintiff's documents should be admitted, are not evidence; and their production by the defendant cannot be held to compel the court to depart from the rules of evidence in the decision of the case. The Sub-Judge held the documents in question to be inadmissible on the ground that the plaintiffs had not called B as a witness. On appeal the documents were admitted.

Held, that the reception of those documents could not be supported, their alleged author having been alive down to the closing of the plaintiff's case (33-4). (*Lord Robertson.*) **RAI JAGATPAL SINGH v. RAJA JAGESHAR BAKSH SINGH.** (1902) 30 I. A. 27 = 25 A. 143 (153) = 7 C. W. N. 209 = 8 Sar. 367.

———Inadmissible document—Admission of, to prop up oral evidence—Practice of.

To admit documents, not strictly evidence at all, to prop up oral evidence too weak to be relied upon, is not a course which their Lordships would be inclined to approve; and none of the *chittahs* which have been laid aside by the High Court are shown to have been admissible in evidence according to the laws of evidence regulating the decision of those courts. It would expose purchasers to much danger if their possession could be disturbed by inferences from, or statements in, documents not legally admissible in proof against them (142-3). (*Lord Chelmsford.*) **SREE ECKOWRIE SINGH v. HEERALOLL SEAL.**

(1868) 12 M. I. A. 136 = 11 W. R. P. C. 2 = 2 B. L. R. P. C. 4 = 2 Suth. 171 = 2 Sar. 399.

———Inter partes—Deed not—Admissibility—Landlords—Dispute between two—Criminal Proceedings prior between one landlord and ryots of another—Razinama in—Admissibility in evidence to show character of enjoyment.

Where the question was whether plaintiff had a right to the enjoyment of water overflowing from an artificial reservoir through an artificial watercourse on defendant's (his neighbour's) land *held* that a razinama which had been entered into in certain prior criminal proceedings between persons representing plaintiffs' interest against the ryots of the defendant relating to the enjoyment of the said water and which had been subsequently acted upon was admissible in evidence to explain the character of the enjoyment of the water (41-2). (*Sir Montague E. Smith.*) **RAMESHUR PERSHAD NARAIN SINGH v. KOONJ BEHARI PATTUK.**

(1878) 6 I. A. 33 = 4 C. 633 (640) = 3 Sar. 856.

EVIDENCE—(Contd.)**Document—(Contd.)**

———Official documents—Corrections in, made on ex parte application while case is sub judice—Documents with corrections—Admission of.

Judges of the courts below have been induced to treat as authentic various entries in the Collector's books which were not the entries as originally made, but were entries subject to "correction"; and correction made upon an *ex parte* application on behalf of the plaintiff. This application was preferred, and apparently granted, behind the back of the defendant, and during the course of this present litigation (216) It appears to their Lordships to be quite unsafe to place reliance upon a denomination of these lands dependent upon a "correction" which appears, or is alleged, to have been made while the case was *sub judice*, and upon an *ex parte* representation. Their Lordships think that the original state of the records before the so-called corrections were made was that alone to which a Court of Law should have looked. This would at least be the safe and ordinary rule, and there do not appear to be any facts in the present case to ground an exception to it. It is not for their Lordships to pronounce upon the procedure by which such "corrections" of official documents and records can be possible in those districts in circumstances such as are here disclosed (217). (*Lord Shaw.*) **RAGHOJIRAO SAHEB v. LAKSHMANRAO SAHEB.** (1912) 39 I. A. 202 = 36 B. 639 (661) = 16 C. W. N. 1058 = 12 M. L. T. 472 = (1912) M. W. N. 1140 = 14 Bom. L. R. 1226 = 17 C. L. J. 17 = 16 I. C. 239 = 23 M. L. J. 383.

———Opponent—Document put in by—Evidence against party himself if and when becomes—Cross-examination by party with reference to it—Argument founded by him upon it—Effect. See EVIDENCE—DOCUMENT—PLAINTIFF—DOCUMENT PUT IN BY. (1925) 52 I. A. 372 (376-7).

———Plaint—Document filed with, but not exhibited—Admissibility.

The judgment of dismissal of the 27th of June, 1881, although it had been filed with the plaint, was not put in evidence, and cannot be looked at (190). (*Sir Richard Couch.*) **HURRINATH CHATTERJI v. MOHUNT MOTHOR MOHUN GOSWAMI.** (1893) 20 I. A. 183 = 21 C. 8 (16) = 6 Sar. 334.

———Plaintiff—Document put in by—Evidence against defendant if becomes—Cross-examination by defendant with reference to it—Argument founded by him upon it—Effect.

In a suit by the 1st respondent for dissolution of his marriage with the 2nd on the ground of her adultery with the appellant and for damages, the 1st respondent's counsel put in certain letters which were written by the 2nd respondent but which were inadmissible against the appellant though admissible against the 2nd respondent, as part of the 1st respondent's case. Counsel for the appellant objected to their admissibility against his client, and at the trial 1st respondent's counsel admitted they were inadmissible against the appellant. In the appeal to the court below the 1st respondent, however, contended that those letters became evidence against the appellant by reason of his counsel having in cross-examination founded questions upon them, and that contention was upheld by the court below. The Chief Justice observed: "As soon as these letters were used by the defence for the purpose of challenging the plaintiff's honour and *bona fides* they became part of the case between these two parties for all purposes. They were 'in' as between these two parties."

Held, that the court below was wrong.

Before the defendant's counsel asked a single question regarding them they were "in" as part of the plaintiff's own case, and, therefore, questions and arguments might

EVIDENCE—(Contd.)**Document—(Contd.)**

properly be founded upon them without in any way adopting them as part of the evidence produced on behalf of the appellant—for appellant's counsel had a right to rebut that case, and to destroy it, by means of its own component material. There is no identity or analogy between this case and one in which a defendant's counsel makes evidence against his client of a document not already put in, by asking questions on its assumed contents—which questions then lead to its necessary production. There he brings in a fresh document, but these letters were all treated as put in by the plaintiff's counsel. (*Lord Darling.*) *VRASAPILLAI GABRIEL v. ELIATAMBY.* (1925) 52 I. A. 372 (376-7) = A. I. R. 1925 P. C. 229.

—*Production of—Delay in—Objection to admission on ground of—Inference adverse to party guilty of delay—Further investigation necessary but not made.*

Glover, J, remarks that the defendants strongly objected to the books being put in at such a late stage of the case without opportunity being given to them of producing rebutting evidence, and seems to consider there was a miscarriage of justice in their objection being rejected. Supposing this were so, it might be a reason for further investigation, but not for a conclusion adverse to the other side (421). (*Sir Mortgague E. Smith.*) *BURRA LALL OPENDRONATH SAHEE DEO v. COURT OF WARDS.*

(1877) 3 Suth. 414 = Bald. 125 = 1 I. J. 451.

—*Production of—Risk in India attendant upon—Dependent Talukdar—Special risk of.*

The production of documents in the courts of India is subject to risk; and of all men, the dependent Talukdar has the greatest reason to be careful of his title-deeds, since whatever may have been the recognition of his title by his existing Zamindar, he may, at some future time, have to establish that title by the strictest proof against one coming in by purchase at a sale for arrears of revenue. (*Lord Justice Knight Bruce.*) *BABOO GOPAL LALL THAKOOR v. TALUCK CHUNDER RAI.*

(1865) 10 M. I. A. 183 (193) = 3 W. R. (P. C.) 1 = 1 Suth. 558 = 2 Sar. 98.

—*Recitals in—Value of. See DEED—RECITALS IN.*

—*Rejection in appeal of, as not genuine, from mere inspection—Propriety—Court below relying on document.*

In a case in which the testimony of the witnesses was very conflicting the evidence which was to be derived from the entries in certain account books which were brought into court to show on which side the truth lay became of great value. The High Court reversed the court below on a question of fact, by rejecting the entries as not genuine, from their own observation of the books, without taking evidence or re-hearing the case upon that point.

Held, that the High Court ought to have taken evidence and reheard the case on that point (421). (*Sir Montague E. Smith.*) *BURRA LALL OPENDRONATH SAHEE DEO v. COURT OF WARDS.*

(1877) 3 Suth. 414 = Bald. 125 = 1 I. J. 451.

—*Seals—Fabrication of—Practice of, and skill in, in India.*

In India fabrication of seals and documents is very common and very skilfully managed (453). (*Lord Chelmsford.*) *MAHARAJAH RAJUNDUR KISHWUR SING, BAHADOOR v. SHEOPURUN MISSER.* (1866) 10 M. I. A. 438 =

5 W. R. (P. C.) 55 = 1 Suth. 628 = 2 Sar. 174.

—*Seals on. See SEAL.*

—*Secondary evidence of contents of—Admission of—Case proper for, not made out—Other evidence—Admission of—Propriety.*

If a proper case has not been established for the admission of secondary evidence of the contents of a written

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document, and objection has been taken to the fact that the document has not been produced, it is not permissible to go to other evidence for the purpose of indicating what the contents of the written document may prove to be if once it were examined. (*Lord Buckmaster.*) *BONNERJI v. SITANATH DAS.* (1921) 49 I. A. 46 (52) =

49 C. 325 (332) = (1922) M. W. N. 98 =

26 C. W. N. 236 = 30 M. L. T. 182 = 15 L. W. 452 =

20 A. L. J. 294 = 35 C. L. J. 320 = 24 Bom. L. R. 565 =

66 I. C. 140 = A. I. R. 1922 P. C. 209 = 42 M. L. J. 403.

—*Secondary evidence of contents of—Admission of—Objection to—Appeal—Maintainability for first time in.*

It was urged for the appellants that a registered copy of the will was admitted in evidence without sufficient foundation being laid for its admission. No objection, however, appears to have been taken in the first court against the copy obtained from the Registrar's Office being put in evidence. Had such objection been made at the time, the trial Judge would probably have seen that the deficiency was supplied. There is no substance in this contention. (*Mr. Ameer Ali.*) *PADMAN v. HANWANTA.*

(1915) 18 M. L. T. 54 = 19 C. W. N. 929 = 13 A. L. J. 801 =

17 Bom. L. R. 609 = 2 L. W. 645 = (1915) M. W. N. 500 =

22 C. L. J. 172 = 110 P. W. R. 1915 = 93 P. R. 1915 =

11 P. L. R. 1916 = 29 I. C. 807 =

29 M. L. J. 307 (312).

—*Secondary evidence of contents of—Certified copy—Admissibility.*

A copy of a document coming out of a public office, and certified by the officer in charge of that department to be a true copy, is admissible in evidence (138-9). (*Dr. Lushington.*) *UNIDE RAJAH RAJE BOMMARAUZE BAHADUR v. PEMMASAMY VENKATADRY NAIDOO.*

(1858) 7 M. I. A. 128 = 4 W. R. 121 =

1 Suth. 300 = 1 Sar. 637.

—*Held*, that a certified copy of an ewaznama or deed of exchange, dated January 1782, produced from the custody of one of the appellants and found to be written on paper bearing the same stamp and water-mark as other contemporary documents in the record of certain litigation, was admissible in evidence. (*Lord Collins.*) *SHAHZADI BEGAM v. SECRETARY OF STATE FOR INDIA IN COUNCIL.*

(1907) 34 I. A. 194 (201) =

34 C. 1059 (1075) = 2 M. L. T. 439 =

9 Bom. L. R. 1192 = 6 C. L. J. 678 = 9 Sar. 279.

—*Secondary evidence of contents of—Certified copy itself a copy of a copy but treated as genuine in earlier suits—Admission of.*

Where the High Court treated as genuine and admitted in evidence a certified copy of a document which was shown, though a copy, to have been produced in earlier suits but was not impeached or treated as other than a genuine document, *held* that though the document was a copy of a copy, the High Court had not miscarried in finding that it was genuine (461-2). (*Sir James Colvile.*) *RAM GOPAL ROY v. GORDON STUART & CO.* (1872) 14 M. I. A. 453 =

17 W. R. 285 = 2 Suth. 549 = 3 Sar. 73.

—*Secondary evidence of contents of—Compromise petition filed in Court reciting a mortgage—Certified copy of—Admissibility of, to prove mortgage—Records of proceedings destroyed in Mutiny.*

In a suit for the redemption of an usufructuary mortgage alleged to have been created in 1857, the plaintiffs relied on a certified copy of a petition of compromise filed in court on April 1, 1857, to establish the suit mortgage. The petition contained a recital relating to the suit mortgage. The record of the proceedings in which the petition was filed was destroyed in the Mutiny, which broke out shortly after.

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Held, that the certified copy was admissible in evidence relative to the facts recited therein, and was rightly admitted by the trial judge (266). (*Mr. Amcer Ali*). AHMAD RAZA v. ABID HUSAIN. (1916) 43 I.A. 264 =

38 A. 494 (499-500) = 14 A.L.J. 1099 =
21 C.W.N. 265 = 24 C.L.J. 504 = 20 M.L.T. 447 =
(1916) 2 M.W.N. 548 = 1 Pat. L.W. 90 =
18 Bom. L.R. 904 = 39 I.C. 11 = 5 L.W. 153.

—Secondary evidence of contents of—Conditions of admissibility of.

Secondary evidence may be given of the contents of a document if its non-production has been duly accounted for.

A hibbanamah was not produced. It was not shewn that it was lost, destroyed, or not forthcoming. It was suggested that the deed might have remained with the executant (the opposite party), but that suggestion was opposed to the evidence; and, further, the custody of the executant would not be according to the supposed terms of the deed, the proper custody.

Held that no sufficient foundation was laid for the admission of secondary evidence (102). (*Sir Montague E. Smith*). AMEERONISSA KHATOON v. ABEDONISSA KHATOON. (1875) 2 I.A. 87 = 15 B.L.R. 67 =

23 W.R. 208 = 3 Sar. 423 = 3 Suth. 87.

—Secondary evidence of the contents of a document cannot be admitted, unless the non-production of the original is accounted for in such a manner as to bring the case within one or other of the clauses of S. 65 of the Evidence Act (73-4).

Held that the destruction or loss of the original anumati-patra had not been satisfactorily accounted for, and that secondary evidence of its contents was therefore inadmissible (74). (*Sir Barnes Peacock*). KRISHNA KISHORI CHOWDHURANI v. KISHORI LAL ROY. (1887) 14 I.A. 71 = 14 C. 486 (491) = 5 Sar. 13.

—Secondary evidence of contents of—Copy—Admissibility of—Conditions.

The copies of the documents were inadmissible, for there was no evidence of a search for the originals. (*Mr. Baron Parke*). MEER USUD-OOLAH v. MUSSUMAT BEEBY IMAMAN. (1836) 1 M.I.A. 19 (41) =

5 W.R. (P.C.) 26 = 1 Suth. 46 = 1 Sar. 89.

—Their Lordships are undoubtedly of opinion that when a copy has been in any way received, and it becomes the function of a judge to consider what weight and value should be given to it, it is the duty of the judge, in order to test its authenticity, to satisfy himself that there is some reason for producing a copy instead of the original, and sufficient reason assigned why the original is not produced, and why the parties rely upon the copy. In all cases, the whole of the circumstances should be looked at in order that the Judge may come to a definite conclusion as to the genuineness of the document in question and the weight and value which he will attach to it (461). (*Sir James Colville*). RAM GOPAL ROY v. GORDON STUART & CO. (1872) 14 M.I.A. 453 = 17 W.R. 285 = 2 Suth. 549 = 3 Sar. 73.

—Their Lordships are by no means prepared to say that an Indian Judge would not do right, according to the practice of the Courts of that country, in rejecting a copy if the absence of the original were not satisfactorily accounted for. There seems to be no reason for assuming that a rule requiring the best evidence producible to be produced, has no application to Courts of which the Judges may be presumed to be, for want of professional training, less capable than they are elsewhere of weighing the effect of evidence

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(21). (*Lord Hatherley, L.C.*) FORESTER v. SECRETARY OF STATE FOR INDIA. (1872) Sup. I.A. 10 =

12 B.L.R. 120 = 18 W.R. 349 = 3 Sar. 1 =
1 P.R. 1872 = 2 Suth. 628.

—There may be considerable question whether the copy of the genealogy was admissible in evidence, when the original has not been produced or satisfactorily accounted for (17). (*Sir Montagu E. Smith*). NAWAB MUHAMMAD AZMAT ALI KHAN v. MUSSUMAT LALLI BEGUM. (1881) 9 I.A. 8 = 8 C. 422 (431-2) = 4 Sar. 310 =

17 P.R. 1882 (Civil).

—The question was whether what was called a copy of an authority to adopt alleged to have been executed by the defendant's husband in her favour had been rightly rejected by the Courts below as being inadmissible.

The original document said to have been executed by the deceased was not forthcoming. The defendant sought to prove that it had been lost, and tendered what she alleged to be a copy. The Subordinate Judge considered that there had not been any such amount of search for the original as would justify the Court in admitting a copy. On appeal the High Court held that the evidence did not show that the alleged copy was a copy of any document to which the witnesses deposed as having been executed by the deceased; and, on that ground, and also because they agreed with the Subordinate Judge that there had been no sufficient proof of search for or loss of the original, concurred in the rejection of the alleged copy.

Held, on the evidence, that the High Court decided rightly in rejecting the copy (80-2). (*Lord Hobhouse*). SRIMATI RANI HURRIPRIA v. RUKMINI DEBI. (1892) 19 I.A. 79 = 19 C. 438 = 6 Sar. 177.

—Secondary evidence of contents of—Copy—Admissibility of—Document mere link in evidence—Document foundation of suit—Distinction.

As regards the admissibility of copies of documents and the weight and value to be attached to them, there is, no doubt, a considerable difference between cases where documents come in as mere links or as part only of the evidence in the case, and those in which the suit is actually brought upon the instrument of which a copy is tendered, and the whole cause of action depends upon the proof of the original instrument. In the latter case strict proof may properly be required (461). (*Sir James Colville*). RAM GOPAL ROY v. GORDON STUART AND CO. (1872) 14 M.I.A. 453 = 17 W.R. 285 = 2 Suth. 549 = 3 Sar. 73.

—Secondary evidence of contents of—Copy—Admissibility of—English strict rules as to—Inapplicability in India of.

With reference to the general question of the admissibility of copies, and the mode in which the Courts in India deal with them, it has been repeatedly ruled here, that these questions are not to be dealt with by the strict rules that would prevail at a *Nisi prius* Trial in England, where the question is, whether the document ought to be submitted at all to the Jury. The way in which evidence is brought in in India almost precludes that rule (460-1). (*Sir James Colville*). RAM GOPAL ROY v. GORDON STUART AND CO. (1872) 14 M.I.A. 453 = 17 W.R. 285 = 2 Suth. 549 = 3 Sar. 73.

—Secondary evidence of contents of—Copy—Admissibility of, if not objected to, under law then in force—Failure to object to admission in case of—Effect.

The appellant, when called on to answer as to the factum of a will, said, "What does it signify if there is such a will. If such a will be produced it cannot have any effect against my interest." The official copy of the will was produced at

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the hearing, and no objection was taken to the reception of that instrument, and no demand was made on the part of the appellant that the instrument should be regularly proved by witnesses. The Regulation applicable to the case provided that where documents were produced, and they were not disputed, they should be received without proof.

It was contended before their Lordships on the part of the appellant, that that will was not properly in evidence, because there was no examination of witnesses.

Held, that the will was, for the purposes of the suit, against the appellant, sufficiently established (521 2). (*Mr. Pemberton Leigh.*) **BEBEE TOKAI SHEROB v. BEGLAR.**

(1856) 6 M. I. A. 510 = 4 W. R. (P. C.) 87 = 1 Suth. 259 = 1 Sar. 577.

—Secondary evidence of contents of—Copy bearing endorsement by predecessor of party (against whom it is used) that it was a copy of the original—Admissibility of.

In the case of a document which was lost, *held* that a copy thereof bearing an endorsement by the predecessor of the party against whom it was admitted in evidence that the copy was a copy of the original was secondary evidence of the terms of the original and was admissible in evidence. (*Lord Atkin.*) **SEETHAYYA v. SUBRAMANIA SOMAYAJULU.**

(1929) 52 M. 453 = 29 L. W. 804 = 33 C. W. N. 578 = A. I. R. 1929 P. C. 115 = 56 M. L. J. 730 (735).

—Secondary evidence of contents of—Copy filed in another suit—Indorsement on, "Copy in accordance with original" signed by presiding Judge.

The question was whether *K* made a gift of his estate to *R*, under whom the respondents claimed. All the Courts below decided in favour of the gift, holding that it was proved by a deed of which secondary evidence was given. The question for decision in the appeal to the Privy Council was whether the evidence that had been admitted by the Courts below was really and truly secondary evidence.

The evidence let in was a copy of a deed which was filed in another suit and was on the records of the Court. That deed was indorsed "copy in accordance with the original," and it was signed by the Judge presiding in the Court. Upon the value of that copy the Court below (the Judicial Commissioner) observed as follows:—"There can be no doubt that the Judge, in the course of the suit in 1864, did accept and file, with the proceedings, a copy of a deed of gift by *K*, and the only question is whether that copy has been compared with the original, when the copy is enfaced, in accordance with practice, 'copy according to the original,' and the Judge's order to file is also found on it. I cannot doubt that the copy was duly compared. Except the Judge, there was no person who was authorised to compare and accept a copy, and his signature to the order must, it seems to me, guarantee the genuineness of the copy."

Their Lordships entirely concurred with the opinion of the Court below, and held that the copy of the deed was rightly admitted as secondary evidence (127). (*Lord Hobhouse.*) **LACHMAN SINGH v. MUSSUMAT PUNA.**

(1889) 16 I. A. 125 = 16 C. 753 (755) = 5 Sar. 370.

—Secondary evidence of contents of—Mortgage—Compromise petition filed in Court reciting mortgage—Certified copy of—Admissibility of—Records of proceedings destroyed in Mutiny. See EVIDENCE—DOCUMENT—SECONDARY EVIDENCE OF CONTENTS OF—ADMISSIBILITY OF—COMPROMISE PETITION, ETC. (1916) 43 I. A. 264 (266) = 38 A. 494 (499-500).

—Secondary evidence of contents of—Oral evidence—Admissibility.

Parol evidence cannot be received of the contents of documents from those who have the custody of those very documents (141). (*Dr. Lushington.*) **UNIDE RAJAH RAJE**

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BOMMARAUZE BAHADUR v. PEMMASAMY VENKATADRY NAIDOO. (1858) 7 M. I. A. 128 = 4 W. R. 121 = 1 Suth. 300 = 1 Sar. 637.

—It is a cardinal rule of evidence, not one of technicality, but of substance, that where written documents exist they shall be produced as being the best evidence of their own contents. Nothing is more dangerous than to allow parol evidence to be given of what they are alleged to contain when there is reason to suppose that the documents themselves exist. If a letter exists, it may contain something very different from that which the witness represents to be its contents (15).

In a case in which the question was whether *H* had a special authority from the defendant to make a particular adjustment with the plaintiff which would constitute an acknowledgment by an agent especially authorised in that behalf within the meaning of S. 20 of the Limitation Act of 1871, the plaintiff relied upon a letter alleged to have been written by the defendant herself to establish the special authority. The letter was not filed by the plaintiff, though, if it existed, it should have been in his *Serishta*. And no attempt was made by the plaintiff to account for its non-production.

Held that, under such circumstances, parol evidence of the contents of the letter was not properly received in evidence (15-6). (*Sir Montague E. Smith.*) **DINOMOVI DEBI v. ROY LUCHMIPUT SINGH.** (1879) 7 I. A. 8 = 6 C. L. R. 101 = 4 Sar. 112 = 3 Suth. 710 = Bald. 34

—Secondary evidence of contents of—Oral evidence of person who has not himself read document but who has merely heard it read out by others—Admissibility.

The question whether a document is a talaknama or deed of divorce is a fact which can be seen by reading it, and, therefore, in accordance with the general principle embodied in S. 63 of the Evidence Act can only be spoken to by a witness who has himself read it.

On an issue as to whether a deceased Mahomedan had executed a talaknama or divorce document divorcing the respondent, his wife, the original document itself was not produced. At the trial, several of the witnesses deposed to having heard the talaknama read out, and to having seen it executed by the deceased, but the writer of the document was not called, and none of the witnesses had read it so as to be able to speak *de visu* to its contents.

Held, affirming the High Court, that the statements of the witnesses were not secondary evidence within the meaning of S. 63 of the Evidence Act (64-5). (*Sir John Wallis.*) **MA MI v. KALLANDER AMMAL.**

(1926) 54 I. A. 61 = 5 Rang. 18 = 25 A. L. J. 65 = (1927) M. W. N. 80 = 38 M. L. T. (P. C.) 41 = 28 Punj. L. R. 109 = 25 L. W. 342 = 100 I. C. 1 = 8 Pat. L. T. 280 = 31 C. W. N. 621 = 29 Bom. L. R. 800 = A. I. R. 1927 P. C. 15 = 52 M. L. J. 376.

—S. 63 of the Evidence Act enacts: "Secondary evidence means and includes... (5) oral accounts of the contents of a document given by some person who has himself seen it." This means that the oral evidence of the contents of the document must be given by some person who has seen those contents, that is to say, who has read the document. Evidence that the witness saw the document and heard it read out by some one else is only hearsay so far as the contents are concerned, and does not fulfil the requirements of S. 60 of the Act as to oral evidence generally: "Oral evidence must in all cases whatever be direct; that is to say—if it refers to a fact which could be seen it must be the evidence of a witness who says he saw it" (64-5). (*Sir John Wallis.*) **MA MI v. KALLANDER AMMAL.**

(1926) 54 I. A. 61 = 5 Rang. 18 = 25 A. L. J. 65 =

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Document—(Contd.)

(1927) M. W. N. 80 = 38 M. L. T. (P. C.) 41 =
28 Punj. L. R. 109 = 25 L. W. 342 = 100 I. C. 1 =
8 Pat. L. T. 280 = 31 C.W.N. 621 = 29 Bom. L. R. 800 =
A. I. R. (1927) P. C. 15 = 52 M. L. J. 376.

—Secondary evidence of contents of—Original—Loss or destruction of—Onus of proof of—Document lost while in Court custody.

In a suit upon a promissory note it was found when the suit came on for trial that the original note was missing. The plaintiff's pleader deposed that he had filed the original along with the plaint, and his evidence was found to be true by the trial Judge. It, was not, however, possible to ascertain how, by whom, and when the original had been abstracted. The trial Judge allowed to be put in, as secondary evidence of the note, a photograph of it taken some little time before.

Held, that secondary evidence was rightly admitted.

As the original document was placed in the custody of the law, their Lordships do not think that the onus of proof required the plaintiff to show how it was afterwards made away with, or to satisfy the Courts that the defendant was more likely to have been guilty than himself. His denial of participation in the act, if believed, was enough. (*Lord Sumner.*) LALA TULSI RAM v. RAM SARAN DAS.

(1924) 22 L. W. 86 = 29 C. W. N. 965 =
23 A. L. J. 109 = 2 O. W. N. 256 = L. R. 6 P. C. 70 =
86 I. C. 552 = 27 Bom. L. R. 777 = 26 Punj. L. R. 419 =
A. I. R. 1925 P. C. 80 = 49 M. L. J. 132 (136).

—Secondary evidence of contents of—Original—Loss or destruction of—Proof of—Evidence of person in whose custody original should be that it was lost—Sufficiency of. See EVIDENCE—DOCUMENT—SECONDARY EVIDENCE OF CONTENTS OF—ADMISSIBILITY—REGISTRATION COPY—LOSS OF ORIGINAL—PROOF OF.

(1921) 48 I. A. 365 (372-3).

—Secondary evidence of contents of—Original—Non-production of, by party having.

In a suit which turned chiefly upon the construction of an ikrarnamah, in the Court of first instance the plaintiff, although he admitted that he had the ikrarnamah in his possession, did not produce it, alleging that it had been in the possession of the defendants, and that they might have tampered with it, or had tampered with it. But as he did not produce it, the Judge quite properly held that secondary evidence of it could not be admitted, and dismissed the suit. When the case came on appeal to the Sudder Court at Agra, the plaintiff did then produce that document, and offer it for the inspection of the Court. The Court refused to look at it, but admitted secondary evidence of its contents.

Held, that the Sudder Court was wrong in that course of proceeding (67-8).

If the plaintiff had the original and did not produce it in the Court below, his case was not proved because it rested almost entirely on the ikrarnamah, but to accept secondary evidence of the document which was in the plaintiff's custody, without looking at the original, seems to their Lordships to be an extraordinary course (68). (*Sir Robert P. Collier.*) HIRA LALL v. GANESH PERSHAD.

(1882) 9 I. A. 64 = 4 A. 406 (410) = 11 C. L. R. 109 =
4 Sar. 342.

—Secondary evidence of contents of—Original—Search for—Proof of—Quantum.

The question was whether a deed of endowment had been executed by a deceased Zemindar. No evidence was given of the existence of such a deed, except the mention of it in the rubicari of a former suit. No witness was called who ever saw the deed. The man who produced it in the prior

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suit, when called, did not refer to it; and the only search which had been proved was a search made by some clerk in the sherista of the Zemindary—a young clerk who was not likely to have any knowledge of the deed and who simply said that upon search he did not find it there.

Held, that it was very doubtful whether secondary evidence of the deed should be permitted at all (59). (*Sir Montague E. Smith.*) KONWUR DOORGANATH ROY v. RAM CHUNDER SEN.

(1876) 4 I. A. 52 =
2 C. 341 (348) = 3 Sar. 681 = 3 Suth. 373.

—Secondary evidence of contents of—Original—Search for—Proof of—Sufficiency of—Trial Judge's opinion as to—Weight due to.

The question whether there has been such an amount of search for an original document as to justify the Court in admitting a copy of it is one which is proper to be decided by the Judge of First Instance, and is treated as depending very much on his discretion. His conclusion should not be over-ruled except in a very clear case of miscarriage. (*Lord Hobhouse.*) SRIMATI RANI HURRIPRIA v. RUKMINI DEBI. (1892) 19 I. A. 79 (81) = 19 C. 438 = 6 Sar. 177.

—Secondary evidence of contents of—Power-of-attorney—Will reciting—Admissibility of—Loss or destruction of original—Absence of proof of. See POWER-OF-ATTORNEY—EVIDENCE OF. (1837) 1 M. I. A. 494.

—Secondary evidence of contents of—Public document—Authenticated copy of—Admissibility of.

The native Courts of India would, by their usual practice, admit a copy of a public document, authenticated by the signature of a public officer, as *prima facie* evidence, subject to further inquiry, if it were disputed (90). (*Lord Kingsdown.*) NARAGUNTY LUTCHMEEDAVAMAH v. VENGAMA NAIDOO.

(1861) 9 M. I. A. 66 =
1 W. R. 30 P. C. = 1 Suth. 460 = 1 Sar. 826.

—Secondary evidence of contents of—Public Document—Pymash accounts if and when. See PYMASH ACCOUNTS—ADMISSIBILITY OF

(1881) 8 I. A. 143 (150) = 3 M. 384 (392-3).

—Secondary evidence of contents of—Registration copy—Admissibility of.

In a suit brought upon a mortgage bond, the defendant denied that he had ever had any dealings with the plaintiff, or that he had ever executed the suit bond.

The plaintiff alleged that, since the institution of the suit, the original bond had been accidentally destroyed by rats, and prayed that a copy from the Registry-book might be admitted, pursuant to the provisions of S. 11 of Regulation 17 of 1802. He filed an official copy from the registry, of a vakalatnama, to get the bond in question registered, an office copy of the bond from the Registry-book together with the fragments of the original bond. He examined two of the subscribing witnesses to the original instrument; but no further evidence was given of the destruction of the bond. Evidence was also given of the dealings between the parties and of the due execution of the instrument. The fragments of the alleged original bond produced did not agree with the description on the registry. The Courts below admitted the registered copy in evidence and decreed the suit.

Held, that, in the absence of satisfactory evidence of the destruction of the original bond, the registered copy was improperly admitted as secondary evidence.

The material evidence was the bond itself; failing that, evidence should have been given of its destruction. Secondary evidence can only be received, when the absence of the bond is accounted for—Vice-Chancellor Knight Bruce (161).

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It is not upon the fragments the case rests, but upon the requiring of secondary evidence. The fragments did not open the door to secondary evidence. The Judge seems to have assumed, without evidence, that these scraps were portions of the bond; and these scraps, it appears, do not agree with the description on the Registry. It is exactly as if this were to take place at *nisi prius*; an action upon a bond, and the plaintiff produces, from an attorney's office, the draft from which these fragments were copied; to let in this draft, the first thing would be to prove that the fragments were the bond declared upon, and put in suit, and then if there appeared a discrepancy between the fragments produced, and the draft, that would be fatal; he would be nonsuited in two moments—Lord Brougham (161). (*Lord Brougham.*) SYUD ABBAS ALI KHAN v. YADEEM RAMY REDDY. (1843) 3 M. I. A. 156 = 1 Sar. 259.

—Secondary evidence of contents of—Registration copy—Admissibility of—Loss of original—Proof of—Evidence of person in whose custody document should be that it was lost—Sufficiency of.

In ordinary cases, if the witness, in whose custody a deed should be, deposed to its loss, unless some motive is suggested for his being untruthful, his evidence would be accepted as sufficient to let in secondary evidence of the deed. And if in addition he is not cross-examined, this result would follow all the more.

The purchaser of property subject to a mortgage sued for its redemption. He alleged in his plaint, and deposed to that effect in his examination as a witness in the suit, that the original sale-deed had been lost, but that it had been registered; and he offered as secondary evidence a copy certified by the Registrar.

Held, reversing the High Court and restoring the first Court, that the evidence of the loss of the original was sufficient, and that the copy was admissible in evidence (372-3). (*Lord Phillimore.*) EHTISHAM ALI v. JANNA PRASAD. (1921) 48 I. A. 365 = 15 L. W. 104 = 30 M. L. T. 132 = 9 O. L. J. 71 = 24 O. C. 272 = 24 Bom. L. R. 675 = 64 I. C. 299 = 27 C. W. N. 8 = 20 A. L. J. 961 = A. I. R. 1922 P. C. 56.

—Sham document—Details in—Rejection in toto of—Propriety.

Though the purpose of the document was a sham, it does not, therefore, enable every detail in it to be disregarded (874). (*Lord Buckmaster.*) MUSSUMAT FAKRUNISSA v. MOULVI IZARUS SADIK. (1921) 25 C. W. N. 866 = 63 I. C. 898 = 17 N. L. R. 72.

—Signature in—Proof of—Mode of—Party to suit—Adjustment of account by—Document amounting to—Signature in.

The plaintiffs-respondents borrowed from the defendants-appellants, Rs. 29,000 upon a Zur-i-peshgee lease, the effect of which was that it was a lease for fifteen years at a rent calculated to cover the interest on the Rs. 29,000 at 9 o/o and also the Government revenue payable on the property leased, the lessee and mortgagee undertaking to keep down the Government revenue, and to pay themselves such interest, and being at liberty to make what further profits they could out of the Zur-i-peshgee lease. At the end of the 15 years the principal sum was to be paid down in a lump sum and the property redeemed. That was the mortgage transaction. It was, however, admitted that it was further arranged between the parties that that sum of Rs. 29,000 should not be paid by the mortgagees, the bankers, into the hands of the mortgagors, but should be transferred to their account in the books of the former, to be applied, as occasion should require, in satisfaction of their judgment and other debts. The result of that arrangement was to make

EVIDENCE—(Contd.)**Document—(Contd.)**

the mortgagees accounting parties to the plaintiffs for Rs. 29,000.

In a suit brought by the plaintiffs against the defendants claiming upwards of Rs. 10,000 as unaccounted for, the defendants, who resisted the plaintiffs' demand, and rested their case principally on two *amanut namas*, and the endorsements of payments thereon, which purported to have been signed by the plaintiffs; because those, if really signed by them, were proof of settled accounts comprehending most of the disputed payments.

Held that, in any country where the administration of justice was conducted with any degree of formality and regularity, the proper mode of proving those documents would be to put them into the hands of the plaintiffs; to call upon them to admit or deny their alleged signatures in the same; and to give far more specific proof of those documents than a mere statement that they were identified and verified by the witnesses (133-4).

The witnesses must have been called upon to state whether they saw the plaintiffs sign the documents, or, if not, whether they could speak to the handwriting, and generally what took place on the two occasions on which the accounts were vaguely said to have been adjusted (134). BABOO GUNGA PERSAD v. BABOO INDERJIT SINGH.

(1875) 3 Suth. 132 = 23 W. R. 390 = 3 Sar. 486.

—Stamp—Document with insufficient or with no—Tender in evidence of—Procedure on—Rejection of document altogether—Propriety. See STAMP ACT OF 1899, S. 35.

—Title—Documents of. See TITLE-DEEDS.

Embezzlement.

—Frauds—Series of—Embezzlement by—Participation in—Proof of—Participation in some of frauds only—Evidence of—Sufficiency of—Conditions.

The suit was brought on the part of the Government of Bengal against the appellant, who was a surety for S, the Treasurer of the Mirzapore Collectorate, to recover a sum of money, with interest. The case on the part of the Government was, that between the years 1843 and 1848 the Treasurer had been a party to the embezzlement of the sums of money in question. The question was whether there was satisfactory evidence that S, the Treasurer, was a party to the embezzlements in question. The whole of the frauds were proved to be upon one system from beginning to end.

Held, that, in such a case, when it was once shown and proved that there were frauds to the suit amount, and how they were concocted and carried out, and when it was further shown clearly from certain instances, that there was evidence beyond all question, that the Treasurer was a party to them, the inference was very strong indeed that he was a party to all the frauds (99-100).

It never could be believed that some of the frauds were committed with the knowledge of the Treasurer, he receiving the money, and that the rest of the frauds were not practically committed in the same way (100). (*Lord Justice Mellish.*) LALLA BUNSEEDHUR v. GOVERNMENT OF BENGAL. (1871) 14 M. I. A. 86 = 16 W. R. (P. C.) 11 = 9 B. L. R. 364 = 2 Suth. 448 = 2 Sar. 689.

—Official—Embezzlement by—Suit against surety in respect of—Evidence of embezzlement in—Depositions *ex parte* of official—Admissibility. See SURETY—OFFICIAL. (1871) 14 M. I. A. 86 (91-2.)

—Treasurer—Embezzlement by—Proof of—Mode of—Accountants who examined account-books—Examination of—Proof by.

The suit was brought on the part of the Government of Bengal against the appellant who was a surety for S, the Treasurer of the Mirzapore Collectorate, to recover a sum

EVIDENCE—(Contd.)

Embezzlement—(Contd.)

of money, with interest. The case on the part of the Government was, that between the years 1843 and 1848 the Treasurer had been a party to the embezzlement of the sums of money in question. The question was whether there was evidence of an embezzlement of the amount claimed.

The Government filed all the voluminous documents with which they supported their case as also the Bill of discovery, and they were open to examination on the part of the appellant. The Accountants were called, and they stated what the result of the documents was; they stated that they did show a deficiency in the accounts to the amount claimed. The appellant appointed persons who were perfectly competent for their duty, he being himself a large and extensive Banker, and they were clerks of his own, who themselves went through those accounts, and after they went through them, they were asked, whether they wanted any more documents, whether there was anything that the Government could produce which they required. They said there was nothing more. They were examined, and the result of their evidence was that an examination of all those documents tended to show that there was an embezzlement shown by those accounts to the amount stated.

Held, that the way in which the embezzlement was proved was the only possible way in which a fraud of that kind could be proved, because it was quite impossible for the Court itself to go into every single item of such voluminous accounts (92-3).

In this country it is the practice to call in an Accountant, who goes through the Books; he makes a summary of the accounts, and the other side are left to question them, and this case was conducted in that way (93). (*Lord Justice Mellish.*) *LALLA BUNSEEDHUR v. GOVERNMENT OF BENGAL.* (1871) 14 M. I. A. 86 = 16 W. R. (P. C.) 11 = 9 B. L. R. 364 = 2 Suth. 448 = 2 Sar. 689.

False evidence.

Common in India.

In India the religious obligation of an oath is very little felt. (*Lord Wynford.*) *SUTROOGUN SUTPUTTY v. SABITRA DYE.* (1835) 5 W. R. (P. C.) 109 = 1 Suth. 36 = 2 Knapp. 287.

Fabrication of—Facility for, amongst Hindus.

Neither the witnesses nor the documents appear to be open to any imputation, beyond what applies to all Hindoo testimony, *viz.*, the facility with which false witnesses are produced and documents fabricated (426). (*Mr. Pemberton Leigh.*) *HARADHUN MOOKURJIA v. MUTHORANATH MOOKURJIA.* (1849) 4 M. I. A. 414 = 7 W. R. (P. C.) 71 = 1 Suth. 213 = 1 Sar. 375.

Fabrication of—Tendency in India.

Such a practice would tend further to encourage the manufacture of evidence in a place (India) already too prone to the fabrication of it (143). (*Lord Chelmsford.*) *SREE ECKOWRIE SINGH v. HEERALOLL SEAL.*

(1868) 12 M. I. A. 136 = 11 W. R. (P. C.) 2 = 2 B. L. R. P. C. 4 = 2 Suth. 171 = 2 Sar. 399.

Production of—Costs of litigation—Effect on. See COSTS—SUCCESSFUL PARTY—DISALLOWANCE OF COSTS TO.

True Case—Use of false evidence to support—Practice of—Decision of case not to be affected by.

Both the courts below treated the whole of the parol evidence of the appellant as unworthy of credit, and the Pottah produced by her as a forged instrument; and their Lordships regret that on the fullest consideration they are not prepared to differ from them in these conclusions. When false witnesses or forged documents are produced in support of a case, the fact naturally creates suspicion as to the case itself; and if the evidence on which their Lord-

EVIDENCE—(Contd.)

False evidence—(Contd.)

ships act depended in any degree for its credibility or weight on such witnesses, or document, they would have paused as to their conclusion. The fact is not so, however, in the present case; their Lordships believe they have to deal with a just case foolishly and wickedly attempted to be supported by false evidence. This misconduct must not mislead them in deciding the case (149-50). (*Lord Justice Turner.*) *RANEE SURNOMOYEE v. MAHARAJAH SUTTEESCHUNDER ROY BAHADOOR.*

(1864) 10 M. I. A. 123 = 2 Sar. 60 = 2 W. R. (P. C.) 13 = 1 Suth. 548.

—In a native case it is not uncommon to find a true case placed on a false foundation, and supported in part by false evidence. It not unfrequently happens that each case, that of the claim and that of the defence, has to struggle through difficulties in which wicked and foolish managers involve it, by fabrication of evidence and subornation or tutoring of witnesses; and it is not always a safe conclusion that a case is false and dishonest in which such falsities are found (183).

A Native, even with an honest case, or his advisers, may fabricate evidence to meet a case which they fear, though they know it to be groundless; and if this woman and her child stood in an ambiguous relation to the deceased, and the real heir feared that a Court would draw in favour of marriage and legitimacy really groundless conclusions, from a plausible appearance of marriage and legitimization, the fabrication might, however, not be fatal to a defence; but in this case the defendant's oral evidence presents a desperate and hopeless case as the real case of the claimants. If, then, the fabrication be established proof of that fabrication supports plaintiff's case to some extent (191). (*Sir Richard Kindersely.*) *WISE v. SUNDULONISSA CHOWDRANEE.* (1867) 11 M. I. A. 177 (183, 191-2) = 7 W. R. (P. C.) 13 = 1 Suth. 667 = 2 Sar. 249.

—It is unfortunately by no means an unfamiliar occurrence in the Indian Courts of Justice that parties should concoct a false story to help their case, and yet on the main point of the case be right (20). (*Lord Hobhouse.*) *RAMESWAR KOER v. BHARAT PERSHAD SAHI.*

(1899) 4 C. W. N. 18.

—In Indian litigation it is not safe to assume that a case must be a false case if some of the evidence in support of it appears to be doubtful or is clearly untrue. There is on some occasions a tendency amongst litigants in India, as elsewhere, to back up a good case by false or exaggerated evidence (628). (*Sir John Edge.*) *BANKIM BIHARI MAITI v. SRIMATI MATANGINI DAS.*

(1919) 24 C. W. N. 626.

—Ill-judged attempts are very often made by litigants to improve their case by manufacture of evidence, but they do not affect the inferences in a party's favour arising from the admitted and clearly established facts of the case (32). (*Sir John Wallis.*) *MA MI v. KALLANDER AMMAL.*

(1926) 54 I. A. 23 = 5 Rang. 7 = 25 A. L. J. 69 = (1927) M. W. N. 76 = 38 M. L. T. (P. C.) 53 = 4 O. W. N. 300 = 25 L. W. 679 = 6 Bur. L. J. 59 = 29 Bom. L. R. 772 = 100 I. C. 32 = A. I. R. 1927 P. C. 22 = 52 M. L. J. 362.

—Use of—Effect of, on other evidence adduced by party.

If any important paper produced by a party as a genuine paper be shown to be false, the court cannot have any safe ground for deciding in favour of one who knowingly has produced such a fabricated paper as a genuine instrument. (*Lord Wynford.*) *SUTROOGUN SUTPUTTY v. SABITRA DYE.* (1835) 5 W. R. 109 P. C. = 1 Suth. 36 (37) = 2 Knapp. 287.

EVIDENCE—(Contd.)**False evidence—(Contd.)**

—The respondent, the owner of a certain mouzah, executed in favour of the appellant a kararnamah effecting a conditional sale of the mouzah. The respondent alleged that on the same day the appellant executed a counter-kararnamah in his favour agreeing to restore the mouzah to him in certain contingencies. The appellant denied that he executed the counter-kararnamah, and alleged that it was a fabrication. The respondent adduced what was *prima facie* legal evidence of the counter-kararnamah. The appellant sought to impeach the credit of the witnesses to the counter-kararnamah by adducing counter evidence and by relying upon a receipt purporting to have been given by the respondent, which receipt, if it had been a genuine document, would have gone very far, if not conclusively, to show that the counter-kararnamah was a fabrication. It was, however, found that the receipt was clearly a fabrication.

Held that the fact that the receipt set up by the appellant to rebut the evidence of the counter-kararnamah was a fabrication and that therefore the main feature of the appellant's case brought forward to rebut the evidence of the counter-kararnamah fell to the ground had certainly the effect of cutting down to a great extent the attempt on the part of the appellant to rebut the evidence, which was *prima facie* legal evidence, of the counter-kararnamah (18, 21-2). (*Mr. Justice Bosanquet.*) SRI RAJAH KAKULAPOODY JAGANNADHA RAJ BAHADOOR *v.* SRI RAJAH VUTSAVOY. (1837) 2 M. I. A. 1 = 5 W. R. 117 = 1 Suth. 79 = 1 Sar. 143.

—A party's conduct in knowingly making a false statement with regard to a portion of his case, and in endeavouring to support it by forgery and perjury naturally causes grave doubts as to the truth and honesty of the other part of his case. FUKHUROODEEN MAHOMED AHSUN CHOWDRY *v.* KUMROONISSA KHATOON. (1872) 9 M. J. 141.

—Unfortunately, the discovery of falsehood in a portion of a case is not, in Indian litigation, so conclusive as to the whole as it is apt to be in England. But it is a highly material circumstance that the party, who had been personally engaged in the suit transactions from beginning to end, set out with a false allegation, and supported it by forged papers (194-5). (*Sir Arthur Hobhouse.*) BAIJNATH SAHAY *v.* RUGHONATH PERSHAD SINGH. (1882) 12 C.L. R. 186 = 4 Sar. 372 = Bald. 437.

—Where one of the defendants was disbelieved on a most material point, on which he gave distinct evidence, *held* that the effect was not merely to invalidate his evidence as to that particular fact, but to cast doubt on the defendant's case (163-4). (*Lord Hannen.*) ZAKERI BEGUM *v.* SAKINA BEGUM. (1892) 19 I. A. 157 = 19 C. 689 (697) = 6 Sar. 213.

—The District Judge does not appear to have considered the fact that the defendants deliberately attempted to fabricate a story as to a divorce to have any weight in considering the value of their evidence on the other parts of the case (873). (*Lord Buckmaster.*) MUSSUMAT FAKRUNISSA *v.* MOULVI IZAMS SADIK. (1921) 25 C. W. N. 866 = 63 I. C. 898 = 17 N.L.R. 72.

—When the evidence given on behalf of a party to a cause consists of a series of concocted falsehoods, carefully prepared and put together for the deliberate purpose of misleading the Court, it is only right that that party should be associated with the scheme of deceit which it was designed to carry out, and that such association should be regarded as an important element in determining whether his defence

EVIDENCE—(Contd.)**False evidence—(Contd.)**

is honest and just. (*Lord Buckmaster.*) MADHU SUDAN CHOWDHRI *v.* MUSAMMAT CHANDRABATI CHOWDHRAIN. (1917) 21 C.W.N. 897 (901) =

(1917) M.W.N. 518 = 42 I.C. 527 = 6 L. W. 437.

—Use of—Other evidence of party—Consideration of—Duty of Court.

It is true that any judge disbelieving a story put forward by a party must view very warily other evidence coming from the same quarter. But that does not exonerate the Court from weighing whatever evidence has actually been tendered and the mode in which it has been met. (*Lord Hobhouse.*) RAMESWAR KOER *v.* BHARAT PERSHAD SAHI. (1899) 4 C.W.N. 18 (20).

Frauds—Participation in a series of.

—Proof of—Participation in some of them only—Evidence of—Sufficiency of—Conditions. See EMBEZZLEMENT—FRAUDS. (1871) 14 M. I.A. 86 (100).

Girl.

—Majority of—Hearsay evidence of—What amounts to—Admissibility.

In a case in which the question was whether the appellant was at the time of her marriage with the respondent a minor or a major according to Mahomedan law, *held* that the evidence of a witness who stated that he knew she was of age, because he had been told so by the appellant's father was inadmissible as hearsay and was no evidence whatever of the substantive fact of the girl's puberty.

Held also that the evidence of another witness who stated that he had heard from his wife that the appellant was of age, and that his wife had herself heard so from the appellant's mother was also inadmissible as hearsay. (*Lord Atkinson.*) MUSAMMAT ATKIA BEGUM *v.* MAHOMED IBRAHIM RASHID NAWAB. (1916) 6 L. W. 26 (29) = (1917) M. W. N. 261 = 21 C. W. N. 345 = 36 I. C. 20 = 10 Bur. L. T. 79

—Puberty of—Date of attainment of—Question as to—Medical examination twelve months after—Refusal of girl to submit to—Inference adverse from—Propriety. See MAHOMEDAN LAW—MAJORITY—AGE OF—GIRL. (1916) 6 L. W. 26 (35).

Hearsay evidence—Admissibility of.

—Girl—Majority of—Hearsay evidence of—What amounts to—Validity. See EVIDENCE—GIRL—MAJORITY OF. (1916) 6 L. W. 26 (29).

—Legitimacy—Members of family—Statements by—Hearsay reports of—Admissibility and value of. See LEGITIMACY—EVIDENCE OF—MEMBERS OF FAMILY. (1903) 30 I. A. 94 (105) = 25 A. 236 (248-9).

—Objection to—Omission to raise—Effect. See EVIDENCE—ADMISSION OF—INADMISSIBLE EVIDENCE—ADMISSION OF—OBJECTION TO—FAILURE TO RAISE—HEARSAY. (1928) 56 M. L. J. 88.

—Relationship. See RELATIONSHIP.

Hindu—Concubine kept by.

—Communication by him of, to stranger Mahomedan, with particulars—Evidence as to—Improbability of.

The question was whether the plaintiff was a dancing-girl and therefore incapacitated to contract marriage, or was, as she claimed, a legitimate child of one S, a Sudra man, of the Vellala caste.

One K, a Mahomedan, who said the plaintiff was a dancing-girl herself, and was the daughter of a dancing-girl, deposed to the effect that he heard from S that the plaintiff was his daughter, and that he had kept her mother, and that S also gave his daughter's (plaintiff's) name. No explanation was given for a communication so utterly improbable.

EVIDENCE—(Contd.)**Hindu—Concubine kept by—(Contd.)**

Their Lordships observed with regard to *K's* evidence: such a communication by a Hindu headman to a stranger and a Mussulman is opposed to all experience of native habits. Such testimony is very common, it is possible in a given case that it may be true, but it is of so dangerous a nature, and presents so few claims to be believed, that evidence of this kind is little regarded even though the witness deposing to it be in no other way discredited than as one deposing to evidence on which a Court cannot rely (364-5). (*Lord Justice James.*) *RAMAMANI AMMAL v. KULANTHAI NATCHIAR.* (1871) 14 M. I. A. 346 =

17 W.R. 1 = 2 Suth. 493 = 2 Sar. 736.

Hindu Testimony.

(*See also* EVIDENCE—NATIVE TESTIMONY.)

———*Perjury and forgery—Characteristics of.*

The observation which may be made on all Hindu testimony is that perjury and forgery are so extensively prevalent in India that little reliance can be placed on it (106). (*Mr. Pemberton Leigh.*) *RUNGAMMA v. ATCHAMA.* (1846) 4 M. I. A. 1 = 7 W. R. (P. C.) 57 = 1 Suth. 197 =

1 Sar. 318,

———*Rejection in entirety of—Propriety.*

Though, owing to the lamentable disregard of truth prevailing amongst the native inhabitants of Hindoostan, all oral evidence is necessarily received with great suspicion, and when opposed by the strong improbability of the transaction to which they depose, or weakened by the mode in which they speak, it may be of little value, yet we must be careful not to carry this caution to an extreme length, nor utterly to discard oral evidence merely because it is oral, and unless the impeaching and discrediting circumstances are clearly found to exist. It would be very dangerous to exercise the judicial function, as if no credit could necessarily be given to witnesses, deposing *viva voce*, how necessary soever it may be always to sift such evidence with great minuteness and care (441). (*Dr. Lushington.*) *MUDHOO SOODUN SUNDIAL v. SUROOP CHUNDER SIRKAR CHOWDRY.* (1849) 4 M. I. A. 431 = 7 W. R. (P. C.) 73 =

1 Suth. 216 = 1 Sar. 378.

———*Suspicion attaching to.*

It is quite true, that such is the lamentable disregard of truth prevailing amongst the native inhabitants of Hindoostan, that all oral evidence is necessarily received with great suspicion, and when opposed by the strong improbability of the transaction to which they depose, or weakened by the mode in which they speak, it may be of little avail (441). (*Dr. Lushington.*) *MUDHOO SOODUN SUNDIAL v. SUROOP CHUNDER SIRKAR CHOWDRY.* (1849) 4 M. I. A. 431 = 7 W. R. (P. C.) 73 =

1 Suth. 215 = 1 Sar. 378.

———All Hindu testimony is unfortunately liable to suspicion (165). (*Mr. Pemberton Leigh.*) *BABOO KASI PERSAD NARAIN v. MUSSUMAT KAWALBASI KOER.* (1851) 5 M. I. A. 146 = 1 Suth. 225 = 1 Sar. 412.

Honest cases—Discrepancies in evidence in.

———Common in India. *See* EVIDENCE—DISCREPANCIES IN HONEST CASES. (1856) 6 M. I. A. 393 (415).

Impartible estate.

———Holder of—Relationship of plaintiff to deceased—Status of family of plaintiff and of deceased—Evidence—Return made by former holder to Collector of District pursuant to requisition by Government—Authenticated copy of—Admissibility. *See* HINDU LAW—IMPARTIBLE ESTATE—POLLIEM—POLIGAR—RELATIONSHIP TO DECEASED. (1861) 9 M. I. A. 66 (91-2).

EVIDENCE—(Contd.)**Impartible estate—(Contd.)**

———Partible estate—Evidence—Official reports—Admissibility and value of—Facts stated therein—Opinions expressed therein—Historical narrative given in—Distinction. *See* HINDU LAW—IMPARTIBLE OR PARTIBLE ESTATE.—EVIDENCE—OFFICIAL REPORTS.

(1927) 55 I. A. 45 = 55 C. 403.

Inam Commission.

———*See* INAM COMMISSION.

Inam Register.

———*See* INAM REGISTER.

Inadmissible evidence.

———Admission of. *See* EVIDENCE—ADMISSION OF—INADMISSIBLE EVIDENCE.

Inheritance—Custom of.

———Kanungoes—Declarations of—Village records, Entries made in, by officer charged with that duty—Admissibility of—Value of. *See* HINDU LAW—INHERITANCE—CUSTOM OF—EVIDENCE—KANUNGOES.

(1909) 36 I. A. 125 = 31 A. 457 (474-5).

———Statement as to, in *Wajib-ul-arz* made under Regulation VII of 1822—Admissibility—Opinion or finding of Settlement Officer not appearing on face of record. *See* WAJIB-UL-ARZ—INHERITANCE—CUSTOM OF—STATEMENT AS TO. (1879) 7 I. A. 63 (70-1) = 5 C. 744 (753-4).

Insanity.

———*Evidence on issue as to—Undue influence—Admissibility on issue as to.*

Evidence adduced on an issue as to mental capacity is not properly admissible on an issue as to undue influence. (*Sir Arthur Wilson.*) *ISMAIL MUSSAJEE MOOKEEDUM v. HAFIZ BOO.* (1906) 33 I. A. 86 = 33 C. 773 (783) = 10 C. W. N. 570 = 3 A. L. J. 353 = 3 C. L. J. 484 = 8 Bom. L. R. 379 = 1 M. L. T. 137 = 9 Sar. 94 = 16 M. L. J. 166.

Issumnovisee returns.

———Admissibility and value of. *See* GHATWALI TENURE—LANDS INCLUDED IN—EXTENT OF—EVIDENCE—ISSUMNOVISEE RETURNS.

Judgment not inter partes.

———*See* JUDGMENT—JUDGMENT NOT *inter partes*.

Judicial Officer—Information of.

———*Admissibility of, when officer not examined.*

A suit was instituted in the Settlement Officer's Court in which the question was whether the defendant, with whom a summary settlement in respect of certain villages had been made and to whom a sunnud had been granted, held the whole or any part thereof, or the rents and profits thereof, in trust for the plaintiffs. The Settlement Officer wrote to *B*, who was Special Commissioner at the time when the summary settlement with the defendant was made, asking to be informed whether the settlement with the defendant was intended to be for his benefit alone, or in trust for the plaintiffs also.

Held that the Settlement Officer acted irregularly in doing so (191).

If any information from *B* was considered necessary he ought to have been examined as a witness. The Settlement Officer who was acting as a Judge ought not to have written to him to know what his recollection was upon the subject of the summary Settlement. His answer was not evidence, and cannot be properly used in forming a judicial opinion on the case (191) (*Sir Barnes Peacock.*) *THAKOOR HARDEO BUX v. THAKOOR JAWAHIR SINGH.* (1877) 4 I. A. 178 = 3 C. 522 (532) = 3 Sar. 704 = Bald. 218 = R. & J's No. 45 = 3 Suth. 427.

EVIDENCE—(Contd.)**Landlord—Tenants different of different parcels of land—Ejectment suit single against**

—Evidence applicable to one tenant — Use of against another—Irregularity—Waiver of—Objection to, in appeal—Maintainability. See C. P. C. OF 1908, O. 2, R. 3—LANDLORD. (1919) 47 I. A. 76 (86-7) = 43 M. 567 (578).

Landlords—Dispute between.

—Criminal proceedings prior between one landlord and ryots of another—Razinamah in—Admissibility of, to show character of enjoyment. See EVIDENCE—DEED—*Inter partes*—DEED NOT. (1878) 6 I. A. 33 (41-2) = 4 C. 633 (640).

Legitimacy.

—See LEGITIMACY—EVIDENCE OF.

Litigation.

—Compromise of—Consent of party to—Issue as to—Evidence—Legal practitioners engaged in litigation—Examination of—Necessity. See COMPROMISE—SUIT—COMPROMISE OF—CONSENT OF PARTY TO. (1922) 17 L. W. 481 (493).

—Connected suits—Evidence in one of—Use of, in another—Defendants in two suits the same, but plaintiffs different.

Two suits in which the defendants were the same, and the plaintiffs were different, were tried simultaneously, and the evidence in one was admitted in the other (181). (*Lord Hobhouse.*) GAJAPATI RADHIKA v. VASUDEVA SANTA SINGARO. (1892) 19 I. A. 179 = 15 M. 503 (509) = 6 Sar. 218.

—See PRACTICE—ISSUE—CONNECTED SUITS. (1920) 48 I. A. 1 (9-10) = 44 M. 283 (291).

—Cross-suits—Evidence in one of — Use of, in the other.

It was said that in the Razinama suit there was really no evidence. In strictness that seems to be so. But the suits were substantially suit and cross-suit, and the evidence in the one might very properly be looked at in the other (77). (*Lord Kingsdown.*) PAKALA BALAKRISTNAMA PATRULU v. SREE NARAINA MARDARAZ DEVU. (1864) 10 M. I. A. 60 = 2 Sar. 66.

—Different litigations—Evidence in one of — Admission of, in another—Issues different.

When evidence has been given in one case upon the issues raised in that case, examination-in-chief and cross-examination alike having been directed to those issues, nothing can be more dangerous than to take that evidence and apply it in another case in which other issues arise. Inference drawn from that evidence bearing upon these latter issues cannot but be regarded with much misgiving. (*Sir Arthur Wilson.*) LUBECK, AN ADVOCATE, *In re*. (1905) 32 I. A. 217 (224) = 7 Bom. L. R. 894 = 15 M. L. J. 432.

—Different litigations—Evidence in one of—Admission of, in another by consent of parties—Decree on basis of such evidence—Validity.

Two suits were instituted, one by A, claiming to be the sister's son of the last male owner, and the other by B, alleging himself to be of the same gotra with the deceased, for the recovery of the properties of the deceased. The defendant in both suits was the same and claimed to be entitled to the suit properties as the widow of the adopted son of the last male owner. The questions in the two suits were the same with the exception of that in B's suit which related to his relationship to the deceased. The evidence in B's suit was by consent of parties received in that of A. Both suits were decreed by the 1st Court, and appeals were preferred

EVIDENCE—(Contd.)**Litigation—(Contd.)**

therein by the defendant. Pending the appeals, the defendant entered into a compromise with B, admitting his title. Thereupon in the appeal against A, the appellate Court framed a new issue under S. 566 of the Code of 1882 as to whether he was entitled as nearest of kin, or was excluded by B. On the trial of this new issue on remand, the evidence in B's suit bearing on the same was admitted in evidence. But neither at the trial of that issue, nor in the appeal preferred against the finding on the same did A object to the admission of such evidence. On objection taken before their Lordships to the admission of such evidence, *held* that the parties intended that the evidence should be admitted and that no irregularity had taken place materially affecting the decree of the High Court dismissing A's suit. (*Lord Hobhouse.*) CHANDI DIN v. NARAINI KUAR. (1892) 14 A. 366.

—Litigation not inter partes — Depositions in—Admissibility of.

The depositions in the prior suit are not evidence of the facts stated therein against the appellant. The appellant was not a party to the suit in which they were taken, the issues upon which they were taken were wholly different from the issues raised in the present suit; and the appellant had not the opportunity of cross-examining the deponents (530). HURMUT-OOL NISSA BEGUM v. ALLABDIA KHAN AND HAJI HIDAYAT. (1871) 2 Suth. 525 = 17 W.R. 108.

—Litigation not inter partes—Things occurring in—Admissibility of, against person not party to it.

Nothing which occurred in the progress of a suit can be evidence against a person who was no party to it (164). (*Sir Montague E. Smith.*) RANI MEEVA KUWAR v. RANI HULAS KUWAR. (1874) 1 I. A. 157 = 13 B. L. R. 312 = 3 Sar. 354 = R. & J.'s No. 27.

—Prior suit—Evidence in—Admission by consent of.

It has been necessary to advert to the prior suit because the evidence taken in it has by consent been brought into the present suit, and is the only evidence in it (3-4). (*Sir Montague E. Smith.*) RAMALAKSHMI AMMAL v. SIVANANTHA PERUMAL SETHURAYAR. (1872) Sup. I. A. 1 = 14 M.I.A. 570 (586) = 17 W. R. 553 = 12 B. L. R. 396 = 2 Suth. 603 = 3 Sar. 108.

—Prior suit—Evidence in—Use of.

Quære, whether evidence in a prior litigation between the parties or their representatives in interest can be regarded in a subsequent litigation between them in regard to the same matter (31). (*Lord Blanesburgh.*) LAL CHAND MARWARI v. RAMRUP GIR. (1925) 53 I. A. 24 = 5 P. 312 = 24 A. L. J. 105 = (1926) M. W. N. 203 = 7 P. L. T. 163 = 3 O. W. N. 335 = 43 C. L. J. 249 = 28 Bom. L. R. 855 = 30 C. W. N. 721 = A. I. R. 1926 P. C. 9 = 93 I. C. 280 = 50 M. L. J. 289.

Loan.

—Terms of—Reasonableness and propriety of—Other borrowings by borrower on similar onerous terms—Evidence of—Admissibility. See LOAN.

Mahalwar Register.

—Bengal Act VII of 1876, S. 4—Register kept under—Entries in. See BENGAL ACTS—LAND REGISTRATION ACT VII OF 1876, S. 4—MAHALWAR REGISTER KEPT UNDER. (1915) 19 C. W. N. 764.

—Survey—Register made in pursuance of, and in accordance with.

The question was whether the right of the plaintiff in a mouzah called Julkur Khuluk Shajai was, as the defendant contended, merely a right of fishery in the Cheel, or whether it was, as the plaintiff contended, the right to a mouzah covered with water.

EVIDENCE—(Contd.)**Mehalwar Register—(Contd.)**

The history of the mouzah down to 1853 was a blank; there was, however, an extract from the Mehalwari Register in that year, in which the predecessor in title of the plaintiff was entered by the Government as possessor of the talook of which the Julkar Khuluk Shajai formed part, and the said Julkur was described as one of the mouzahs of that talook and containing a stated area. That Mehalwari Register was made in pursuance of and in accordance with a survey in 1847. At the time of the survey the defendant made no claim whatever for that mouzah.

Held, that as between the plaintiff and the Government, the plaintiff had a clear title to the soil of the Cheel, and that he had also a title against the defendant (811). (*Sir Robert P. Collier.*) RADHA GOBIND ROY SAHEB ROY BAHADOOR *v.* INGLIS. (1880) 3 *Suth.* 809 = 7 *C. L. R.* 364 = *Bald.* 377.

Majority of girl.

—Evidence of. *See* EVIDENCE—GIRL.

Malicious prosecution.

—*See* MALICIOUS PROSECUTION.

Map.

—*Proof of—Assistant unskilled of skilled Amin who prepared Map—Evidence of—Admissibility—Death of skilled Amin and of Collector who checked measurement.*

To prove a map a witness was called, who said he had assisted in preparing it for a person who was dead. Both of them prepared it as Amins, and the Collector, Mr. B, tested the accuracy of the measurement. Mr. B was dead. The witness himself was not a skilful surveyor, and the accuracy of that work was not reliable, if unchecked.

Held, that the map was sufficiently proved to be admissible in evidence (34-5). (*Lord Lindley.*) DINOMONI CHOWDHRANI *v.* BROJO MOHINI CHOWDHRANI.

(1901) 29 *I. A.* 24 = 29 *C.* 187 (199-200) = 6 *C. W. N.* 386 = 4 *Bom. L. R.* 167 = 8 *Sar.* 224 = 12 *M. L. J.* 83.

—Survey Map. *See* SURVEY MAP.

—Thak Map. *See* THAK MAP.

Marriage.

—Evidence of. *See* MARRIAGE—EVIDENCE OF.

Mutation proceedings.

—*See* MUTATION—PROCEEDINGS FOR.

Natives of high rank—Appearance in Court.

—*Reluctance as regards.*

There are examples, increasing, fortunately, in number, of men who disregard the prejudice of natives of rank to appear and be examined as witnesses in a Court of Justice (27). (*Sir James Colville.*) BABOO BEER PERTAB SAHEE *v.* MAHARAJAH RAJENDER PERTAB SAHEE. (1867) 12 *M. I. A.* 1 = 9 *W. B. (P. C.)* 15 = 2 *Suth.* 114 = 2 *Sar.* 348.

—(*Sir Montague E. Smith.*) AMEEROONISSA KHATOON *v.* ABEDOONISSA KHATOON. (1875) 2 *I. A.* 87 (110) = 15 *B. L. R.* 67 = 23 *W. R.* 208 = 3 *Sar.* 423 = 3 *Suth.* 87.

—(*Sir James W. Colville.*) JUMOONA DASSYA CHOWDHRANI *v.* BAMASOONDARI DASSYA CHOWDHRANI. (1876) 3 *I. A.* 72 (81) = 1 *C.* 289 = 25 *W. R.* 235 = 3 *Sar.* 602 = 3 *Suth.* 222.

—(*Lord Fitz Gerald.*) THAKUR ROHAN SINGH *v.* THAKUR SURAT SINGH. (1884) 12 *I. A.* 52 (63) = 11 *C.* 318 (335) = 4 *Sar.* 590.

EVIDENCE—(Contd.)**Natives of high rank—Appearance in Court—(Contd.)**

—(*Lord Hannen.*) ZAKERI BEGUM *v.* SAKINA BEGUM. (1892) 19 *I. A.* 157 (163) = 19 *C.* 689 (696) = 6 *Sar.* 213.

Native palace—Factions in.

—Evidence in case of—Little of unbiassed testimony can be looked for in such cases. (*Lord Chelmsford.*) NEELKISTO DEB BURMONO *v.* BEERCUNDER THAKOOR. (1869) 12 *M. I. A.* 523 (548) = 12 *W. R. (P. C.)* 21 = 3 *B. L. R. (P. C.)* 13 = 2 *Suth.* 243 = 2 *Sar.* 523.

Native testimony.

—Rejection in entirety of—Propriety. *See also* EVIDENCE—HINDU TESTIMONY.

—The whole of the transaction is perfectly consistent with probability; and in support of the genuineness of the document relied on, is the evidence of witnesses, against whose veracity no solid objection has been raised beyond the general observation that oral evidence in India is untrustworthy. It would, indeed, be most dangerous to say that, where the probabilities are in favour of the transaction, we should conclude against it solely because of the general fallibility of native evidence; such an argument would go to an extent which can never be maintained in this or in any other Court, for it would tend to establish a rule that all oral evidence must be discarded; and it is most manifest that, however fallible such evidence may be, however carefully to be watched, justice can never be administered in the most important cases without recourse to it. (*Dr. Lushington.*) BUNWAREE LAL *v.* MAHARAJAH HETNARAIN SINGH. (1858) 7 *M. I. A.* 148 (167) = 4 *W. R.* 128 = 1 *Sar.* 610 = 1 *Suth.* 307.

—Native testimony cannot be thrown aside entirely, and decisions cannot be based upon conjecture or suspicion instead of evidence. (*Lord Chelmsford.*) NEELKISTO DEB BURMONO *v.* BEERCHUNDER THAKOOR.

(1869) 12 *M. I. A.* 523 (549) = 12 *W. R. (P. C.)* 21 = 3 *B. L. R. (P. C.)* 13 = 2 *Suth.* 243 = 2 *Sar.* 523.

—The ordinary legal and reasonable presumptions of facts must not be lost sight of in the trial of Indian cases, however untrustworthy much of the evidence submitted to these courts may commonly be; that is, due weight must be given to evidence there as elsewhere, and evidence in a particular case must not be rejected from a general distrust of native testimony, nor perjury widely imputed without some grave grounds to support the imputation. Such a rejection, if sanctioned, would virtually submit the decision of the rights of others to the suspicions and not to the deliberate judgment of their appointed judges. Nor must an entire history be thrown aside because the evidence, or some of the evidence, of some of the witnesses is incredible or untrustworthy. (*Lord Justice James.*) RAMAMANI AMMAL *v.* KULANTHAI NATCHIAR.

(1871) 14 *M. I. A.* 346 (354-5) = 17 *W. R.* 1 = 2 *Suth.* 493 = 2 *Sar.* 736

Negotiable Instrument.

—Bill of exchange—Hundi—Promissory note. *See* under NEGOTIABLE INSTRUMENT.

Non-production of available.

—Inference adverse from. *See* EVIDENCE ACT. S. 114, *ILL. (g).*

Official—Embezzlement by—Suit against surety for official in respect of.

—Evidence of embezzlement in—Depositions *ex parte* of official—Admissibility. *See* SURETY—OFFICIAL. (1871) 14 *M. I. A.* 86 (91-2).

EVIDENCE—(Contd.)**Officials.**

—Inquiries by or proceedings before—Evidence in, or information obtained at—Admissibility in civil suit. *See* EVIDENCE—COLLECTOR.

—Transactions brought before, in their official capacity long before—Particulars of—Evidence of—Value of.

It seems to us to be utterly improbable, if not impossible, that two or three officers who were in the habit of putting their seals to instruments very frequently, should recollect in the year 1820 what took place in the year 1809, the conversation which then passed, and the explanation which was then given by the party who brought the deed, as to what the contents of that deed were; and that they should depose as to all this with a particularity which, if the circumstance had happened only a week before, could hardly in ordinary cases have been expected, unless there were some particular reason or other for its having made so strong an impression upon their minds (165-6). (*Mr. Pemberton Leigh.*) **BABOO KASI PERSAD NARAIN v. MUSSUMAT KAWALBASI KOER.** (1851) 5 M. I. A. 146 = 1 Suth. 225 = 1 Sar. 412.

Opponent.

—See EVIDENCE—PARTY—OPPONENT.

Opportunity to adduce—Refusal of—Plea in appeal of.

—Maintainability—Mode of enquiry pointed out by court below—Parties not objecting to and not adducing evidence—Effect.

Where a certain mode of enquiry was pointed out, and a certain mode of taking the evidence was suggested, by the court below, and there was no objection by the parties to that procedure, and there was no evidence tendered by them which the court below refused to hear, *held* that it was not open to either party in appeal to raise the objection that the court below did not give an opportunity to the parties to adduce all the evidence that they were in possession of, and that there ought therefore to be a further enquiry (18-9). (*Lord Brougham.*) **MOTEE LALL OPUDHIYA v. JUGGURNATH GURG.** (1836) 1 M.I.A. 1 = 5 W.R. 25 (P.C.) = 1 Suth. 45 = 1 Sar. 88.

—Onus on appellant in case of.

An appellant who complains that the court below did not give an opportunity to the parties to adduce all the evidence that they were in possession of, and who urges that there ought therefore to be a further enquiry, ought to show from the proceedings that he was ready to produce evidence and offered that evidence, and that the court rejected it (18). (*Lord Brougham.*) **MOTEE LALL OPUDHIYA v. JUGGURNATH GURG.** (1836) 1 M.I.A. 1 = 5 W.R. (P. C.) 25 = 1 Suth. 45 = 1 Sar. 88.

—Proof of—Quantum necessary—Judgment of court below directly contradicting plea.

The judgment of the trial court contained a distinct statement that the defendant, on whom the onus of proof lay, had not applied for a summons in the name of any witness whatever, and had not even named a single witness nor adduced any description of evidence whatever. In his appeal to the High Court against that judgment, the defendant, however, complained that the court below had not allowed him to adduce evidence, though some witnesses were forthcoming and ready to be examined. He alleged that he had presented a petition to the court below for leave to examine witnesses, and the only materials relied upon by him in support of his allegation were the story of a witness, and the copy of the petition referred to above, which, however, was not forthcoming. The High Court allowed the defendant to adduce, and took additional evidence in appeal. With reference to this, their Lordships observed:—Certainly it appears somewhat singular that, if the learned

EVIDENCE—(Contd.)**Opportunity to adduce—Refusal of—Plea in appeal of—(Contd.)**

judges of the High Court had no other contradiction of that solemn and direct statement upon the face of the judgment of the lower court that no evidence had been tendered, they should have acted upon the very wild story told by the witness, and the copy of a petition said to have been made from an original petition lost in the extraordinary manner in which that witness states it to have been lost. (*Sir James Colville*) **RAJ LUKHEE DABEA v. GOKUL CHUNDER CHOWDHRY.** (1869) 13 M.I.A. 209 (225-6) = 12 W.R. (P.C.) 47 = 3 B.L.R. (P.C.) 57 = 2 Suth. 275 = 2 Sar. 518.

Oral agreement

—Proof of—Evidence of witnesses materially different as regards matters most striking in their nature and most likely to endure in the memory—Effect of, on other parts of their evidence. *See* AGREEMENT—ORAL AGREEMENT—PROOF OF. (1891) 18 I.A. 78 (98) = 18 C. 573 (602-3).

Oral evidence.

(*See also* EVIDENCE—HINDU TESTIMONY; EVIDENCE—NATIVE TESTIMONY; EVIDENCE—WITNESSES.)

—Affirmative and negative evidence—Value of—Distinction.

In estimating the value of evidence, the testimony of a person who swears positively that a certain conversation took place is of more value than that of one who says that it did not, because the evidence of the latter may be explained by supposing that his attention was not drawn to the conversation at the time (357). (*Mr. Baron Parke.*) **CHOWDRY DABEE PERSAD v. CHOWDRY DOWLUT SING.** (1844) 3 M.I.A. 347 = 6 W.R. 55 (P.C.) = 1 Suth. 161 = 1 Sar. 288.

—Conflict of—Judgment in case of—Basis proper of. *See* JUDGMENT—BASIS PROPER OF—EVIDENCE—ORAL EVIDENCE.

—Corrupt manner of procuring—Easy in India. (*Sir William H. Maule.*) **RAJAH BOMMARAUZA BAHADUR v. RANGASAMY MUDALI.** (1855) 6 M.I.A. 232 (249) = 1 Sar. 536.

—Defence resting solely on—Written instrument set up in defence—Cases of—Distinction.

There is a very clear distinction, and not an unimportant one, between the pleading a written instrument as an answer to a demand, and the setting up a defence founded exclusively on oral testimony; for instance, if the defence were adoption, where there was no written record of the transaction, and the fact was to be established merely by the evidence of witnesses who swear they were present at it, there the proof would be purely oral evidence, and might be liable to all the imputations which are generally cast upon it; but where the defence is rested upon a written document as a release, there is an essential difference, for its genuineness, on the contrary, may be shown by many facts and circumstances very different from mere oral evidence. And, moreover, the witnesses who are to prove a written document cannot resort to that latitude of statement which affords such opportunity of fabrication to purely oral evidence.

There are more means of trying the genuineness of a written instrument than there can be in disproving purely oral evidence. This is quite manifest, as the truth of the transaction may be investigated by reference to the handwriting, to the seal, to the stamps, the description of the paper, the alleged habits of him who is said to have written it. (*Dr. Lushington.*) **BUNWAREE LAL v. MAHARAJAH HETNARAIN SINGH.** (1858) 7 M.I.A. 148 (156-7) = 4 W.R. 128 = 1 Suth. 307 = 1 Sar. 610.

EVIDENCE—(Contd.)**Oral evidence—(Contd.)**

——Discrediting of, on strength of circumstantial evidence—Propriety of. See EVIDENCE—CIRCUMSTANTIAL EVIDENCE. (1922) 17 L.W. 481 (483).

——Documentary evidence—Criticism damaging of—Room for—Courts below—Conclusions of, as to matters of fact—Difference in.

When different conclusions as to matters of fact are formed by the courts below, there is always more or less ground for damaging criticism of the evidence of witnesses and the genuineness of documents (12). (*Sir Andrew Scoble.*) RAM PERSHAD SINGH v. LAKHPATI KOER.

(1902) 30 I.A. 1 = 30 C. 231 (255) = 7 C.W.N. 162 = 5 Bom. L.R. 103 = 8 Sar. 380.

——Lapse of time—Evidence given after long—Contemporaneous statements made without any possible motive for misrepresenting facts—Conflict between—Preference. See EVIDENCE—AGE—ORAL EVIDENCE OF, ETC.

——Mercantile transaction—Oral evidence of—Difficulty of. See MERCANTILE TRANSACTION—ORAL EVIDENCE OF. (1924) 52 I.A. 126 (130) = 52 C. 408.

——Parts of—Consideration of, as if each part were to be taken by itself—Impropriety of. (*Lord Halsbury.*) SAYAD MUHAMMAD v. FATTEH MUHAMMAD.

(1894) 22 I.A. 4 (7) = 22 C. 324 (333) = 6 Sar. 515.

——Propping up of, by admission of inadmissible documents—Practice of—Propriety. See EVIDENCE—DOCUMENT—INADMISSIBLE DOCUMENTS—ADMISSION OF—PROPRIETY—ORAL EVIDENCE.

(1868) 12 M.I.A. 136 (142-3).

——Recent happenings—Evidence even as to—Unsatisfactory nature of, in India.

It is not always easy in India to prove even recent happenings satisfactorily by oral evidence. (*Sir John Wallis.*) LAKHAMGOWDA v. APPANNA

(1928) 56 I.A. 44 = 53 Bom. 222 = I.R. (1929) P.C. 27 = 113 I.C. 467 = 31 Bom. L.R. 235 = 29 L.W. 617 = A.I.R. 1929 P.C. 30 = 56 M.L.J. 429 (433).

——Rejection in entirety of—Propriety. See EVIDENCE—HINDU TESTIMONY AND EVIDENCE—NATIVE TESTIMONY.

——Truth and value of—Trial judge's opinion as to—Weight due to. See EVIDENCE—WITNESSES—CREDIBILITY OF—TRIAL JUDGE'S OPINION AS TO.

Parts of—Consideration of each of, by itself—Propriety.

——Grant—Estate conveyed under—Evidence as to.

In a case in which the question was whether an inam grant was a grant of both the warams or was a grant of the melwaram only, the District Munsif held that it was a grant of the melwaram only, relying on four main points. The High Court held, on the other hand, that the grant was of both the warams. The learned Judges did so, dealing with each of the points relied upon by the Munsif separately, and finding the point inconclusive as to each of them.

Held that the High Court's mode of treating the evidence was faulty, inasmuch as it ignored the weight which was obtained from the effect of the whole. (*Lord Atkin.*) SEETHAYYA v. SUBRAMANIA SOMAYAJULU.

(1929) 52 M. 453 = 29 L.W. 804 = 33 C.W.N. 578 = A.I.R. 1929 P.C. 115 = 56 M.L.J. 730 (738).

——Oral evidence—Case of. See EVIDENCE—ORAL EVIDENCE—PARTS OF. (1894) 22 I.A. 4 (7) = 22 C. 324 (333).

Party.

——Adjustment of account by—Document amounting to—Signature in—Proof of—Mode of. See EVIDENCE—DOCUMENT—SIGNATURE IN. (1875) 23 W.R. 390.

EVIDENCE—(Contd.)**Party—(Contd.)**

——Defendant—Examination of, before plaintiff or his witnesses—Irrregularity.

The principal defendant gives his evidence before the plaintiff's case has been opened or the evidence of their witnesses given. Nothing could be more unsatisfactory than this mode of procedure. (*Lord Atkinson.*) SATISH CHANDRA CHATTERJI v. KUMAR SATISH KANTHA ROY. A.I.R. 1923 P.C. 73 = 33 M.L.T. 325 (P.C.) = 73 I.C. 391 = 45 M.L.J. 363 (368-9).

——Appearance in Court of—Reluctance as regards—Social evil in India.

The indisposition of persons of consequence to appear as suitors in Courts of Justice has been always one of the great social evils of India (449). MAHARAJA OF VIZIANAGARAM v. ZEMINDAR OF BOBILI. (1872) 12 B.L.R. 443 = 13 W.R. 301 = 3 Sar. 165.

——Appearance in court of—Reluctance in India as regards—Minimising of—Court's duty.

It is certainly strongly against the policy of the law that anything should be done which tends to increase that which has always been one of the great social evils of India, i.e., the indisposition of persons of consequence to appear as suitors in Courts of Justice (449). MAHARAJA OF VIZIANAGARAM v. ZEMINDAR OF BOBILI.

(1872) 12 B.L.R. 443 = 18 W.R. 301 = 3 Sar. 165.

——Evidence adduced on behalf of—Rejection of—Propriety—Account books of party—Clerk who kept—Omission to examine, and to make account books corroborative evidence—Rejection on ground of.

It follows therefore that the real result of the learned Recorder's finding is, that inasmuch as by reason of the non-calling of the clerk who had made some of the entries in the account books of the plaintiff's firm, those accounts had not been satisfactorily proved and made corroborative evidence, he was bound to reject all the independent evidence—that evidence which is the real foundation of the commissioner's finding,—and to come to the conclusion that the plaintiff had failed to substantiate his case. That is a decision which cannot be supported (360-1). (*Sir James W. Colville.*) WATSON v. AGA MEHEDEE SHERAZEE.

(1874) 1 I.A. 346 = 3 Sar. 384.

——Evidence given by, and on behalf of, fatal to his case—Ignoring of—Permissibility.

It is impossible that such evidence adduced by the plaintiff himself, fatal as it is to his case, can be ignored (34). The plaintiff must take the consequences of solemn testimony given by himself and adduced on his behalf (35). (*Lord Blanesburgh.*) LAL CHAND MARWARI v. MAHANT RAM-RUP GIR.

(1925) 53 I.A. 24 = 5 P. 312 = 24 A.L.J. 105 = (1926) M.W.N. 203 = 7 P.L.T. 163 = 3 O.W.N. 335 = 43 C.L.J. 249 = 28 Bom. L.R. 855 = 30 C.W.N. 721 = A.I.R. 1926 P.C. 9 = 93 I.C. 280 = 50 M.L.J. 289.

——Evidence material in possession of—Production of—Duty as to—Non-production of such evidence trusting to abstract doctrine of onus of proof—Impropriety of.

A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing accordingly to furnish to the courts the best material for its decision. With regard to third parties, this may be right enough; they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon

EVIDENCE—(Contd.)**Party—(Contd.)**

the proposition. (*Lord Shaw.*) **MURUGESAM PILLAI v. MANICKAVASAKA DESIKA GNANA SAMBANDHA PANDARA SANNADHI.**

(1916) 44 I. A. 98 = 40 M. 402 (408-9) =
21 M. L. T. 288 = 15 A. L. J. 281 = 1 P. L. W. 457 =
5 L. W. 759 = 21 C. W. N. 761 = 9 Bom. L. R. 456 =
25 C. L. J. 589 = (1917) M. W. N. 487 =
32 M. L. J. 369.

—Observations of Lord Shaw in I. L. R. 40 M. 402 (408-9) referred to and applied. (*Lord Blanesburgh.*) **MAHARAJADHIRAJ SIR RAMESHWAR SINGH v. BAJIT LAL PATHAK.**

(1929) 33 C. W. N. 430 =
27 A. L. J. 261 = 49 C. L. J. 308 = 6 O. W. N. 423 =
114 I. C. 592 = 29 L. W. 501 = A. I. R. 1929 P. C. 95 =
57 M. L. J. 565.

—See also EVIDENCE ACT, S. 114, ILL. (g).

—Examination of—Appeal—Examination for first time in—Propriety.

In a case in which the question was as to the factum and validity of a deed of conveyance executed by a Mahomedan lady in favour of the plaintiff, a professional man, *held*, it was dangerous to allow the plaintiff, who had not thought fit to give evidence in his own suit on his own behalf, upon the failure of evidence which he had adduced, to be subsequently called for the purpose of supporting the case, which had broken down. **MUSSUMAT USHRUFOONNESSA BEGUM v. BABOO GRIDHAREE LALL.**

(1872) 19 W. R. 118 = 5 Sar. 708 (709) = 2 Suth. 763.

—Examination of—Necessity—Failure—Adverse inference from. See EVIDENCE ACT, S. 114, ILL. (g).

—Examination of, by opponent—Forcing of—Practice of—Propriety. See EVIDENCE—PARTY—OPPONENT—EXAMINATION BY.

—False evidence—Use of—Effect. See EVIDENCE—FALSE EVIDENCE.

—Omission to examine himself—Inference from. See EVIDENCE ACT, S. 114, ILL. (g).

—Opponent—Document put in by—Evidence against party himself if and when becomes—Cross-examination by party with reference to it—Argument founded by him upon it—Effect. See EVIDENCE—DOCUMENT—PLAINTIFF—DOCUMENT PUT IN BY. (1925) 52 I. A. 372 (376-7).

—Opponent—Evidence of—Reliance on, in support of one's own case. See EVIDENCE—DEFENDANT—EVIDENCE OF. (1864) 10 M. I. A. 151 (161).

—Opponent—Examination by—Forcing of—Practice of—Propriety.

In India, it is one of the artifices of a weak and somewhat paltry kind of advocacy for each litigant to cause his opponent to be summoned as a witness, with the design that each party shall be forced to produce the opponent so summoned as a witness, and thus give the counsel for each litigant the opportunity of cross-examining his own client. It is a practice which their Lordships cannot help thinking all judicial tribunals ought to set themselves to render as abortive as it is objectionable. It ought never to be permitted in the result to embarrass judicial investigation as it has done in this instance. (*Lord Atkinson.*) **KISHORI LAL v. CHUNNI LAL.**

(1908) 36 I. A. 9 (13) =
31 A. 116 (122) = 11 Bom. L. R. 186 = 5 M. L. T. 58 =
9 C. L. J. 172 = 13 C. W. N. 370 = 1 I. C. 128 =
19 M. L. J. 186.

—A species of advocacy is tolerated by the Courts of law in India, in which the unworthy effort of the advocate on each side is to force his opponent to produce his own client

EVIDENCE—(Contd.)**Party—(Contd.)**

in order that he himself may have the opportunity of cross-examining that client. The result is that, should the opponent refuse to be led into the trap, the parties (the principal witnesses who possibly could throw light on all those tangled transactions which so perplex those who have to decide these cases) are never examined at all, and the litigation goes forward through tortuous windings to its unsatisfactory and uncertain end. The practice is a vicious practice, unworthy of a high-toned or respectable system of advocacy. It must embarrass and perplex judicial investigation, and, it is to be feared, too often enables fraud, falsehood, or chicane to baffle justice (4-5). (*Lord Atkinson.*) **LAL KUNWAR v. CHIRANJI LAL.**

(1909) 37 I. A. 1 = 32 A. 104 (108-9) = 7 M. L. T. 57 =
11 C. L. J. 172 = 14 C. W. N. 285 = 12 Bom. L. R. 244 =
5 I. C. 249 = 20 M. L. J. 182.

—*B* had been present in Court when the evidence was being taken, and she did not go into the witness-box, and was not examined as a witness on her own or her alleged son's behalf. Notice has frequently been taken by this Board of this style of procedure. It sometimes takes the form of a manœuvre under which counsel does not call his own client, who is an essential witness, but endeavours to force the other party to call him, and so suffer the discomfiture of having him treated as his, the other party's own witness. This is thought to be clever, but it is a bad and degrading practice. It is, in the language of Lord Atkinson, "a vicious practice, unworthy of a high-toned or reputable system of advocacy." (*Lord Shaw.*) **SARDAR GURBAKSH v. GURDIAL SINGH.**

A. I. R. 1927 P. C. 230 =
46 C. L. J. 272 = 4 O. W. N. 935 = 1927 M. W. N. 778 =
29 Bom. L. R. 1392 = 28 Punj. L. R. 567 =
105 I. C. 220 = 32 C. W. N. 119 = 53 M. L. J. 392.

—Opposing case of—Falsity of—Effect of. See EVIDENCE—DEFENDANT—OPPOSING CASE OF, FOUND TO BE FALSE. (1864) 10 M. I. A. 151 (161).

Payment.

—Account books—Non-production of—Party paying—Non-examination of—Inference from.

In a suit brought by the plaintiff, the lessee under a registered lease deed, to recover possession of the property leased, the question was whether the plaintiff paid a sum of Rs. 3,000 to the lessor as advance. The plaintiff was a merchant at Madras, keeping books, as a matter of course in which all his transactions would be entered. He did not, however, present himself as a witness, did not prove the advance of the Rs. 3,000, and did not vouch the entries in his books in support of his evidence.

Held, that it was difficult to reconcile the mode in which the plaintiff conducted his suit with the idea that he had really paid the Rs. 3,000 to the defendant (397-8). (*Lord Chelmsford.*) **KAMALA NAICKEN v. PITCHACOOTY CHETTY.**

(1865) 10 M. I. A. 386 = 2 Sar. 147.

—In specie—Payment—False evidence of—Facilities for.

Evidence of payment *in specie* can be very easily got up, and cannot be so easily checked as when money remitted by banker's draft or letter (28). (*Lord Watson.*) **COOMARI RODESHWAR v. MANROOP KOER.**

(1885) 13 I. A. 20 = 4 Sar. 689.

—Large sum—Payment of—Receipt for—Likelihood of.

When payment of a large sum is alleged, one's first question is, where is the receipt? (518). (*Sir Ford North.*) **KALAGURLA SURYANARAYANA v. YARLAGADDA NAIDOO.**

(1901) 6 C. W. N. 513.

EVIDENCE—(Contd.)

Payment—(Contd.)

—Large sum—Payment of—Witnesses to—Absence of—Suspicion from.

It is not likely that the payment of so large a sum (Rs. 21,000), which would require, according to the habits of the natives of India, a considerable time to effect, could have taken place without some persons being present who could have proved the fact (358). (*Mr. Baron Parke.*) CHOWDRY DABY PERSAD v. CHOWDHRY DOWLUT SING. (1844) 3 M. L. A. 347 = 6 W. R. 55 (P. C.) = 1 Suth. 161 = 1 Sar. 288.

—Receipts—Non-production of—Other evidence—Admissibility of.

The main point here is payment or no payment. Written receipts for payments are important but by no means necessary as proof, nor are they of the nature of primary evidence the loss of which must be shown in order to let in secondary evidence. (*Lord Hobhouse.*) RAMESWAR KOER v. BHARAT PERSHAD SAHI. (1899) 4 C. W. N. 18 (20).

Pedigree.

—Deceased person—Pedigree exhibited by, in prior suit—Admissibility—Document not brought home to him.

The other document stands in a different position. Its alleged author, G, had died before the trial. But the exhibit in question is merely a genealogical table filed on behalf of G in a claim made by him for certain villages. The object of G in this proceeding was to make himself out to be of the eldest branch of his family, and this admittedly was untrue. But the fatal objection to the admissibility of the document is that it is in no way brought home to G, except as being an exhibit binding on him for the purposes of that suit. His relation to the document is, therefore, something entirely different from the personal knowledge and belief which must be found or presumed in any statement of a deceased person which is admissible in evidence. For aught that appears, the genealogical table in question might never have been seen or heard of by G personally, but have been entirely the work of his pleader (34). (*Lord Robertson.*) RAI JAGATPAL SINGH v. RAJA JAGESHAR BAKSH SINGH. (1902) 30 I. A. 27 = 25 A. 143 (154) = 7 C. W. N. 209 = 8 Sar. 367.

—Earlier and later pedigrees—Conflict between—Preference in case of.

The real question in the appeal was connected with the pedigree of a family, of which one Bennapagowda, who died in 1876, was one of the most prominent members. The question was whether one Basawangowda, the ancestor of Bennapagowda, was the only son of his father, or whether he had a brother whose name was T.

The pedigree upon which the appellant relied was one which was put forward as far back as 6—7—1849, when a statement was prepared by Bennapagowda, relating to his *Patilki Watan* and *Khasgat Inam* in accordance with the forms of the Inam Committee. He only showed one line of descent from Basawangowda, and he excluded entirely from his pedigree T, the brother of Basawangowda. That pedigree contained the statement that "The genealogy is all that is known (to us); it is not traced from the original acquirer as that is not known."

Upon the death of Bennapagowda proceedings were further taken with regard to the heirship consequent upon his death and, there again, the same pedigree was used.

In 1878, however, N, the widow of Bennapagowda, proceeded to adopt P as Bennapagowda's son. She asserted in connection with the adoption that P was a member of the family, and for that purpose she produced a pedigree, which went much further back than the pedigree originally produced by Bennapagowda and introduced the further line

EVIDENCE—(Contd.)

Pedigree—(Contd.)

coming down through T, the alleged brother of Basawangowda and ending with P.

In 1888, a more important question arose owing to P, who had been adopted in 1878, having died without issue on 5—10—1887, namely, as to whose name should be entered on the register of inland revenue, and for that purpose there was an investigation once more of the family history, and in the end the person who was accepted as being the person in whose name the entry ought to be made was one S, one of the people who descended from the line of T. The investigation made at that time was as careful as possible, and nothing happened since to throw doubt on what was then done.

The appellant urged that the pedigree of 1849 ought to be relied upon in preference to the later pedigrees. But it appeared that in that pedigree it was not necessary for the purpose for which Bennagowdappa prepared it to do more than to bring down the one line from Basawangowda.

Held, that the pedigree that originally came to light in connection with the adoption of P could not be treated as a completely concocted document, and that, as it had been supported by verbal evidence, and accepted by the competent authorities, there was no reason for disregarding it. (*Lord Buckmaster.*) DODDAWA KOM BENNEP-GOWDA v. BENNEPAGOWDA. (1925) 86 I. C. 326 = A. I. R. 1925 P. C. 199.

—Family pedigree—What is—Pedigree not being a family pedigree—Statement of relationship in—Admissibility—Statement made post litem motam—What is.

Pedigrees, which are not ancient family records handed down from generation to generation and added to as a member of the family dies or is born, but documents drawn up on a particular occasion for a specific purpose by members of the family, must be treated as mere declarations made by the persons who respectively drew them up or adopted them. A statement in such a pedigree which has been made *post litem motam* is inadmissible in evidence. In order to make the statement inadmissible on this ground the same thing must be in controversy before and after the statement is made. (*Lord Atkinson.*) KALKA PARSHAD v. MATHURA PARSHAD. (1908) 35 I. A. 166 (173-4) = 30 A. 510 (522-3) = 4 M. L. T. 380 = 13 C. W. N. 1 = 8 C. L. J. 447 = 10 Bom. L. R. 1086 = 5 A. L. J. 701 = 11 O. C. 362 = 1 I. C. 175 = 18 M. L. J. 424.

—Memory—Pedigree prepared from—Evidentiary value of—Opinion of—Indian Courts as to—Privy Council's interference with.

On a question as to the evidentiary value of pedigrees simply handed down by tradition and preserved by memory and by oral communication *inter vivos* and not prepared on the basis of any records of any kind, judges having familiarity with the customs and thoughts of the communities among whom these materials have been handed down are at an advantage.

On such a question, their Lordships held that, though they would subject such evidence to an entirely independent scrutiny, they would be both to review the conclusion arrived at by the judges below, who were familiar with the customs and thoughts of the communities among which those materials were handed down, unless some error could be plainly established. (*Lord Sumner.*) MEWA SINGH v. BASANT SINGH. (1918) 9 L. W. 416 (420) = 24 M. L. T. 429 = 28 C. L. J. 530 = 48 I. C. 540 = 1 P. W. R. 1919 = 21 Bom. L. R. 232 = 28 P. L. R. 1919.

—Parties to suit—Pedigrees filed by both—Evidence for and against either—If and how far.

In a suit for a declaration of plaintiffs' right to inherit certain properties in the defendants' possession on the

EVIDENCE—(Contd.)**Pedigree—(Contd.)**

ground that they were the reversionary heirs of the last male owner of the properties, the plaintiffs' case rested on certain family pedigrees.

Among the properties held by the family of the deceased and of the plaintiffs, there were two, called respectively *P* and *S*; the former was one of the subjects of the suit, the latter was not. In 1865, when property *S* was dealt with under the Revenue Settlement then proceeding in the Punjab a *wajib-ul-arz* was drawn up, which in the regular course embodied a pedigree of its proprietors. That was put in by the defendants. About the same time and under similar circumstances a pedigree was no doubt enrolled, when property *P* was dealt with, but that was not forthcoming. It must, however, have been the basis of the pedigree, which was embodied in the *wajib-ul-arz*, drawn up when property *P* was dealt with in the next Revenue Settlement in 1891, and the official, who produced that pedigree out of the proper custody, deposed that it consisted "of two parts, viz., (1) the genealogical table prepared in 1865, and (2) the addition made to it after 1865." The genealogical table was prepared for the first time in 1865." That pedigree of 1891 was put in by the plaintiffs, without any objection taken to its admissibility.

Held that, though the defendants were members of the same family, the evidence of the pedigree of 1865 did not bind them any further than it would bind a stranger.

The defendants' case is possession. They put in the pedigree of 1865, not for the purpose of proving that it was accurate, but for the purpose of contesting the plaintiffs' case by showing that pedigrees of the family of the deceased and of the plaintiffs, drawn up in similar circumstances and from similar sources and possessing equal authority, are so discrepant that no trustworthy inference can be drawn from either for the purposes of the suit.

Held further, that the plaintiffs might resort to the 1865 pedigree if it supported them, and were not bound to that of 1891 alone, if a legitimate conclusion could be got out of a combination of the two, but that the plaintiffs could not eke out the defects of either by mere conjecture as to both. (*Lord Sumner.*) MEWA SINGH *v.* BASANT SINGH.

(1918) 9 L. W. 416 (418-9) = 24 M.L.T. 429 =
28 C.L.J. 530 = 48 I.C. 540 = 1 P.W.R. 1919 =
21 Bom. L. R. 232 = 28 P.L.R. 1919.

—*Proof of—Difficulty in India—Differences in details between different pedigrees, though honestly prepared—Effect.*

It must always be a matter of great difficulty to prove pedigrees in a country where there is no official register of births and deaths, where records of a family may be few, and where it is essential to depend for information upon the uncertain testimony of family traditions; men's lives are swiftly forgotten and the memories of survivors often fail. It is, therefore, not a matter of surprise to find that pedigrees, which may be accepted as honestly prepared, are, none the less, not in actual agreement in every detail. (*Lord Buckmaster.*) DODDAWA KOM BENNEPGOWDA *v.* BENNEPAGOWDA.

(1925) 86 I. C. 326 =
A.I.R. 1925 P. C. 199 (200).

—*Proof of—Evidence—Pandas and Jagas—Books of, containing entries relating to pedigree—Admissibility of—Value of.*

The question in the appeal was whether the pedigree set up by the appellants or that set up by the respondents was the true one. Certain books of *pandas* and *jagas* containing entries relating to pedigree were produced and relied upon by the respondents. The Subordinate Judge treated the entries in those books as forgeries, accepted the pedigree of the appellants, and gave judgment in their favour. The

EVIDENCE—(Contd.)**Pedigree—(Contd.)**

High Court, on the other hand, came to the conclusion that the entries in those books were genuine and conclusively established the respondents' case.

The evidence in the case fell under two categories: (1) the oral, and (2) the documentary. But if the documentary evidence was genuine and admissible, it was of such a character as to support strongly the respondents' case and to afford firm ground from which to test the oral evidence.

Held that the books of *pandas* and *jagas* referred to above were certainly admissible in evidence, but that, having regard to their nature, it was proper that they should be received with extreme caution and with a measure of suspicion.

Held further, affirming the High Court, that the entries in the books of the *pandas* and the *jagas* were undoubtedly genuine and established the respondent's case. (*Lord Tomlin.*) KUNWAR MULAYAM SINGH *v.* SHEORAJ SINGH.

(1929) 27 A. L. J. 856 = 118 I.C. 13 =
I. J. 1929 P. C. 49 = I. R. (1929) P.C. 293 =
A. I. R. 1929 P. C. 217 = 57 M.L.J. 572.

—*Proof of—Mooktar deceased not connected with family and not having special means of knowledge—Deposition of.*

Claiming to be related to *P*, deceased, the plaintiff sued to recover from *P*'s niece and her son a mouzah appertaining to *P*'s estate. The plaintiff produced a pedigree, and the question was whether he proved it.

The evidence in proof of the pedigree consisted mainly of the deposition of one *H*, deceased. That deposition had been taken in a prior proceeding between the two widows of *P*, on the one side, and one *D*, a claimant, on the other, with reference to the settlement of the suit mouzah, and it was taken with a view to the making up of what are called the *wajib-ul-arz* or village papers. *H* was a mooktar of those ladies.

There was no proof that *H* had any other knowledge than as mooktar acting for those ladies. He was not shown to have been a member of the family, to have been intimately connected with it, or to have any special means of knowledge of the family concerns. Further, it appeared from his deposition that he was making a statement of the case on the part of his clients rather than professing to speak from his own knowledge of facts.

Held, that the deposition was not admissible under S. 32, sub-sec. 5 of the Evidence Act, (1) because *H* was not shown to have special knowledge and did not come within the description of a person having special means of knowledge, and (2) because he did not pretend to speak from his knowledge at all (185). (*Sir Robert P. Collier.*) THAKUR SANGRAM SINGH *v.* MUSST. RAJAN BAI.

(1885) 12 I.A. 183 = 12 C. 219 = 4 Sar. 676.

—*Proof of—Persons who have heard names of ancestors recited—Statements of—Admissibility—Witnesses being relatives—Effect.*

Evidence of competent witnesses as to their having heard the names of the ancestors recited by members of the plaintiff's family on ceremonial and other occasions was held to be admissible evidence in support of the pedigree on which the plaintiff based his claim. Such evidence is not open to criticism merely on the ground that the witnesses are relatives. (*Lord Robertson.*) DEBI PERSHAD CHOWDHRY *v.* RANI RADHA CHOWDHRY.

(1904) 31 I. A. 160 (166-7) = 32 C. 84 (93-4) =
9 C.W.N. 161 = 8 Sar. 708.

—*Public documents—Statements in, made by authorized agents of the public in the course of official duty and respecting facts of public interest or required to be recorded for benefit of community—Admissibility to prove facts stated.*

EVIDENCE—(Contd.)**Pedigree—(Contd.)**

The question for decision was whether the appellant was a Rajput. He would be held to have been a Rajput if he had a right to the use of the term "Mohal".

It was proved beyond all doubt and so found by the appellate Court that in the Revenue Records the appellant's family had been shown since 1852 as holding land, their caste being described as Khayyat Mohal and there were in evidence extracts from the settlement records of the district for 1853 in which the granduncle and grandfather of the appellant were put down as owners of 25 ghumaons of land in the village of S, their quzum being mentioned in Kayyat (Mahomedan) and got (*i.e.*, sub tribe) as Mohal. Similar entries were to be found in relation to the Settlement of 1882. It was admitted by the appellate Court that if those records truly described the appellant's family as "Mohals" it would prove the appellant's claim, but they disposed of that evidence by saying "there is no proof that whoever first caused this entry to be made had any real title to the use of the term Mohal." That was the only link apparently which the appellate Court found to be absent from the evidence necessary to prove the appellant's case. No evidence was, however, given and no suggestion was made that such entries were false or that there was any existing reason why deliberately false entries should have been made.

Held, dissenting from the appellate court, that evidence of the character adduced, taken from public records for a series of years since 1852 and recorded in accordance with the requirements of the law, could not in a pedigree case be disregarded for the reason stated by the appellate court.

In such a case as the present, statements in public documents are receivable to prove the facts stated on the general grounds that they were made by the authorised agents of the public in the course of official duty and respecting facts which were of public interest or required to be recorded for the benefit of the community. In many cases, indeed, in nearly all cases, after a lapse of years it would be impossible to give evidence that the statements contained in such documents were in fact true, and it is for this reason that such an exception is made to the rule of hearsay evidence. (*Lord Carson*.) *GHULAM RASUL KHAN v. SECRETARY OF STATE FOR INDIA IN COUNCIL*.

(1925) 52 I.A. 201 = 6 Lah. 269 = 23 A.L.J. 639 = 2 O.W.N. 646 = 22 L. W. 299 = 30 C. W. N. 101 = 26 P. L. R. 390 = A.I.R. 1925 P. C. 170 = 86 I.C. 654 = 50 M.L.J. 120.

Remoteness of—Value of pedigree—Effect on.

It is not suggested that there were any records of any kind which were or could have been made use of in the preparation of these pedigrees (the evidentiary value of which is in question). They appear to have been simply handed down by tradition and to have been preserved by memory and by oral communication *inter vivos*. As is well known, in social conditions where a people has not yet learnt to place exclusive reliance on written and printed records, and where family pride or family rights encourage the maintenance of a body of oral family history, memory, unaided by permanent materials, is often a very sufficient medium of record, and oral communication often preserves the record with singular uniformity. Nor does a pedigree necessarily lose its value in proportion to its remoteness from the present time, at least as far as names and kinship are concerned. The oldest names in a pedigree are naturally the first to be learnt, and the first to be recited, and the names of the earliest generations may well survive in their proper order long after all trustworthy memory of their lives had passed away. (*Lord Sumner*.) *MEWA SINGH v. BASANT SINGH*. (1918) 9 L. W. 416 (419-20) = 24 M. L. T. 429 = 28 C. L. J. 530 = 48 I. C. 540 = 1 P. W. R. 1919 = 21 Bom. L.R. 232 = 28 P.L.R. 1919.

EVIDENCE—(Contd.)**Pedigree—(Contd.)****Statements in—Admissibility—Conditions.**

Under S. 32 of the Evidence Act, statements in a pedigree are admissible in evidence only when the statements are made by a person who is dead, or cannot be found, or has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the court unreasonable.

Where a pedigree tendered in evidence was alleged to have been caused to be prepared by a Rajah with the assistance of the bards of the family whom he had called together for the purpose, but neither the Rajah nor any of the bards was called as a witness and no proof was given that they were within any of the descriptions in S. 32 which made it unnecessary to call them, *held*, that the pedigree was rightly held to be inadmissible in evidence (187-8). (*Sir Richard Couch*.) *SURJAN SINGH v. SARDAR SINGH*.

(1900) 27 I. A. 183 = 23 A. 72 (76-7) = 5 C. W. N. 49 = 2 Bom. L.R. 942 = 7 Sar. 752.

Perjury and forgery.

—Prevalent extensively in India. (*Mr. Pemberton Leigh*.) *RUNGAMMA v. ATCHAMA*.

(1846) 4 M. I. A. 1 (106) = 7 W. R. 57 (P. C.) = 1 Suth. 197 = 1 Sar. 313.

Permanent Settlement of 1793—Land whether included in, or not.

—Evidence. See PERMANENT SETTLEMENT—LAND WHETHER INCLUDED IN, OR NOT—EVIDENCE.

Person present in court but not examined as a witness.

—Question put by judge to—Answers to, not challenged—Adverse inference from. See EVIDENCE—WITNESS—PERSON PRESENT IN COURT BUT NOT EXAMINED. (1919) 10 L. W. 599 (602).

Pleading—Allegations in.

—Proof of—Necessity.

It does not necessarily follow that the whole of the defendants' written statement is to be taken as proved in their favour, if they offer no evidence whatever in respect of the allegation that the mortgage was a fraudulent transaction (17). (*Sir Barnes Peacock*.) *NARAIN SINGH v. SHIM-BHOO SINGH*. (1876) 4 I. A. 15 = 1 A. 325 (327) = 3 Sar. 673 = 3 Suth. 357.

Possession.

—Evidence of. See POSSESSION—EVIDENCE ON.

Pottah.

—Evidentiary value of. See PATTA.

Power of Attorney.

—Will reciting—Admissibility of—Loss or destruction of original—Proof of—Absence of. See POWER OF ATTORNEY—EVIDENCE OF. (1837) 1 M. I. A. 494.

P. C. Appeal.

—Additional evidence—Admissibility of.

In this case there was a petition by the respondents before the P. C. to bring further proceedings on the record. The petition was formally dismissed as it was not found necessary to refer to those proceedings. (*Viscount Haldane*.) *HENG MOH v. LOM SAW YEAN*. (1923) 1 R. 545 = 18 L. W. 92 = (1923) M. W. N. 614 = 33 M. L. T. 430 (P. C.) = A. I. R. 1923 P. C. 87 = 75 I. C. 287 = 29 C. W. N. 12 = 45 M. L. J. 776 (778).

EVIDENCE—(Contd.)**P. C. Appeal—(Contd.)**

—Additional evidence—Admission of—Application for—Costs taxed of—Successful appellant who made application—Disallowance to. (*Sir James W. Colville.*) **PERIASAMI v. PERIASAMI.** (1878) 5 I. A. 61 (77)=1 M. 312 (332)=2 C. L. R. 81=3 Suth. 508=3 Sar. 795.

—Additional evidence—Admission of—Application for—Onus on applicant in case of—Due diligence—Proof of—Failure—Effect. See EVIDENCE—ADMISSION OF—APPLICATION FOR, AT A LATE STAGE OF THE CASE. (1926) 52 M. L. J. 492.

—Additional evidence—Admission of—Application for—Rejection of. (*Lord Davey.*) **RAJAH KOTAGIRI VENKATA SUBBAMMA RAO v. RAJAH VELLANKI VENKATRAMA RAO.** (1900) 27 I. A. 197 (202, 208)=24 M. 1 (13)=4 C. W. N. 725=2 Bom. L. R. 771=7 Sar. 678=10 M. L. J. 221.

—Additional evidence—Admission of—Application for—Rejection of—Grounds for (1) Respondent did not appear. (2) No notice had been given to him that leave to produce fresh evidence would be asked for. (*Lord Davey.*) **CHOU DHRI MAKBUL HUSAIN v. LALTA PERSHAD.**

(1901) 28 I. A. 169 (177)=24 A. 1 (10)=8 Sar. 65.

—Additional evidence—Admission of—Grounds—Rejection wrongful by trial Judge of such evidence.

Additional documentary evidence was admitted by Privy Council because their Lordships were of opinion that the same was wrongly rejected by the trial Judge. (*Sir John Wallis.*) **KUMAR GOPIKA RAMAN ROY v. ATAL SINGH.** (1929) 27 A. L. J. 246=33 C. W. N. 463=49 C. L. J. 327=29 L. W. 674=10 P. L. T. 301=114 I. C. 561=A. I. R. 1929 P. C. 99=56 M. L. J. 562 (568).

—Additional evidence—Admission of—Jurisdiction of Privy Council as to. (*Lord Davey.*) **CHOU DHRI MAKBUL HUSAIN v. LALTA PERSHAD.** (1901) 28 I. A. 169 (177)=24 A. 1 (10)=8 Sar. 65.

—There is no restriction on the powers of the Board to admit evidence for the non-production of which at the initial stage sufficient ground has been made out. (*Mr Ameer Ali.*) **INDRAJIT PRATAP SAHI v. AMAR SINGH.**

(1923) 50 I. A. 183 (191)=2 P. 676=21 A. L. J. 554=A. I. R. 1923 P. C. 128=4 Pat. L. T. 447=1 Pat. L. R. 345=33 M. L. T. 233=18 L. W. 728=25 Bom. L. R. 1259=28 C. W. N. 277=39 C. L. J. 318=74 I. C. 747=45 M. L. J. 578.

—Additional evidence—Admission of—Propriety.

There is great danger in the court of ultimate appeal lightly introducing evidence which has not been under the consideration of the Courts below, and which the parties have had no means of testing, and which may be so easily produced and fabricated after the judgment (26). (*Sir James W. Colville.*) **GOBIND SUNDARI DEBIA v. JAGADAMBA DEBIA.** (1868) 3 B. L. R. 25.

—Additional evidence—Admission by appellate court of—Objection to—Maintainability—Admission by consent or without objection.

Where, on appeal to the Privy Council, it was objected that the appellate court acted irregularly in examining certain witnesses and in admitting certain account books, but it appeared that the examination of witnesses was taken with the consent of both sides, and that the admission of the account books was not objected to at the time, held, that the objection to the admission of fresh evidence was not open on appeal to the Privy Council. (*Sir Arthur Wilson.*) **JAGAR-NATH PERSHAD v. HANUMAN PERSHAD.**

(1909) 36 I. A. 221 (224)=36 C. 833 (839)=10 C. L. J. 74=13 C. W. N. 830=6 M. L. T. 7=11 Bom. L. R. 861=3 I. C. 465=19 M. L. J. 435.

EVIDENCE—(Contd.)**P. C. Appeal—(Contd.)**

—Additional evidence—Affidavit filed before Privy Council in interlocutory proceedings—Admissibility and value of.

In a case in which the question was whether the husband of the respondent had been validly adopted by P, the deceased husband of the appellant, the date of the birth of a daughter to P became material. The daughter, who was a party to the suit and to the appeal to the Privy Council, put in an affidavit before the Privy Council to the effect that she had come of age on a particular date, which would make the date of her birth favourable to the respondent's contention.

Held, that it was very doubtful whether the affidavit was admissible at all for the purposes of the hearing of the appeal, but that, even if admitted, the statement in it was of little weight, inasmuch as it had not been tested by any cross-examination (604). (*Viscount Haldane.*) **GANNA BHATTULA VENKAMMA v. GANNABHATTULA VENKATA RATNAMMA.** (1919) 10 L. W. 599=23 C. W. N. 961=(1919) M. W. N. 544=27 M. L. T. 107.

—Additional evidence admitted by appellate Court—Rejection by Privy Council of, not proper, even if admission by appellate Court wrong. (*Sir James W. Colville.*) **RAJ LUKHEE DABEA v. GOKOOL CHUNDER CHOWDHRY.**

(1869) 13 M. I. A. 209 (226)=12 W. R. (P. C.) 47=3 B. L. R. (P. C.) 57=2 Suth. 275=2 Sar. 518.

—Additional evidence rejected by appellate Court—Admission by Privy Council of—Discretion of Court below—Reluctance to interfere with.

A petition was lodged for the admission of new evidence. This application had been made to the Court of Appeal and refused. Their Lordships will be slow indeed to interfere with the decision of the local Court on what is really a question of discretion and procedure. (*Viscount Dunedin.*) **WILLIAM ROBINS v. NATIONAL TRUST CO., LTD.**

(1927) 4 O. W. N. 463=101 I. C. 903=A. I. R. 1927 P. C. 66 (70).

—Evidence—Account books—Witnesses—Rejection by both Courts below of—Acceptance by Privy Council. See EVIDENCE—PRIVY COUNCIL APPEAL—EVIDENCE—WITNESSES—ACCOUNT BOOKS. (1867) 11 M. I. A. 551 (587).

—Evidence—Admission of—Objection to—Allowance of, when necessary for right decision on merits. (*Sir Montague E. Smith.*) **AMEEROONISSA KHATOON v. ABEDOO-NISSA KHATOON.** (1875) 2 I. A. 87 (103)=15 B. L. R. 67=23 W. R. 208=3 Sar. 423=3 Suth. 87.

—Evidence—Admission of—Objection to—Attitude with regard to. (*Sir Montague E. Smith.*) **AMEEROONISSA KHATOON v. ABEDOO-NISSA KHATOON.**

(1875) 2 I. A. 87 (103)=15 B. L. R. 67=23 W. R. 208=3 Sar. 423=3 Suth. 87.

—Evidence—Admission of—Objection to—Courts below—Evidence received by—Effect produced by—Consideration by Privy Council of.

Privy Council will look at evidence which Courts below have received, and consider the effect which it ought to have produced. (*Mr. Pemberton Leigh.*) **MUSST. IMAM BANDI v. HURGOVIND GHOSE.** (1848) 4 M. I. A. 403 (405-6)=7 W. R. (P. C.) 67=1 Suth. 208=1 Sar. 371.

—Evidence—Admission of—Objection to—Maintainability of—Waiver of objection in Court below—Effect. See C. P. C. OF 1908, O. 2, R. 3—LANDLORD.

(1919) 47 I. A. 76 (86-7)=43 M. 567 (578).

—Evidence—Admission of—Objection to—Maintainability for first time of.

With respect to the reception of evidence, their Lordships do not find that any objection was formally taken in the

EVIDENCE—(Contd.)**P. C. Appeal—(Contd.)**

Court below to the reception of the accounts; and they think it would be mischievous if they were now to allow that exception to be taken in the final Court of appeal (391). *SRI KRISHNA DEVU MAHARAJULUNGARU v. SRI RAM-CHANDRA DEVU MAHARAJULUNGARU.*

(1870) 5 M. J. 389.

—Objections to the reception of a copy of a document, the genuineness of which is in question, on the grounds (1) that the original was not shown to have been lost or destroyed, and (2) that there was no sufficient evidence, assuming that there had been an original, that the alleged copy was a true copy, ought to be taken and insisted upon in the first Court. Even if the copy had been improperly received in the first Court it would not be too late to object to its reception in the High Court.

Where the defendants raised no such objection to the admissibility of the copy in question in either of the Courts below, and both sides applied themselves to the question, on which they went into a vast quantity of evidence, as to whether the document was or was not a forgery, and the Courts below considered the only question before them to be whether the document was a forgery or not, *held*, it was too late to raise before the Privy Council the objection that the copy could not be looked at, on either of the grounds mentioned above (457). (*Sir Robert P. Collier.*) *RANI BADAM KUNWAR v. COLLECTOR OF BIJNOR.*

(1882) Bald. 455.

—Their Lordships treated the maps as evidence in the case. They were used in the Courts below; and though objected to in the Court of First Instance it does not appear that they were objected to in the High Court, and in the appellants' case their acceptance in evidence is not mentioned as a reason for the appeal. If the objection to the admission of these maps had been successfully urged in India, other evidence might have been forthcoming to give the required information. Their Lordships cannot now give effect to these objections. (*Sir Edward Fry.*) *UDITNARAIN SINGH v. GOLABCHAND SAHU.* (1899) 26 I. A. 236 (241) = 27 C. 221 (228) = 7 Sar. 628.

—It is too late on an appeal to the Privy Council to object to the admissibility in evidence of a document which had been admitted without objection in the first Court. (*Lord Collins.*) *SHAHZADI BEGAM v. SECRETARY OF STATE FOR INDIA IN COUNCIL.*

(1907) 34 I. A. 194 (201) = 34 C. 1059 (1074) = 2 M. L. T. 439 = 6 C. L. J. 678 = 9 Bom. L. R. 1192 = 9 Sar. 279.

—Evidence—Admission of—Objection to—Technical objection not allowed—Case dealt with by Privy Council as substantial justice required. (*Sir James W. Colville.*) *BABOO BODHNARAIN SINGH v. BABOO OMRAO SINGH.*

(1870) 13 M. I. A. 519 (529) = 15 W. R. (P. C.) 1 = 6 B. L. R. 509 = 2 Suth. 371 = 2 Sar. 607.

—Evidence—Admission by Court below of—Irregularity in—Objection based on—Maintainability.

Objection not given effect to, because (1) no objection to the irregularity was taken at the trial, where, if it was taken, the irregularity might have been remedied, and (2) the decision of the Court below was not affected by the irregularity. (*Sir William H. Maule.*) *RAJAH BOMMA-RAUZE BAHADUR v. RUNGASAMY MUDALI.*

(1855) 6 M. I. A. 232 (249-50) = 1 Sar. 536.

—Evidence—Admission by Court below of, improper—Objection to—Evidence not relied upon by Privy Council. (*Mr. Pemberton Leigh.*) *RANY PUDMAVATI v. BABOO DOOLAR SINGH.* (1847) 4 M. I. A. 259 (285-6) = 7 W. R. (P. C.) 41 = 1 Suth. 178 = 1 Sar. 348.

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—Evidence—Appreciation by Indian Courts of—Dissent from—Reluctance as regards. (*Lord Chelmsford.*) *SREE ECKOWRIE SINGH v. HEERALOLL SEAL.*

(1868) 12 M. I. A. 136 (144) = 11 W. R. (P. C.) 2 = 2 B. L. R. (P. C.) 4 = 2 Suth. 171 = 2 Sar. 399.

—Evidence—De bene esse.

In regard to a document found by the High Court to be genuine and alleged by appellant to be a forgery, affidavits were before the hearing of the appeal to the Privy Council obtained by appellant from skilled witnesses in England and were tendered and read *de bene esse*, and without prejudice to any question. (*Lord Lindley.*) *RANI SRIMATI v. KHAJENDRA NARAIN SINGH.* (1904) 31 I. A. 127 (130) = 31 C. 871 (884) = 9 C. W. N. 74 = 8 Sar. 635.

—Evidence—Document—Copy of, strictly inadmissible but treated as evidence and commented upon by trial Judge—Treatment of, as evidence by Privy Council—Weight attached by it to.

Where, notwithstanding the non-production of the original sunnud, the Judge of First Instance had commented on the copies thereof, their Lordships treated them as admitted in point of fact and considered what credit and effect ought to be given to them. They held, however, that, in weighing the whole evidence, the absence of proof that the original sunnud once existed, and was subsequently lost or destroyed was a very grave circumstance, which could not be excluded from consideration (22). (*Lord Hatherley, L. C.*) *FORESTER v. SECRETARY OF STATE FOR INDIA.* (1872) Sup. I. A. 10 = 12 B. L. R. 120 = 18 W. R. 349 = 3 Sar. 1 = 1 P. R. 1872 = 2 Suth. 628.

—Evidence—Document—Genuineness of—Opinion of Courts below as to—Interference with.

Where it becomes necessary in the course of an appeal involving other questions for their Lordships to consider all the evidence, it may be essential that they should decide for themselves whether a particular document is a genuine one, or a particular fact exists one way or the other, for the purpose of satisfactorily disposing of the appeal.

N.B.—In this case their Lordships held, differing from both the courts below, that a pottah found to be not genuine by the courts below was genuine. *RAMCHUNDER DUTT v. JUGHESH CHUNDER DUTT.*

(1873) 19 W. R. 353 = 12 B. L. R. 229 = 2 Suth. 836 (839) = 3 Sar. 249.

—Evidence—Document—Production—Delay in—Objection to admission of document on ground of—Disallowed because (1) no legal objection could have been made to its admission if it had been tendered at right stage, (2) objection not included in grounds of special appeal, and (3) objection did not affect merits. (*Sir James W. Colville.*) *RAM CHUNDER DUTT v. CHUNDER COOMAR MUNDUL.* (1869) 13 M. I. A. 181 (198) = 2 Sar. 507.

—Evidence—Documents produced from Collectorate—Genuineness of—Opinion of Indian Courts as to—Interference with.

The Judges in India are far more competent than their Lordships here can be to form an opinion of the credit due to documents of that kind coming from the Collectorate (*viz.* a copy of the quinquennial register and the return of the Surbarakar while the estate was in the custody of the Court of Wards). (*Sir James W. Colville.*) *FORBES v. MEER MAHOMED HOSSEIN.* (1873) 2 Suth. 865 (868) = 20 W. R. 45 = 12 B. L. R. 210 = 3 Sar. 264.

—Evidence—Examination of—Privy Council more accustomed to, than civil servants of East India Company

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presiding in Native Courts. (*Mr. Pemberton Leigh.*)
RUNGAMMA v. ATCHAMA. (1846) 4 M. I. A. 1 (111) =
 7 W. R. (P. C.) 57 = 1 Suth. 197 = 1 Sar. 313.

—Evidence—Inadmissibility in part of—Reversal of finding of fact on ground of—Other evidence sufficient to support finding. See **PRIVY COUNCIL—APPEAL—FACT—ISSUE OF—DECISION OF HIGH COURT ON—REVERSAL OF—GROUNDS—EVIDENCE IN PART INADMISSIBLE.** (1867) 11 M. I. A. 369 (385).

—Evidence—Pedigree prepared from memory—Value of—Opinion of Courts below as to—Interference with. See **EVIDENCE—PEDIGREE—MEMORY.**

(1918) 9 L. W. 416 (420).

—Evidence—Production of—Opportunity for—Trial Court's failure to give—Objection to.

Disallowed, because appellant could have applied to appellate court to admit additional evidence, and, though he made the absence of opportunity a ground of complaint in his appeal memo. to the appellate court, he never petitioned that court to admit additional evidence nor specified what evidence could be brought forward. (*Dr. Lushington.*) **GHIRDHAREE SINGH v. KOOLAHUL SINGH.**

(1841) 2 M. I. A. 344 (350-1) = 6 W. R. (P. C.) 1 = 1 Suth. 98 = 1 Sar. 200.

—Evidence—Production of—Time for—Sufficiency of—Objection to—Reversal of decree on ground of. See **PRIVY COUNCIL—APPEAL—DECREE UNDER—REVERSAL OF—GROUNDS.** (1871) 16 W. R. (P. C.) 22 (24).

—Evidence—Rejection improper of—Remand for reception thereof, even though evidence rejected might be slight. (*Lord Justice Turner.*) **MODEE KAIKHOOSCROW HORMUSJEE v. COOVERBHAE.**

(1856) 6 M. I. A. 448 (459) =
 4 W. R. 94 = 1 Suth. 268 = 1 Sar. 562.

—Evidence—Rejection improper of—Remand to appellate court on ground of, with direction to proceed in case accordingly—Procedure proper on—Decision of case by court below on additional evidence—Necessity—Transmission of additional evidence to Privy Council without such decision—Jurisdiction of Privy Council to hear appeal with additional evidence—Reference fresh by Queen in Council—Necessity—Consent of parties—Effect.

Where, on an appeal coming on for hearing, in pursuance of a reference from Her Majesty in Council, the Privy Council makes an order remitting the cause back to the appellate court, on the ground of the refusal of the court below to hear certain witnesses on behalf of the appellants, and directing the appellate court to proceed therein accordingly, and that judgment is approved by Her Majesty in Council, the reference of the appeal to the Privy Council is entirely exhausted, and its authority in the matter of the appeal is entirely at an end.

What ought to be done upon such an order being made by the Privy Council and upon its being approved by Her Majesty in Council is this. After hearing the evidence on the one side, or on both sides, which is offered, the case ought to be decided, and if either of the parties is dissatisfied with the decision, there ought to be a fresh appeal, and the case ought to be under consideration of the Privy Council in the usual and ordinary manner, that is, by a fresh reference by the Queen in Council.

Where, therefore, the Appellate Court remitted the cause to the trial pursuant to the Order of Her Majesty in Council remitting the cause to the Appellate Court, and the trial Court merely transmitted the additional evidence taken by it to the Appellate Court, and the appellate court, without any adjudication upon the case, in consequence of the fresh evidence, sent the case directly up to Her Majesty in Council

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for consideration, held, upon the appeal, with the additional evidence, coming on for hearing, that their Lordships had no jurisdiction to entertain the appeal, without a fresh reference by the Queen in Council, and that consent could not confer it. (*Dr. Lushington.*) **JESWANT SINGH-JEE v. JET SINGH-JEE.** (1844) 3 M. I. A. 245 (252-3) =

6 W. R. (P. C.) 46 = 1 Suth. 150 = 1 Sar. 274.

—Evidence—Rejection by trial Judge of—Objection to.

Disallowed because no such ground taken before appellate Court. (*Lord Justice Selwyn.*) **KATCHEKALYANA RUNGAPPA KALAKKA TOLA OODIAR v. KACHIVIJAYA RUNGAPPA KALAKKA TOLA OODIAR.**

(1869) 12 M. I. A. 495 (504-5) = 2 B. L. R. (P. C.) 72 = 11 W. R. 33 = 2 Suth. 206 = 2 Sar. 461.

—Evidence—Secondary evidence admitted and commented upon by trial Judge, though strictly inadmissible—Privy Council's treatment of, as evidence—Weight attached by it to the same. See **EVIDENCE—PRIVY COUNCIL—APPEAL—EVIDENCE—ADMISSION OF—OBJECTION TO—COPY OF DOCUMENT, ETC.** (1872) Sup. I. A. 10 (22).

—Evidence—Witnesses—Account books—Rejection of, concurrently by Courts below—Acceptance by Privy Council of—Difficulty of. (*Sir James W. Colville.*) **MOONSHEE BUZLOOR RUHEEM v. SHUMSOONNISSA BEGUM.**

(1867) 11 M. I. A. 551 (587) = 8 W. R. P. C. 3 = 2 Suth. 59 = 2 Sar. 259.

—Evidence—Witnesses—Credibility of—Appellate Court's opinion as to—Interference with.

On a pure question of credibility of witnesses, their Lordships have no better competence to determine where the truth lay than the appellate Court has, if so much. (*Viscount Sumner.*) **RANGOPAL v. DHANJI JADHAVJI BHATIA.** (1928) 55 I. A. 299 = 55 C. 1048 = 28 L. W. 55 = 32 C. W. N. 1117 = 30 Bom. L. R. 1389 = 111 I. C. 480 = 24 N. L. R. 154 = (1928) M. W. N. 924 = 48 C. L. J. 567 = A. I. R. 1928 P. C. 200 = 55 M. L. J. 248 (249).

—Evidence—Witnesses—Credibility of—Indian Courts—Competency of, to decide—More than that of Privy Council. (1) (*Mr. Justice Bosanquet.*) **BABOO ULRUK SINGH v. BENY PERSAD.** (1834) 5 W. R. 77 =

1 Suth. 13 (14-5) = 1 Sar. 53 = 2 Knapp 265.

—(2) (*The Vice-Chancellor.*) **MALICK BAPOO MEYAN v. HARI-WALUB NAGUNDAS.**

(1835) 5 W. R. (P. C.) 112 = 1 Suth. 40 = 1 Sar. 883.

—Evidence—Witnesses—Credibility of—Indian Courts—Opinions of—Conflict between—Appellate Court's opinion—Preference of, when trial Judge's opinion not based upon character or manner and demeanour of witnesses. (*Lord Chelmsford.*) **NEELKISTO DEB BURMONO v. BEERCHUNDER THAKOOR.** (1869) 12 M. I. A. 523 (543) = 12 W. R. (P. C.) 21 = 3 B. L. R. 13 = 2 Suth. 243 = 2 Sar. 523.

—Evidence—Witnesses—Credibility of—Indian Courts—Opinions of—Conflict between—Probabilities of case—Consideration by Privy Council of, in such a case. (*Sir Richard Kindersley.*) **WISE v. SUNDULONISSA CHOWDRANEE.** (1867) 11 M. I. A. 177 (187) =

7 W. R. (P. C.) 13 = 1 Suth. 667 = 2 Sar. 249.

—Evidence—Witnesses—Credibility of—Indian Courts—Opinions of—Weight due to. (*Lord Wynford.*) **PETAMBER MANIKJEE v. MOTEECHUND MANIKJEE.**

(1837) 1 M. I. A. 420 (430) = 5 W. R. (P. C.) 53 = 1 Suth. 71 = 1 Sar. 136.

—The question of the credibility of witnesses is eminently a question for the courts in India. (*Lord Davey.*) **MUSAMMAT SHAFIQ-UN-NISA v. KHAN BAHADUR RAJA SHABAN ALI KHAN.** (1904) 31 I. A. 217 (219) 26 A. 581 (586) = 6 Bom. L. R. 750 = 9 C. W. N. 105 = 8 Sar. 674.

EVIDENCE—(Contd.)**P. C. Appeal—(Contd.)**

—Evidence—Witnesses—Credibility of—Trial Judge's finding of fact based on—Weight due to. *See* APPEAL—EVIDENCE—WITNESSES—CREDIBILITY OF—TRIAL JUDGE'S FINDING OF FACT BASED ON.

—Evidence—Witnesses—Credibility of—Trial Judge's opinion of—Weight due to. *See* APPEAL—EVIDENCE—WITNESSES—CREDIBILITY OF—TRIAL JUDGE'S OPINION OF.

—Evidence—Witnesses—Examination of—Refusal as to—Reversal of decree on ground of—When justified. *See* EVIDENCE—WITNESSES—EXAMINATION OF—APPLICATION FOR, IN MIDST OF HEARING.

(1848) 4 M. I. A. 392 (402-3).

—Evidence—Witnesses—Examination of—Refusal as to—Trial Judge—Refusal by—Objection to—Force of—Petition for examination not to be found in records of trial Court—Ground not urged in appeal.

Certain witnesses were not called by the appellant in the Zillah Court, nor did he make any mention of them in his petition of appeal. In his petition of review, however, he stated that he had offered to bring forward those witnesses, and that the trial Judge had refused to receive them. No such application or dharkast was, however, to be found in the records of the Zillah Court.

Held that, in view of the Regulations which required that every document should be on the file of the Court, and of the regularity with which the proceedings in the Court below were conducted, it was impossible to believe that, if any such application had been made, it would not have been on the files of the Court, and that it must therefore be assumed that no such application had in fact been made (356). (*Mr. Baron Parke.*) CHOWDRY DEBY PERSAD *v.* CHOWDRY DOWLUT SINGH. (1844) 3 M. I. A. 347 = 6 W. R. (P.C.) 55 = 1 Suth. 161 = 1 Sar. 288.

Probabilities.

—Conflict between—Judgment in case of—Basis proper of. *See* JUDGMENT—BASIS PROPER OF—EVIDENCE—PROBABILITIES.

—Judgment based on, and not on evidence—Propriety of. *See* JUDGMENT—BASIS PROPER OF—EVIDENCE—ORAL EVIDENCE.

Proceedings not inter partes—Admissibility of.

—Alluvion and Diluvion—Chur land—Re-formation *in situ*—Evidence—Proceedings not *inter partes* in respect of same land. *See* ALLUVION AND DILUVION—CHUR LAND—RE-FORMATION *in situ*—EVIDENCE.

(1906) 3 C.L.J. 560 (563).

—Award—Validity between plaintiff and defendant—Evidence—Decree obtained by third party on foot of award against plaintiff and defendant. *See* ARBITRATION—AWARD—VALIDITY BETWEEN PLAINTIFF AND DEFENDANT—EVIDENCE. (1894) 21 I. A. 148 (158) = 17 A. 1 (14).

—Petitions in proceedings—Statements in—Admissibility in evidence of, for or against person not party.

As it does not appear that the plaintiffs, or any persons through whom they claim, were parties to the proceeding under Bengal Act IV of 1840, the statements in the petition presented to the Magistrate under that Act are not evidence either for or against the plaintiffs (32). (*Sir Richard Couch.*) CHUNDRABATI KOERI *v.* HARRINGTON. (1891) 18 I. A. 27 = 18 C. 349 (355) = 5 Sar. 481.

Production of.

—Application at late stage for—Onus on applicant—Evidence *res noviter ad notitiam preventa*.

When application is made at a late stage in the case to

EVIDENCE—(Contd.)**Production of—(Contd.)**

put in evidence *res noviter ad notitiam preventa*, one of the primary duties of the applicant is to show that it was owing to no want of diligence on his part that the matter was not discovered before. (*Lord Phillimore.*) KACHIREDDI NAGIREDDI *v.* SAKIREDDI CHINNA NARAYANA REDDI.

(1926) 25 L. W. 400 = 38 M. L. T. (P. C.) 57 =

(1927) M. W. N. 190 = 100 I. C. 77 = 45 C. L. J. 308 =

29 Bom. L.R. 786 = 31 C. W. N. 245 =

A. I. R. 1927 P. C. 27 = 52 M. L. J. 492 (495).

—Available evidence — Production of — Failure—Adverse inference from. *See* EVIDENCE ACT, S. 114, ILL. (g).

Profit for purposes of income-tax.

—Evidence of—Book-keeping entry *per se* if conclusive. *See* INCOME-TAX—PROFIT.

(1927) A. I. R. 1927 P. C. 76 (80).

Property.

—Alienability of—Custom against — Evidence of—Instances of alienation—Absence of—Value of. *See* HINDU LAW—CUSTOM—ALIENABILITY OF PROPERTY—CUSTOM AGAINST.

—Description of, in Schedule to Summons in proceeding under S. 145 of Criminal Procedure Code—Use of, as evidence against either party—Propriety. *See* EVIDENCE—CRIMINAL PROCEDURE CODE, S. 145—PROCEEDING UNDER—SUMMONS IN.

—Misdescription in deed of—Evidence of—Later deeds in favour of third parties by same executant with same description—Rectification of, at their instance—Evidence of—Admissibility. *See* SPECIFIC RELIEF ACT, S. 31—MORTGAGE DEED—RECTIFICATION OF.

(1914) 41 I.A. 110 (119-20) = 41 C. 972 (988).

—Value of—Revenue Inspector—*Ex parte* valuation by, made years before for ascertaining Stamp duty payable on deed relating to larger area—Value of. *See* HINDU LAW—WIDOW—SALE BY—PRICE FOR—FAIRNESS OF—EVIDENCE. (1922) 16 L. W. 478 (483).

Puberty of Girl.

—*See* EVIDENCE—GIRL—PUBERTY OF.

Pymash Accounts.

—Value of. *See* PYMASH ACCOUNTS.

Pymash Proceedings.

—Value of. *See* PYMASH PROCEEDINGS.

Quantum of—Sufficiency of—Objection to.

—Force of.

Where there is sufficient evidence of a fact, it is no objection to the proof of it, that more evidence might have been adduced. (*Lord Chelmsford.*) RAMALINGA PILLAI *v.* SADASIVA PILLAI. (1864) 9 M. I. A. 506 (512) = 1 W. R. 25 = 1 Suth. 538 = 2 Sar. 51.

Railway Company.

—Preference and common stock of—Valuation of, as a going concern—Evidence—Selling value or replacement cost—Evidence of—Admissibility. *See* RAILWAY COMPANY—PREFERENCE AND COMMON STOCK OF. (1922) 33 M. L. T. (P.C.) 246 (255).

Receipt.

—Large sum—Payment of—Receipt for—Likelihood of. *See* EVIDENCE—PAYMENT—LARGE SUM. (1901) 6 C. W. N. 513 (518).

Recent Happenings.

—Proof by oral evidence of—Difficulty in India as to. *See* EVIDENCE—ORAL EVIDENCE—RECENT HAPPENINGS. (1928) 56 M. L. J. 429 (433).

EVIDENCE—(Contd.)**Rejection of entire.**

———*Decision of case upon suspicion derived from Court's own notion of what is the habit of the people or anything else—Propriety of.*

It is the duty of a Court, either of first instance or of appeal, to act upon the issues and upon the proofs in the case. Of course, they must receive all evidence with careful scrutiny; if necessary, with suspicion; but they must after all decide the rights of people according to the matters which are proved before them; and it never can be allowed that a Court is, simply upon a suspicion derived from its own notion of what is the habit of the people or anything else, to throw aside the whole evidence and give effect to their mere suspicion as if it were legal proof. This obviously applies with great additional force to a case where the suspicion acted on is wholly inconsistent with the case alleged and sworn to by the person in whose favour they have decided (679). *BABOO BHUGWAN DOSS v. BABOO HUNNOOMAN PERSHAD SAHOO.*

(1872) 2 Suth. 678 = 18 W. R. 184.

Relationship.

———Evidence of. *See* RELATIONSHIP—EVIDENCE OF.

Rent.

———Payment of—Later fusli—Payment for—Proof of—Presumption from, of payment for earlier fusli. *See* LEASE—RENT—PAYMENT OF—LATER FUSLI.

(1899) 4 C. W. N. 18 (21-2).

———Payment of—Receipts adduced in proof of, false—Other evidence if may be accepted. *See* LEASE—RENT—PAYMENT OF—EVIDENCE. (1899) 4 C. W. N. 18 (20).

Revenue Officials.

———Inquiries by or proceedings before—Evidence in, or information obtained at—Admissibility in civil suit. *See* EVIDENCE—COLLECTOR.

Rules of, adopted in one country.

———*Applicability of, in another.*

The peculiar rules of evidence adopted in one country, whether established by the practice of its courts, or enacted by the Legislature for the government of those Courts, cannot be extended to regulate the proceedings of Courts in another country, where transactions that took place in the former country come to be inquired (290). (*Lord Brougham*). *JAMES CLARK v. BABOO ROUPLAUL MULLICK.*

(1839) 2 M. I. A. 263 = 3 Moo. P. C. 252 = Morton 43 = 1 Sar. 188.

Seals.

———Fabrication of—Practice of, and skill in, in India. *See* EVIDENCE—DOCUMENT—SEALS.

(1866) 10 M. I. A. 438 (453).

Secondary Evidence.

———Admissibility of. *See* EVIDENCE—DOCUMENT—SECONDARY EVIDENCE OF CONTENTS OF AND EVIDENCE ACT, SS. 63, 65.

Service Tenure.

———Resumption of—Zemindar's right of—Evidence of—Circuit Committee—Records of—Statement in—Value of. *See* CIRCUIT COMMITTEE—PURPOSE OF.

(1905) 33 I. A. 46 = 29 M. 52 (57).

Settlement Records.

———*See* SETTLEMENT RECORDS.

Settlement Register.

———*See* SETTLEMENT REGISTER.

EVIDENCE—(Contd.)**Sham Document.**

———Details in—Rejection in toto of—Propriety. *See* EVIDENCE—DOCUMENT—SHAM DOCUMENT.

(1921) 25 C. W. N. 866 (874).

Son and heir of deceased.

———*Proof of—Quantum.*

The question decided in this case was one of fact. It was whether the appellant before the Privy Council was the real son and heir of *H* or whether the real son and heir of *H* of the same name as appellant died and appellant was fraudulently substituted in his place. *Held*, reversing the judgment of the High Court, that appellant was the real son and heir of *H*. (*Sir Arthur Wilson*). *CHANDRASANGJI KIMATSANGJI v. MOHANSANGJI HAMIRSANGJI.*

(1906) 33 I. A. 198 = 30 B. 523 = 4 C. L. J. 181 = 8 Bom. L. R. 705 = 1 M. L. T. 301.

Speculation.

———Judgment—Basis proper of. *See* JUDGMENT—BASIS PROPER OF—EVIDENCE—SPECULATION.

Sraddh—Performance of.

———*Purohit—Evidence of—Weight due to.*

The purohit is the appropriate and ordinarily adequate witness to the performance of a Sraddh in a Hindu family. (*Sir James W. Colville*). *SOORENDRONATH ROY v. MUSST. HEERAMONEE BURMONEAH.*

(1869) 12 M. I. A. 91 (97) = 10 W. R. 35 = 1 B. L. R. (P. C.) 26 = 2 Suth. 147 = 2 Sar. 372.

Suits not inter partes—Finding of fact in one of.

———*Admissibility in evidence of, in another in which that fact is in issue.*

Findings of fact arrived at on the evidence before the Court in one case are not evidence of that fact in another case not *inter partes*. (*Sir John Wallis*). *KUMAR GOPIKA RAMAN ROY v. ATAL SINGH.*

(1929) 27 A. L. J. 246 = 33 C. W. N. 463 = A. I. R. 1929 P. C. 99 = 56 M. L. J. 562 (568).

Survey.

———*See* SURVEY.

Survey Award.

———*See* SURVEY AWARD.

Survey Map.

———*See* SURVEY MAP.

Survey Officers—Reports of.

———*See* SURVEY OFFICERS—REPORTS OF.

Survey Proceedings.

———*See* SURVEY PROCEEDINGS.

Survey and Settlement Register.

———*See* SURVEY AND SETTLEMENT REGISTER.

Suspicion.

———Judgment—Basis proper of. *See* BENAMI—DECISION ON QUESTION OF—BASIS PROPER OF—EVIDENCE AND JUDGMENT—BASIS PROPER OF.

———Not proof. (*Lord Buckmaster*). *MUSST. FAK-RUNNISSA v. MOULVI IZARUS SADIK.*

(1921) 25 C. W. N. 866 (875) = 63 I. C. 898 = 17 N. L. R. 72.

Tampering with—Fraud in.

———*Effect on case of.*

This fraud, in tampering with evidence, throws additional doubt upon this part of the case (275). (*Lord Chelmsford*). *MAHARANEE SHIBESSOUREE DEBIA v. MOTHORANATH ACHARJO.* (1869) 13 M. I. A. 270 = 13 W. R. (P. C.) 18 = 15 B. L. R. 178 (Note) = 2 Suth. 300 = 2 Sar. 528.